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**The Notion of the Rule of Law in the EU's Rule  
of Law Promotion Activities**

Maryna Rabinovych

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# **The Notion of the Rule of Law in the EU's Rule of Law Promotion Activities**

Maryna Rabinovych\*

## **Abstract**

This master thesis aims to conduct comprehensive research on the scope of the notion of the “rule of law” within the context of the EU’s rule of law promotion activities and to develop EU Rule of Law Indicators on that basis. The study consults three major sources in order to single out essential attributes of the rule of law as the predominant value the EU seeks to promote beyond its borders and develops the respective indicators. The study of the concept of the rule of law, as entailed in the constitutional traditions of the EU Member States (namely the UK, Germany and France) provides a starting point for viewing the rule of law in light of its promotion by the EU. The central part of the paper deals with analyzing the scope of the rule of law, as understood through the legal instruments the EU uses to promote the rule of law abroad. The third source, used for researching the scope of the rule of law, embraced a range of existing systems of measuring the rule of law (e.g., the UN Rule of Law Indicators and the World Justice Project Rule of Law Index). The practical value of this paper lies in the presentation of a draft design of the EU rule of law attributes and possible indicators for states’ compliance with regard to their judicial systems.

**Keywords:** rule of law, rule of law promotion, measuring rule of law, rule of law indicators, external action, external governance, European integration

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**List of abbreviations**

ACP	African, Caribbean and Pacific Group of States
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CVM	Mechanism for Cooperation and Verification
DCI	Development Cooperation Instrument
EBA	“Everything but Arms”
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EC	European Communities
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
ENI	European Neighbourhood Instrument
EULEX	EU Rule of Law Mission
GSP	Generalized Scheme of Preferences
IPA	Instrument for Pre-Accession Assistance
RoL	Rule of law
SAP	Stabilisation and Association Process
SEA	Single European Act
TEU	Treaty of the European Union
TEU (M)	Treaty of the European Union (Maastricht Treaty)
TFEU	Treaty of the Functioning of the European Union
WJP	World Justice Project

## Introduction

The notion of the rule of law (hereafter: RoL) represents one of the cornerstones of the European integration and functioning of the Area of Freedom, Security and Justice, and is of growing importance with respect to the evolution of the EU external relations. The importance of the external RoL promotion was firstly emphasized in the European Security Strategy of 2003<sup>1</sup>. Since that time, the RoL was highlighted as the governing principle in such bilateral political and legal instruments as the Stabilisation and Association Process (SAP) with the Western Balkan states and the European Neighbourhood Instrument (ENI)<sup>2</sup>.

With regard to RoL promotion, four different agendas coexist. Firstly, RoL is strongly tied to the democracy promotion agenda, because it creates a legal infrastructure for the separation of powers and the protection of individual liberties that, in turn, constitute the basics for a democratic constitutional order<sup>3</sup>. Secondly, functioning RoL is to be viewed as a prerequisite for economic success. The third cluster of the functioning of the RoL lies in the fact that it serves as “a tool for advocacy by and on behalf of disadvantaged groups”. Finally, the RoL is linked to the international law enforcement agenda<sup>4</sup>. In a more narrow sense, the RoL is viewed as a means to achieve such “ends” as a government, bound by law; equality before the law; the

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<sup>1</sup> European Council. European Security Strategy of 12 December 2003 “A secure Europe in a better world” [Not published in the Official Journal].

<sup>2</sup> Metais/ Thepaut, in: *Metais, Thepaut & Keukellerie* (eds.), What is structural foreign policy?, pp.5-10.

<sup>3</sup> The adherence to the RoL is considered to be a necessary prerequisite for the establishment of the democratic constitutional order (Rosenfeld, *Southern California Law Review*, 2001, p.1307). However, closer scrutiny demonstrates that the relationship between democracy and the RoL is more complex due to the counter-majoritarian dilemma. The term is used to address alleged illegitimacy of the judicial review, granting unelected judges the right to nullify the actions of the elected legislators contrary to the “majority will”. For the further discussion on the implications of the counter-majoritarian dilemma for the relation between the democracy and the rule of law, see: Freeman, S., *Law and Philosophy* 9(4) (1990), pp.327-370, Habermas, J., *Political theory* 29(6) 2001, pp.766-781.

<sup>4</sup> Carothers, in: *P.Domingo and R. Sieder* (eds.) *Latin America: the international promotion of judicial reform*. London, pp.4-10.

law and order; predictable and efficient rulings, as well as human rights<sup>5</sup>.

Despite the fact that RoL promotion currently constitutes a key dimension of the EU external policy, RoL itself still remains an “essentially contested concept”<sup>6</sup>. In the light of the lack of an EU-wide consensus on the scope of the “rule of law” concept, it was recently argued that RoL “stands in the peculiar state of being the preeminent political idea in the world today, without an agreement upon precisely what it means”<sup>7</sup>. Furthermore, sometimes it is claimed that consensus on RoL is “only possible due to dissensus as to its meaning”<sup>8</sup>

An insight into the context of the evolution of RoL promotion allows suggesting that several factors contributed to the current situation of the lack of a unified approach towards defining the European approach towards RoL.

Firstly, it is important to note that the politicization of the external relations instruments of the former EEC is a relatively recent phenomenon. While the first EEC bilateral agreement in this field (Yaounde Association Agreement between European Economic Community and 18 African states<sup>9</sup>) entered into force in 1964, the political aspect of the cooperation firstly gained legal significance in the fourth Lome Convention in 1989 (Lome IV)<sup>10</sup>. As opposed to the previous agreements, Lome IV contained a genuine human rights clause that mentioned human rights protection along with other objectives of sustainable development, and provided for the use of positive measures to promote human rights<sup>11</sup>.

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<sup>5</sup> Kleinfeld, *Competing definitions of the rule of law*, p.6.

<sup>6</sup> Fallan, *Columbia Law Review* 2007, p.6.

<sup>7</sup> Tamanaha, *On the rule of law: history, politics, theory*, p.3.

<sup>8</sup> Chesterman, *American Journal of Comparative Law* 56 (2008), p.331.

<sup>9</sup> The first Association Agreement between the EC and the 18 African states that had recently gained sovereignty was aimed at establishing FTA between the EC and respective states.

<sup>10</sup> Fourth ACP-EEC Convention, signed at Lome on 15 December 1989, available at: [http://www.epg.acp.int/fileadmin/user\\_upload/LomeIV1989.pdf](http://www.epg.acp.int/fileadmin/user_upload/LomeIV1989.pdf). (27 April 2015).

<sup>11</sup> Hilpold, *European Foreign Affairs Review*, pp.52, 60.

Secondly, the design of the EU external relations in general and development cooperation in particular has been continuously changing due to the gradual deepening and widening of European integration. Due to the fact that the EEAS was established only by the Lisbon Treaty, there was no specialized institution to unify existing development cooperation instruments and conceptualize the key common notions they had.

Finally, the non-existence of a general concept of RoL in the field of EU external relations and enlargement can be linked to the lack of the EU instruments for measuring RoL.

Thus, topicality of researching into the definitions of RoL, provided by the multifaceted instruments the EU uses to promote it, is concerned with existing legal uncertainty with regard to the basis of RoL promotion. It is now vital for the EEAS to take steps to conceptualize RoL due to the several interdependent reasons. First of all, defining the scope of RoL will contribute to achieving one of the key aims of the Lisbon Treaty, namely bringing increased consistency across the external policies of the EU, such as trade, security, development etc<sup>12</sup>. Moreover, according to the 18 month work programme of 17 June 2014, prepared by the Italian Presidency,

“the EU has a key role to play in the development of the new universal framework, which should build on the three dimensions of sustainable development (economic, social, environmental) and should also integrate issues relating to governance, the rule of law, human rights, gender equality and peaceful societies”<sup>13</sup>

Besides, clarifying the notion of RoL in EU external policies will help the Union combat RoL promotion being equated to the promotion of the Union’s own interests, such as furthering the EU’s security

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<sup>12</sup> The Lisbon Treaty, available at: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty.html> (28 April 2015).

<sup>13</sup> The Future Italian, Latvian and Luxembourg Presidencies Delegations, Note to the Council of the EU of 17 June 2014 “18-month programme of the Council (1 July 2014-31 December 2015), 10948/1/14.

objectives, or preventing the inflow of security threats and maintaining stability.<sup>14</sup>

Furthermore, continuous and fruitful cooperation with partner states in terms of RoL promotion mechanisms requires the elaboration of quantitative and qualitative indicators to measure partner states' progress with regard to the enhancement of RoL. Development of such indicators is especially important in the light of the EU enlargement due to the fact that the Copenhagen criteria view RoL as one of the political criteria<sup>15</sup>.

The EU's growing attention to goals-based approaches towards basic values, such as RoL, democracy and human rights can be substantiated by the referral to the European Parliament resolution on the Annual Report on Human Rights in the World 2009<sup>16</sup>. The resolution provides for elaborating on "concrete and publicly articulated benchmarks" regarding human rights in order to be able to measure the effectiveness of EU human rights promotion and "avoid repeated mistakes" in terms of human rights consultations<sup>17</sup>.

To sum up, by elaborating on a unified approach to RoL in its relations with partner states, the Union will get the chance to build external legitimacy of its activities abroad and broaden networks within partner states (especially, with regard to civil society organisations). The external legitimacy perspective is vital for the enhancement of the EU credibility in the international arena.

For the purposes of this master thesis, the concept of RoL will be addressed against the background of the EU external action instruments and Mechanism for Cooperation and Verification (CVM).

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<sup>14</sup> Ioannides&Celador, *Conflict, Security and Development* 2011, pp. 415-445; Youngs, *JCMS*, pp. 415-421.

<sup>15</sup> Copenhagen European Council. Presidency conclusions, available at [http://www.europarl.europa.eu/enlargement/ec/pdf/cop\\_en.pdf](http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf) (28 April 2015)

<sup>16</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), para. 21.

<sup>17</sup> *Ibid*, para 22.

CVM is designed to help Bulgaria and Romania develop the well-functioning judicial and administrative systems they need in order to fulfill obligations, stemming from their membership in the EU, and enjoying respective benefits. Evidently, CVM does not fall within the scope of the EU external relations. However, the valid reason for including the CVM perspective into the current paper lies in the fact that particularly CVM represents a single example of the EU attempt to use specific benchmarks to assess states' progress in the field of RoL. Thus, studying the CVM approach to RoL will undoubtedly enhance a general understanding of the attributes the EU tends to associate with RoL.

In the first substantive part of the paper, a patchwork of approaches towards defining and conceptualizing RoL in constitutional traditions of EU Member States and the theory of European integration will be researched with the help of historical and comparative methods. The examples of English, German and French legal systems were chosen for the study due to the rich traditions of RoL in these states. Furthermore, such choice of examples allows viewing RoL in the light of both continental and Anglo-Saxon law.

The next substantive part of the paper will proceed with an overview of the legal instruments the EU uses to promote RoL in partner states and will especially address definitions of RoL, contained in these instruments. The research will consider legally binding unilateral trade, technical and financial assistance instruments, as well as bilateral agreements between the EU and third states. The third part of the master thesis will be dedicated to the development of EU RoL indicators, based on the most common elements of the scope of RoL as provided in the existing instruments of RoL promotion, constitutional traditions of the EU Member States and the European legal doctrine. The construction of RoL indicators will be conducted by reconsidering existing frameworks of measuring complex legal

phenomena with a special emphasis on the ones that specifically address RoL (UN RoL indicators, the World Justice Project).

## **Chapter 1. The notion of the rule of law: theoretical approaches, constitutional traditions of the Member States and the fundamental value of the EU**

### **I.1. Formal and substantive approaches towards the rule of law**

Authors of voluminous researches on the RoL use a variety of approaches to address this concept.<sup>18</sup> These approaches are usually considered in terms of two basic groups: the formal and substantive. For the purposes of future research and developing indicators of RoL, it is worth elaborating on this major classification of the ways to address RoL.

One of the clearest and most well-formulated definitions of the RoL, ideal in the formal light, was developed by F.A. Hayek. According to Hayek, the RoL means that

“ the government in its actions is bound by rules, fixed and accounted beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers, and to plan one’s individual affairs on the basis of this knowledge”<sup>19</sup>.

The major question that arises with regard to this definition is whether substance of the rules, providing for predictability of the ways government will use its coercive powers, influences presence or

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<sup>18</sup> The RoL can be viewed as a foundational principle of the EU, as provided by Art.2 TEU, and one of important elements of political criterion of Copenhagen criteria. as well as a principle common to Member States and manifesting itself differently in English Legal Tradition and continental ones. In terms of the UN activities and the World Justice Project, the RoL can be seen not just as a legal principle, but an attainable benchmark for legal systems.

<sup>19</sup> Hayek, *The Road to Serfdom*, p. 54.

absence of RoL. An answer to this question lies in the very essence of a formal approach to the RoL. As it was formulated by Joseph Raz,

“if the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function”<sup>20</sup>.

In this regard, Raz underlines that the RoL does not have to be viewed as a virtue that a legal system may possess or not. In his view, it is crucial not to mix the RoL with other characteristics of a legal system, such as democracy, justice, equality and human rights. Thus, according to Raz, even an undemocratic legal system that does not provide for equality and protection of human rights can be considered to be based on the RoL, and it is not obligatory that a democratic human rights-based system possesses necessary formal characteristics of the RoL. While Raz tended to deny any links between the the RoL and such concepts as equality, democracy and human rights, the analysis of the way other adherents of formal approach to the RoL defined its basic principles allows claiming that non-linking the RoL with the abovementioned principles does not constitute a peculiarity of a formal approach to the RoL.

For example, two basic elements of Dicey’s formula of the RoL include prohibition of arbitrary punishments and everyone’s equality before the law<sup>21</sup>. According to the analysis by Craig, these elements can be addressed as subprinciples of legality and equality before the law respectively, and constitute traditional RoL-related criteria, common for many European constitutional traditions<sup>22</sup>.

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<sup>20</sup> Raz, *The Law Quarterly Review*, p.211.

<sup>21</sup> The first element of the formula was initially formulated as “A man can only be punished if it was proved in a court that he breached a law”, while the second one sounds as “No man is above the law, and everyone is equal before the law” (Dicey, *Introduction to the Study of the Law of the Constitution*, 1982, p.45).

<sup>22</sup> Craig, *Public Law* 467.

At the same time, the third element of the formula emphasizes the RoL being linked to individual rights, while stating that

“The Constitution (the law) is the result of previous judicial decisions determining the rights of private persons”<sup>23</sup>. Thus, Dicey’s formula provides for individual rights, determined by court, to serve as a basis for the formulation of Constitution and laws in a state.

Scientific works by Dicey also include a variety of ideas, aiming at examining the interplay and mutual interdependencies between the RoL, parliamentary sovereignty and human rights<sup>24</sup>.

Elaborating on Dicey’s understanding of the RoL, prominent educator W.I. Jennings stated that the RoL means a limitation of power on every authority, apart from, perhaps, a representative legislature. He also emphasized that

“a sovereign or any person acting on behalf of a state can only exercise his/her powers as long as his acts can be authorized through existing law”<sup>25</sup>

and underlined the importance of everyone’s equality before the law.

As opposed to Dicey and Jennings, who used three-element formulas to elaborate on the RoL, Raz provided for eight essential elements of the RoL. In short, they can be addressed as follows:

- Prospective, open and clear laws
- Relative stability of laws
- Open, stable and clear rules of law-making
- Guaranteed independence of the judiciary
- Observance of principles of natural justice (such as open and fair hearing). With regard to this principle it can be seen that Raz still

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<sup>23</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, 1982, p.52.

<sup>24</sup> *Ibid*, pp.45-54.

<sup>25</sup> Jennings, *The Law and the Constitution*, pp 47-51.

somehow associates RoL with justice, despite objecting to the existence of links between RoL and justice.

- Courts' review powers over the principles, contained in parliamentary and subordinate legislation, as well as administrative action

- Accessibility of courts
- The discretion of the crime-preventing agencies should not be designed to pervert the legislation<sup>26</sup>

The analysis of the RoL-related criteria, as suggested by Raz, shows that the formal approach to the RoL concerns not only purely formal criteria to be applied to legal norms (e.g., prospective nature, relative stability of the legislation), but institutional and procedural aspects. Emphasis on the need for independent judiciary represents an institutional aspect, whereas ensuring the right to fair trial is an important procedural prerequisite of quality enforcement of laws.

Despite a rather broad scope, formal approach to the RoL provides no solution to regimes that establish clear rules, authorizing egregious injustice and human rights violations<sup>27</sup>. Thus, with regard to authoritarian states, it becomes clear that a set of legal standards, institutions and procedures, as designed by adherents to formal approach to the RoL is not enough to prevent authorities from arbitrary treatment. By supplementing existing formal criteria of the RoL with the ones of human rights protection and observing obligations, stemming from the international public law, Lord Tom Bingham of the UK introduced a substantive approach to the RoL<sup>28</sup>.

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<sup>26</sup> Raz, *The Law Quarterly Review*, p.196.

<sup>27</sup> As an example of such regime P Hoffmann considers South Africa during the apartheid era, whereby the laws were clear, stable, publicized and upheld by enforcement agencies, accountable in accordance with respective laws. (Hoffmann, Paul, *Accountability and the Rule of Law*, available at <http://www.legalbrief.co.za/article.php?story=20091127105455794> (27 April 2015).

<sup>28</sup> Lord Bingham, *The Rule of Law*, available at [http://www.cpl.law.cam.ac.uk/past\\_activities/the\\_rule\\_of\\_law\\_text\\_transcript.php](http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php) (9 May 2015).

A substantive (or rights-based) approach to the RoL manifested itself in a variety of modern conceptualizations of the RoL. For instance, in its Rule of Law Resolution, the International Bar Association provided for some of human rights to be necessary elements of the RoL, such as the right to a fair and public trial without undue delay, as well as presumption of innocence<sup>29</sup>. Consistency with international human rights norms and standards is emphasized as a key prerequisite of the RoL in accordance with the definition by the UN Secretary General, along with

“adherence to supremacy of law, equality before the law, accountability to the law, fairness of the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal certainty”<sup>30</sup>.

Compliance with the international law (including the international human rights law) is also included as a prerequisite of RoL into the scope of the World Justice Project<sup>31</sup>, along with the variety of formal criteria, such as clear, publicized and stable laws.

The analysis of both a formal and a substantive approaches to conceptualizing the RoL shows that, while formal criteria are essential for understanding the RoL, an absence of substantive aspect converts laws, institutions and procedures into vague frameworks. The vagueness of such frameworks creates a basis for violations of

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<sup>29</sup> The International Bar Association, The Rule of Law Resolution, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=a19de354-a0d7-4b17-a7ff-f6948081cd85> (9 May 2015).

<sup>30</sup> UN Secretary General Report “On the rule of law and transitional justice in conflict and post-conflict societies” of 23 August 2004, S/2004/616

<sup>31</sup> The World Justice Project (WJP) is an independent, multidisciplinary organization that works to advance the rule of law worldwide. It was originally founded in 2006 as a presidential initiative of the American Bar Association (founded by W.H. Neukom, the member of the IBA), and became independent in 2009. The WJP board of directors currently includes Ms. Sheikha Abdula Al-Misnad, the President of the Qatar University, Mr. Emil Constantinescu, former President of Romania, Ms. Suet-Fern Lee, Senior Director at Stamford Law Corporation in Singapore etc. Official website of the project is <http://worldjusticeproject.org/>.

international human rights standards under perfectly designed laws and accountable institutions. The essential nature of both formal and substantive aspects of the RoL leads to the fact that the majority of modern definitions of the RoL contain formal and substantive aspects.

After having considered basic categorizations of approaches towards conceptualizing the RoL, let us proceed with the analysis of the way the RoL manifests itself in constitutional traditions of the EU Member States.

## **I.2. The rule of law in constitutional traditions of the EU Member States**

### **I.2.1. The rule of law in the English legal tradition**

The English legal tradition is known all over the world for its significant contribution to developing the RoL concept. According to B. Tamanaha, a renowned constitutional law scholar, England deserves to be specifically mentioned due to its long-running continuous tradition of the RoL, being home to John Locke, influencing Montesquieu and the authors of *The Federalist Papers*, as well as providing grounds for Dicey's arguments about the decline of the RoL<sup>32</sup>.

Nonetheless, despite the RoL plays an important part in British constitutional tradition, there is no single view on the scope of this concept within the English legal tradition.

One of the most important contributions to the development of RoL within the English legal tradition belongs to A.V. Dicey, whose three-element formula was discussed in the previous subsection of the master thesis. While Dicey's "three meanings" of the RoL are still viewed as a departure point for studying the RoL through the lens of English constitutional tradition, contemporary English legal discourse is characterized by a variety of competing understandings of the RoL.

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<sup>32</sup> Tamanaha, *On the rule of law: history, politics, theory*, p.47.

One of the most successful attempts to systemize the RoL-related research in Great Britain was made by P. Craig<sup>33</sup>.

As it was stated by P. Craig, the first essential criterion of the compliance with the RoL means that, when acting, a government must be able to point to a specific basis that is considered to be valid in terms of the respective legal system<sup>34</sup>. Such requirement can be defined as the one of legality that was initially formulated by A.Dicey with regard to criminal punishments and is currently spread over other spheres of life. Due to the absence of a written Constitution and long-established tradition of Parliamentary sovereignty<sup>35</sup>, the principle of legality mostly applies to the activities of ministers and public officers.

While the scope of the RoL cannot be adequately perceived only vis-à-vis the legality requirement, Craig conducted an in-detail study of the variety of the RoL characteristics, entailed in both formal and substantive approaches to the RoL. The second meaning of the RoL, distinguished by Craig, is that legal rules need to be designed in a way to be able to guide one's conduct and provide one with the opportunity to plan one's life. Such capability of law, as advocated by Hayek, can be reached through ensuring that legal norms conform to a range of formal requirements (e.g., prospectivity, clearness, relative stability etc.)<sup>36</sup>.

As it was mentioned above, the general trend in the development of the RoL concept lies in growing attention towards substantive elements of the concept<sup>37</sup>. A similar situation can be traced in British scholarship. For instance, while addressing the RoL, Lord Bingham

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<sup>33</sup> Craig, Public Law 467, p.98.

<sup>34</sup> *Ibid*, p.98.

<sup>35</sup> The Parliament of Great Britain is a supreme law-making authority in the UK. and in practice it means that British courts do not possess the right to challenge validity of parliamentary laws. With regard to the counter-majoritarian dilemma and the case of Great Britain, see supra note 3.

<sup>36</sup> Hayek, *The Road to Serfdom*, pp.75-76.

<sup>37</sup> Pech, Jeann Monnet Working Paper, p.27.

viewed a traditionally formal judicial review requirement through the lens of both formal and substantive issues, such as fundamental rights, openness and participation<sup>38</sup>.

While the concept of the RoL has been playing significant part in the English constitutional tradition for a long time, it has firstly acquired a status of a constitutional one in 2005 as a result of the Constitutional Reform. A statutory regulation of the RoL provoked several political attempts to define the RoL. However, they did not result either in elaborating on a unified definition of the RoL, or singling out its core elements. Instead, the overarching nature of the RoL as a constitutional principle was underlined, and the fact that it is to be understood as containing both a formal and substantive aspect was reaffirmed.<sup>39</sup>

### **I.2.2. The rule of law in the continental legal traditions:**

#### **German *Rechtstaat* and French *Etat de droit***

German *Rechtstaat* and French *Etat de droit* represent two most broadly described national variations of RoL that exerted significant impact on the formation of RoL as a fundamental value of the EU. As the term *Etat de droit* is usually perceived as a literal translation of the German *Rechtsstaat* and did not emerge until the beginning of the 20<sup>th</sup> century<sup>40</sup>, it is worth investigating the scope of the term *Rechtsstaat* first.

The notion of the *Rechtstaat* originated in Germany in the late 18<sup>th</sup> century as a neologism, combining law and state<sup>41</sup>. The peculiarity of understanding *Rechtstaat* as presented by Robert von Mohl lies in the emphasis on supporting and fostering members of society, as well as

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<sup>38</sup> Steyn, *European Human Rights Law Review* (2002), p. 727.

<sup>39</sup> Jowell, *Public Law* 562 (2006), p. 576.

<sup>40</sup> Pech, *Jeann Monnet Working Papers* 2009, p.31.

<sup>41</sup> Placidius, *Literatur der Staatslehre, ein Versuch*; Mohl, *Polizeiwissenschaften nach den Grundsätzen des Rechtsstaates*.

ensuring “free and comprehensive exercise of one’s strengths”<sup>42</sup>. According to von Mohl, state’s obligation to respect laws and customs and consider special inclinations and dispositions of its people is to be attributed to the individual freedom as a major aim of a law-based state as opposed to a police one<sup>43</sup>.

In the 19<sup>th</sup> century, the term *Rechtstaat* started to be considered in three major dimensions, such as state’s self-limitation, subjective rights and primacy of law. According to the state self-limitation theory, state’s actions are not restricted by any external limitations. However, the state was restrained by either the pressure, exercised by society<sup>44</sup>. Providing for and ensuring implementation of individual rights was viewed as one of the core functions of a state. The theory of the primacy of law (*Gesetzmäßigkeit*<sup>45</sup>) can be attributed to the classical principle of legality, encompassing a range of sub-principles, such as abstract nature of laws, impersonality, non-retroactivity etc.

While the three-dimensional understanding of the RoL, peculiar for German public law of the early 19<sup>th</sup> century, testifies to the high level of the concept’s development, in half a century the RoL retained purely technical meaning, and was applied only in terms of administrative law<sup>46</sup>. Formalization of understanding the RoL led to the emergence of the term “*Ordnungstaat*” (“a state based on order”) that hardly had something in common with the initial understanding of *Rechtstaat* as conceptualized by Robert von Mohl. Extreme nature of such formalization led to the misuse of the concept of the RoL that can be exemplified by the fact that during its existence even the Third Reich was occasionally characterized as *Rechtstaat*<sup>47</sup>.

Subsequent developments in the history of Germany due to its losing the World War II led to the reconsideration of the scope of

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<sup>42</sup> Mohl, *Polizeiwissenschaften nach den Grundsätzen des Rechtsstaates*, p.8.

<sup>43</sup> *Ibid.*, pp.10-12.

<sup>44</sup> Jhering, *Der Zweck im Recht*, pp.220-221.

<sup>45</sup> Jellinek, *System der subjektiven öffentlichen Rechte*, pp.95-97.

<sup>46</sup> Gosalbo Bono, *University of Pittsburg Law Review*, p.243.

<sup>47</sup> Koellreuter, *Verwaltungsrecht, Grundriss* 12.

Rechtstaat and its re-emergence as a “thick” constitutional principle in German Basic Law. A substantive aspect of German Rechtstaat, as contained in German Basic Law, lies in the fact that it encompasses a principle of fundamental rights protection<sup>48</sup>. Furthermore, the principle of Rechtstaat plays an important gap-filling function, being used by the Federal Constitutional Court to derive additional legal principles, such as the one of proportionality that significantly influenced not only German, but the EU legal system<sup>49</sup>.

German “mixed” concept of the Rechtstaat heavily influenced the legal doctrine of France, where the term *Etat de droit* firstly emerged in the early 20<sup>th</sup> century in terms of administrative law. In literature, the absence of umbrella rule of law principle in the French legal doctrine is attributed to multiple meanings of French terms *Republique* and *Etat*<sup>50</sup>, as well as the lack of stable constitutionalism<sup>51</sup>. In this light, it is important to understand that the term *Etat de droit* initially encompassed only an effective review of statutory law<sup>52</sup>. In other words, in France it was initially viewed as a purely technical instrument, used to protect an individual from an arbitrariness of a state. As provided by the legislation of the Fifth Republic, *Etat de droit* encompasses two major ideas. Along with establishing the judicial review of statutory law by *counseil consitutionell*, it provides for the limitation of the executive power in accordance with both formal and substantive standards, contained in the Constitution. In other words, French *Etat de droit* guarantees that all public authorities (including the legislative branch of power) are subject to control by a judge, who aims at ensuring that the authorities respect both formal and substantive rules, as provided in the Constitution<sup>53</sup>. Such understanding of the RoL testifies to the presence of significant link

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<sup>48</sup> Grote, Rule of law, Rechtsstaat, and Etat de Droit, p.286.

<sup>49</sup> Pech, Jeann Monnet Working Papers 2009, p.26.

<sup>50</sup> Gosalbo Bono, University of Pittsburg Law Review, p.246.

<sup>51</sup> *Ibid*, pp.246-247.

<sup>52</sup> Heuschling, supra note 392.

<sup>53</sup> Pech, Jeann Monnet Working Papers 2009, p.40.

between constitutionalism and the RoL in French legal tradition, as well as normative power, possessed by *Etat de droit*.

Similarly to the British RoL, modern *Rechtstaat* and *Etat de droit* can be characterized as legal principles of constitutional value. At the same time, neither *Rechtstaat* nor *Etat de droit* are defined by legal acts. Respective definitions, developed by German and French scholars allow considering *Rechtstaat* and *Etat de droit* as meta-principles that encompass a variety of elements of both formal and substantive nature. While variations still exist in terms of the scope of the national concepts of the RoL and their normative power, the British RoL, German *Rechtstaat* and French *Etat de droit* seem to increasingly converge<sup>54</sup>.

### **I.3 The rule of law as the fundamental value of the EU**

As it is emphasized by the new EU Framework to strengthen the RoL, the RoL stems from common constitutional traditions of Member States and, thus, constitutes one of the major values the Union is based on<sup>55</sup>. While the RoL did not find its reflection in the EU Founding Treaties until the Maastricht Treaty entered into force, the concept still exerted significant influence on Community law before that<sup>56</sup>. The CJEU case law, the Court's being obliged to ensure observance of law with regard to Treaties' implementation, as well as national constitutional traditions can be viewed as major sources of the RoL in EC law<sup>57</sup>.

As the RoL was not incorporated in the former EEC Treaty before the Treaty of Maastricht, the concept of the RoL emerged in the EEC firstly in political and, then, in case law terms. Underlining the fact

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<sup>54</sup> *Ibid*, p.41.

<sup>55</sup> Communication from the Commission to the European Parliament and the Council of 14 March 2014 "A new EU Framework to strengthen the rule of law", COM (2014), 158 final.2.

<sup>56</sup> Kochenov, *Erasmus Law Review* 2009, p.4.

<sup>57</sup> *Ibid*, p.18.

that the Community was bound together not by a common army or police force, but by law, Walter Hallstein, the Commission's first president, called it "a Community based on the rule of law"<sup>58</sup>. The CJEU played a leading part in promoting the RoL as the fundamental value of the EEC by picking up a well-known Walter Hallstein's dictum in its ruling in the landmark *Les Verts* case<sup>59</sup>.

Even before the landmark *Les Verts* case, the CJEU considered RoL in variety of cases, providing for singling out such core elements of the RoL as legality<sup>60</sup>, the principle of confidence in the stability of a legal situation<sup>61</sup>, legal certainty<sup>62</sup> and proportionality<sup>63</sup>. Furthermore, the Court also recognized a variety of procedural guarantees that simultaneously constitute substantive elements of the RoL. Among them one can mention the right to be heard<sup>64</sup>, the right to access one's files<sup>65</sup>, the right of defense<sup>66</sup>, as well as the obligation to motivate legal acts in a proper way<sup>67</sup>. All principles and guarantees, mentioned

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<sup>58</sup> Hallstein, *Die Europäische Gemeinschaft*, p.31.

<sup>59</sup> Judgment in *Les Verts*, Case 294/83, ECR, EU:C:1986:166.

<sup>60</sup> Judgment in *Algera and Others v Common Assembly*, Case 7/566, ECR, EU:C:1957:7; Judgment in *Conserve Italia Soc. Coop. arl v Commission of the European Communities*, Case C-500/99P, ECR, EU:C:2002:45.

<sup>61</sup> Judgment in *Algera and Others v Common Assembly*, Case 7/566, ECR, EU:C:1957:7; Judgment in *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community*. Joined cases 42 and 49/59, ECR, EU:C:1961:5; *Marks & Spencer plc v Commissioners of Customs & Excise*, Case C-62/00, ECR, EU:C:2002:435.

<sup>62</sup> Judgment in *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini*, Case 169/80, ECR, EU:C:1981:171.

<sup>63</sup> Judgment in *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, ECR, EU:C:1970:114; *Merkur Fleisch-Import v. Hauptzollamt Hamburg-Ericus*, Case 147/81, ECR, EU:C:1982:131.

<sup>64</sup> Judgment in *Maurice Alvis v Council of the European Economic Community*, Case 32-62, ECR, EU:C:1963:15; *Commission of the European Communities v Lisrestal*, Case C-32/95P, ECR, EU:C:1996:402.

<sup>65</sup> Judgment in *Hoffmann-La Roche v. Commission*, Case C-85/76, ECR, EU:C:1979:36.

<sup>66</sup> Judgment in *AM & S v. Commission*, Case C-155/79, EU:C:1982:157; *Orkem v Commission of the European Communities*, Case 347/83, ECR, EU:C:1989:387.

<sup>67</sup> Judgment in *Portuguese Republic v Commission of the European Communities*, Case C-42/01, ECR, EU:C:2004:379.

above, are enshrined in the new EU Framework to strengthen the RoL<sup>68</sup>.

Thus, before the creation of the EU, the RoL was not explicitly incorporated into the Treaties of Rome. At that time the CJEU was the major driver of the development of the RoL as the basis for the functioning of the former EC, and the major RoL-related challenges dealt with basing legal reasoning on respective comparative considerations.

The new era for the development of the RoL in the EU started with the Maastricht Treaty's entering into force. Art. 6 (1) TEU (M) recreated the idea of the RoL, converting it into one of the basic written principles of the EU law<sup>69</sup>.

Art. 6(1) TEU (M) addressed the RoL as one of the values the EU is based on and that is common to Member States. A similar provision is currently contained in Art. 2 TEU<sup>70</sup>. The Founding Treaties provide for several ways to protect RoL. The infringement procedure, addressed by Art 258 TFEU, has proven to represent an important instrument to tackle the RoL-related concerns in cases when these concerns constitute a breach of specific EU law provisions<sup>71</sup>.

Member States' observing the values of the EU is ensured by Art. 7 TEU, which provides for preventive and sanctioning mechanisms.<sup>72</sup> Fundamental values and mechanisms of their protection play an important role in the functioning of the EU. This thesis can be substantiated by the fact that

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<sup>68</sup> Communication from the Commission to the European Parliament and the Council of 14 March 2014 "A new EU Framework to strengthen the rule of law", COM (2014), 158 final.2.

<sup>69</sup> The Maastricht Treaty, Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, available at <http://www.eurotreaties.com/maastrichtec.pdf> (27 April 2015).

<sup>70</sup> Foster (ed.), EU Treaties and Legislation, p.2.

<sup>71</sup> *Ibid*, p. 88.

<sup>72</sup> *Ibid*, p.4.

“if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs”<sup>73</sup>.

References to the RoL are also contained in the Preamble of the TEU, as well as the Charter of Fundamental Rights of the EU. While TEU addresses the RoL as a *value*<sup>74</sup>, CFR views it as a principle<sup>75</sup>. Despite the fact that some scholars find such terminological uncertainty regrettable<sup>76</sup>, the terms “principle” and “value” need to be understood as synonymous within the context at hand. Along with the terminological discrepancy, traditional RoL-related challenge is associated with the practical application of varying understandings of RoL as contained in national constitutional traditions<sup>77</sup>. A rather new concern with regard to observance of the RoL lies in the fact that Member States are characterized with different levels of the RoL development that is especially challenging with regard to strengthening cooperation in such fields as freedom, security and justice. This concern is specifically addressed in the new EU Framework to strengthen the RoL that provides for a new mechanism to prevent systemic threats to the RoL that arise within Member States. The Framework is aimed at launching dialogue with a Member State at hand to develop swift and concrete actions to avoid application of mechanisms, provided by Art. 7 TEU.

The analysis of the recent CJEU jurisprudence also testifies to significant developments in the field of the RoL, as well as emergence of new challenges. A significant amount of most recent CJEU RoL-

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<sup>73</sup> Communication from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on the European Union, COM/2003/0606 Final.

<sup>74</sup> See Preamble to the TEU (Foster (ed.), EU Treaties and Legislation, p.1)

<sup>75</sup> See Preamble to the Charter of Fundamental Rights of the European Union (Foster (ed.), EU Treaties and Legislation, p.153).

<sup>76</sup> Millns, in J.Ziller (ed.), *The Europeanization of constitutional law*, p.100

<sup>77</sup> Danwitz, *Fordham International Law Journal* 2014, p.1318.

related cases tackle the issue of an effective judicial protection against restrictive measures that emerged due to the so-called “war on terror”<sup>78</sup>. Other issues, whereby the RoL was concerned, include the exercise of legislative discretion and judicial scrutiny<sup>79</sup>, distribution of powers between the institutions of the EU<sup>80</sup>, as well as balancing fundamental rights and freedoms with regard to public policy issues at hand<sup>81</sup>.

The analysis of the development of the RoL as a fundamental value of the EU in the light of EU Treaties and CJEU jurisprudence testifies to the fact that changes in the RoL design and application by the CJEU respond to multiple challenges, emerging due to the deepening of the EU integration. While specific new challenges to the functioning of the RoL arise (e.g., concerned with security issues), terminological discrepancies and differences in the national understandings of the RoL still tend to represent a source of confusion. At the same time, it is doubtless that the RoL is a constituting value with respect to the functioning of the Union and evolution of the EU law.

## **Chapter 2. The EU rule of law promotion activities**

Apart from playing a significant role in the internal functioning of the EU, the RoL serves as one of the principles that governs the Union’s actions in the international arena, and which the EU seeks to advance in the wider world. According to the Art. 21(2) TEU,

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<sup>78</sup> Judgement in *Kadi and Al Barakaat Int’l Found. v. Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, ECR, EU:C:2008:461.

<sup>79</sup> Judgement in *Al-Aqsa v. Council*, Joined Cases 539/10 P & C-550/10, ECR, EU:C:2012:711; *Council v. Mfg. Support & Procurement Kala Naft Co., Tehran*, Case C-348/12 P, ECR, EU:T:2012:201.

<sup>80</sup> Judgement in *Schaible v. Land Baden-Württemberg*, Case C-101/12, ECR, EU:C:2013:661; *Agrarproduktion Staebelow v. Landrat des Landkreises Bad Doberan*, Case C-504/04, ECR, EU:C:2006:30.

<sup>81</sup> Judgement in *Afton Chemical Limited v Secretary of State for Transport*, Case C-343/09, ECR, EU:C:2010:419; *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, Joined cases C-92/09 and C-93/09, EU:C:2010:662.

consolidation and support of democracy, the RoL, human rights and the principles of international law shall be viewed as aims the EU pursues, when cooperating with third states<sup>82</sup>. Thus, the RoL represents a value that the EU continuously seeks to promote “beyond the borders of the Union by means of persuasion, incentives and negotiations”<sup>83</sup>. The following analysis of the instruments the EU uses to promote the RoL in third states testifies to the fact that the RoL promotion is one of the crucial dimensions of the EU external relations. The RoL serving as a guiding principle of the EU action in the international arena and continuous trend towards politicization of the Union’s external relations<sup>84</sup> call forth a process of the RoL legislative mainstreaming.

In turn, the legislative mainstreaming of the RoL determine the emergence of multiple definitions of the RoL. This trend also allows emphasizing the need for elaborating on a unified conceptual document, highlighting the major elements of the RoL as benchmarks that can be used to assess results of the EU RoL promotion in terms of legal instruments that will be addressed below.

The EU uses a variety of ways to promote the RoL in third states. Traditionally, the EU relies on “soft” diplomatic instruments to emphasize the importance of the RoL development for a successful cooperation between the EU and a third state. The RoL is also enshrined in a significant number of the legally binding unilateral trade, technical and financial instruments, as well as bilateral cooperation instruments. While the first substantive part of the chapter will explore the instruments of the RoL promotion as contexts, within which the RoL functions, the second one will present a comparative study of the definitions of the RoL, contained in these instruments.

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<sup>82</sup> Foster (ed.), *EU Treaties and Legislation*, p.10.

<sup>83</sup> Opinion of AG Mengozzi in *Gestoras Pro Amnistía*, Case C-354/04 P, EU:C:2007:115, para. 79.

<sup>84</sup> Kuon, *Good Governance*, p.23.

## **II.1. An overview of the instruments of the EU rule of law promotion**

### **II.1.1. Soft instruments**

As it was mentioned above, the EU widely uses traditional diplomatic instruments to promote the RoL worldwide. Among them one can mention adopting resolutions on issues that may threaten RoL and calling upon governments and other related parties to respect the RoL and related values; welcoming positive developments in partner states, as well as launching dialogues with regard to the RoL. One of the widely spread soft instruments of the EU RoL promotion is the adoption of guidelines on human rights issues<sup>85</sup>. While the guidelines are not legally binding, they are designed to represent a strong political signal of constituting priorities for the EU. Implementation of the guidelines is conducted by the EU global actors by different means, including demarches and statements, as well as human rights dialogues<sup>86</sup>.

While the RoL is not included into existing human rights guidelines, it is reflected in a variety of human rights dialogues. According to the EU Guidelines on Human Rights dialogues, issues concerned with democracy and the RoL ought to be included into “all meetings and discussions with third countries at all levels”<sup>87</sup>. In other words, the RoL was defined as “a priority issue that should be included on the agenda of every dialogue”<sup>88</sup>. Despite the fact that the RoL is included into all human rights dialogues, established by the EU, almost no

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<sup>85</sup> European Union External Action, Human Rights Guidelines, available at [http://eeas.europa.eu/human\\_rights/guidelines/index\\_en.htm](http://eeas.europa.eu/human_rights/guidelines/index_en.htm) (29 April 2015).

<sup>86</sup> The EU conducts dialogues on human rights with more than 40 non-EU states worldwide (e.g, China, Mexico Turkmenistan etc) While the scope of human dialogues is being defined on case-by-case basis, all of them are based on the EU Guidelines on Human Rights Dialogues.

<sup>87</sup> Council of the EU, EU Guidelines on Human Rights Dialogues with Third Countries: Update, 16526/08, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf> (29 April 2015), p.14.

<sup>88</sup> *Ibid*, p.4

evidence regarding the RoL progress of partner states in terms of such dialogues exists due to the lack of specific benchmarks.<sup>89</sup>

One of the rather novel soft instruments to be discussed is the EU-Kosovo Structured Dialogue on the Rule of Law. The inaugural meeting of the Structured Dialogue took place on 30 May 2012 in Brussels, and the Dialogue was established as a high-level forum to set priorities for the RoL reform and monitor results<sup>90</sup>.

As opposed to human rights dialogues, including the RoL, the Structured Dialogue with Kosovo is characterized by a range of peculiarities. Firstly, it explicitly concentrates on the RoL without mentioning other basic values of the EU, such as democracy and human rights. Secondly, while human rights dialogues lack specific benchmarks to assess RoL-related progress in partner states, the Dialogue with Kosovo is linked to specific benchmarks that are to be monitored to assess Kosovo's progress with regard to the RoL. Finally, as opposed to human rights dialogues that do not have specific structure, the functioning of the Structured Dialogue is facilitated by several structural units, such as the Joint Rule of Law Coordination Board and Stabilization and Association Process Dialogue subcommittee on Justice and Home Affairs<sup>91</sup>. Viable functioning of the Dialogue is promoted by EULEX presence in Kosovo<sup>92</sup>.

One of the major successes of the Structured Dialogue in Kosovo was the development of the RoL Assistance Strategy 2016-2019

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<sup>89</sup> Pech, *Cleer Working Papers 2012/2013*, p.16.

<sup>90</sup> Conclusions, Structured Dialogue on the Rule of Law with Kosovo of 30 May 2012, available at [http://ec.europa.eu/archives/commission\\_2010-2014/fule/docs/news/20120530\\_roid\\_conclusions\\_30\\_may.pdf](http://ec.europa.eu/archives/commission_2010-2014/fule/docs/news/20120530_roid_conclusions_30_may.pdf) (28 April 2015).

<sup>91</sup> *Ibid*, p.2.

<sup>92</sup> EULEX is the EU RoL Mission in Kosovo. The mission focuses on providing support to the Kosovo RoL institutions at the strategic level, ensures delivery of the RoL services, restores the RoL in the North of Kosovo and supports the implementation of agreements, concerning the RoL, in dialogues, facilitated by the EU.

(Justice and Internal Affairs) by the Government of Kosovo<sup>93</sup>. The Strategy acknowledges the impact of international donors (including the EU in general and EULEX in particular) into the development of RoL in Kosovo, highlights the analytical background and provides for key strategic aims to be reached through joint efforts of the Government of Kosovo and international donors<sup>94</sup>. Specific attention needs to be paid to the development of specific indicators to monitor and assess the extent to which the Strategy is implemented<sup>95</sup>.

Soft instruments have traditionally played a significant part in the international relations<sup>96</sup>. However, usually it is rather hard to assess their concrete achievements with regard to improving situations, concerning human rights, the RoL and democracy in partner states. Nonetheless, as it is exemplified by the EU –Kosovo Structured Dialogue, the application of soft instruments can serve as a high-level political platform for developing specific strategies to facilitate the development of the RoL and human rights in partner states. The EU – Kosovo Structured Dialogue can be viewed both as an example of the potential of soft instruments to lead to specific changes and the way developing states may design international assistance strategies to make best use of multifaceted projects, promoted by different international donors.

### **II.1.2. Legally binding unilateral trade, technical and financial instruments**

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<sup>93</sup> Government of the Republic of Kosovo, Ministry of Justice, Rule of Law Assistance Strategy in Kosovo 2016-2019 (Justice and Internal Affairs)m\, available at [http://www.md-ks.net/repository/docs/Rule\\_of\\_Law\\_Assistance\\_Strategy\\_in\\_Kosovo\\_2016-2019\\_%28Justice\\_and\\_Internal\\_Affairs%29.pdf](http://www.md-ks.net/repository/docs/Rule_of_Law_Assistance_Strategy_in_Kosovo_2016-2019_%28Justice_and_Internal_Affairs%29.pdf) (28 April 2015).

<sup>94</sup> *Ibid*, pp. 2-4.

<sup>95</sup> Some of the indicators, mentioned in the Strategy, include, for instance, pending cases for more than a year per capita; number of processed and pending cases in the case management system per year; number of attempts for illegal border crossing per population; allocation of free legal aid requests etc.

<sup>96</sup> Melissen (ed.), *The new public diplomacy*, p.11.

Legally binding unilateral trade instruments, which the EU uses in relations with developing states, function within Generalized Scheme of Preferences that is a part to the EU common commercial policy<sup>97</sup>. The Scheme provides for three major types of arrangements: the standard/general GSP arrangement, the GSP+ enhanced preferences and “Everything but Arms” (EBA) arrangement program. While GSP offers significant tariff reductions to developing states, GSP+ provides for the full removal of tariffs on similar product categories as covered by the general GSP arrangement. EBA is designed to grant duty-free quota-free access to all products, apart from arms and ammunitions to least developed states.

Despite introducing regular monitoring and review of arrangements’ implementation by beneficiary states, legal acts providing for GSP, GSP+ and EBA<sup>98</sup>, do not contain explicit references to the RoL.

Such situation is rather surprising due to the fact that the Council Regulation 732/2008 refers to the need for the Union to implement the common commercial policy in conformity with the objectives of development policy that include the RoL<sup>99</sup>. However, it is still possible to state that the Regulation 978/2012 establishes the implicit link to the RoL by Art.9 that makes benefiting from the tariff preferences conditional upon the ratification of the international conventions, listed in the Annex VIII to the Regulation<sup>100</sup>. The relevant conventions, referred to in Art. 9, include the ones, related to

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<sup>97</sup> The common commercial policy of the EU represents one of the cornerstones of the Union’s relationships with third states and efficient functioning of the Customs Union between the Member States of the EU. Legal basis for the conduct of commercial policy is constituted by Art. 207 TFEU (Foster, EU Treaties, p.75).

<sup>98</sup> The European Parliament and Council Regulation (EU) No 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

<sup>99</sup> Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007.

<sup>100</sup> The European Parliament and Council Regulation (EU) No 978/2012 of 25 October 2012.

human rights protection and combating corruption that are frequently being viewed as the necessary attributes of the RoL<sup>101</sup>.

Secondly, while it may be argued that the concept of good governance, mentioned in the Regulation 732/2008 encompasses the RoL, no precise definition of good governance within the context of the common commercial policy is developed.<sup>102</sup>

While the notion of the RoL is not explicitly mentioned in the Regulation 978/2012, conditionality of benefiting from the GSP is partly based on the attributes of the RoL. Thus, the EU tends to use the GSP to promote the RoL in beneficiary states.

The EU uses a variety of technical and financial instruments to promote its fundamental values. Launched in 2006 to replace the European Initiative (2000-2006), the European Instrument for Democracy and Human Rights (EIDHR) is specifically designed to contribute to “the development and consolidation of democracy and the RoL, and of respect for all human rights and fundamental freedoms”<sup>103</sup>. Key peculiarities of the EIDHR are that it can be used to grant aid, where no established development cooperation between the EU and a third state exists, and may provide grants to civil society actors directly.

The EU Development Cooperation Instrument (DCI) was introduced in 2007 to replace a significant range of geographic and thematic instruments that the EU used to conduct development cooperation<sup>104</sup>. As opposed to the EIDHR, the DCI is designed to encompass a wide range of topics, such as poverty eradication, trade and regional

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<sup>101</sup> The protection of fundamental rights is viewed as an attribute of the RoL in constitutional traditions of all the Member States under study, as well as a variety of the EU RoL promotion instruments (e.g., EIDHR, DCI). Combating corruption is envisaged as a part of the RoL under the CVM (See subsequent chapters).

<sup>102</sup> Kuon, Good Governance, p.21.

<sup>103</sup> The European Parliament and Council Regulation (EU)No 235/2014 of 11 March 2014 establishing a financial instrument for democracy and human rights worldwide.

<sup>104</sup> The European Parliament and Council Regulation (EU) No 233/2014 establishing a financial instrument for development cooperation for the period 2014-2020.

integration, social cohesion and employment, as well as governance, democracy, human rights and support for institutional reforms. While not specifically concentrating on funding actions by non-state actors, such actors are still eligible for funding, along with institutions of partner countries, regions, decentralized bodies in partner countries etc. One of the most significant current RoL-related projects, conducted in terms of DCI, is the Rule of Law Platform in Central Asia<sup>105</sup>.

The RoL Platform was designed in 2011 to complement the Central Asia Rule of Law Initiative that has been functioning since 2007 in terms of the EU Central Asia Strategy. It currently addresses judicial reform, administrative law and enhancement of criminal law and procedure through dialogues, training and advice facilities<sup>106</sup>.

Another important instrument that provides for strengthening the RoL in third states is the European Neighborhood Instrument (ENI). Having replaced European Neighborhood Policy Instrument (ENPI), the ENI includes

“fostering human rights and fundamental freedoms, the RoL, equality, sustainable democracy, good governance and a thriving civil society”<sup>107</sup>

as one of its six targets. Apart from promoting RoL through bilateral programs, ENI also funds multi-state programs that address challenges, common to all or a number of partner countries, and supports regional, subregional and cross-border cooperation.

As the RoL represents a part of the political criterion in terms of Copenhagen criteria<sup>108</sup>, a range of technical and financial instruments

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<sup>105</sup> States, taking part in the realization of the project, include Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan.

<sup>106</sup> The Rule of Law Platform Central Asia, available at <http://ruleoflaw.eu/about-us/eu-ca-strategy-for-a-new-partnership/eu-rule-of-law-initiative-central-asia/> (28 April 2015).

<sup>107</sup> The European Parliament and Council Regulation (EU) No 232/14 of 11 March 2014 establishing a European Neighbourhood Instrument.

specifically target actual and potential candidate countries. In this regard, it is worth mentioning an Instrument for Pre-Accession Assistance (IPA II)<sup>109</sup>. The IPA II targets reforms in several sectors, such as a public administration reform, a sustainable economy, people, as well as agriculture and the rural development. The most important novelty of the IPA II for 2014-2020 as opposed to the IPA lies in the development of country-specific indicative strategies that define countries' major challenges to be addressed in terms of abovementioned targets<sup>110</sup>.

Another unique tool to be mentioned with regard to enlargement-related issues is the Mechanism for Cooperation and Verification (CVM). The Mechanism represents a safeguard measure that can be invoked by the European Commission, when a new member or acceding state of the EU fails to comply with the EU requirements, concerned with the Area of freedom, security and justice or internal market policy, in the context of accession negotiations.

The legal basis for the application of such mechanism is constituted by the accession treaty<sup>111</sup> and respective Commission decisions<sup>112</sup>. In accordance with above-mentioned Decisions of the Commission, both Bulgaria and Romania need to address specific benchmarks in the fields of judicial; reforms and fight against corruption<sup>113</sup>. Bulgaria is

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<sup>108</sup> Copenhagen European Council. Presidency conclusions, available at [http://www.europarl.europa.eu/enlargement/ec/pdf/cop\\_en.pdf](http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf) (28 April 2015)

<sup>109</sup> The European Parliament and Council Regulation (EU) No 231/2014 establishing an Instrument for Pre-Accession Assistance (IPA II).

<sup>110</sup> European Commission, European Neighborhood Policy and Enlargement Negotiations, Multi-Country Indicative Strategy Paper, available at [http://ec.europa.eu/enlargement/news\\_corner/key-documents/index\\_en.htm?key\\_document=080126248ca659ce](http://ec.europa.eu/enlargement/news_corner/key-documents/index_en.htm?key_document=080126248ca659ce) (28 April 2015).

<sup>111</sup> Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157, 21.6.2005, pp. 11–27.

<sup>112</sup> Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime, C (2006) 6570 final; Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Romania, C(2006) 6559 final.

<sup>113</sup> *Ibid.*

also committed to strengthen the fight against organized crime. The design of the CVM is significantly different from the one of unilateral assistance instruments, addressed before. Firstly, the CVM is designed to address specific issues in new member states and acceding states. Therefore, the uniqueness of the CVM is determined by the fact that it lies in between the Union's internal policies and external action. Secondly, as opposed to the vast majority of the abovementioned legal instruments, the CVM is designed to assess states' progress with regard to specific benchmarks, developed by the Union. A broad application of the benchmarking approach makes CVM progress reports a useful tool to determine the scope of the RoL, as meant by the Union.

The consideration of unilateral current technical and financial instruments that the EU uses in terms of its external relations allows concluding that the RoL promotion is one of the crucial targets of the EU assistance. In this regard, it is important to mention suspension clauses that can be found in the vast majority of financial programmes under study. Suspension clauses provide for negative conditionality of the EU financial assistance with regard to the EU fundamental values. While EU Regulations, providing for technical and financial instruments usually tend not to include precise definition of the RoL or respective benchmarks, the EU enjoys significant political margin of deciding when a beneficiary state does not observe the principle of the RoL. The issue of suspension clauses will be further investigated in the light of the EU bilateral agreements. In this regard, it is worth noting that such approach does not apply to the CVM, whereby specific benchmarks are used to assess on states' progress and design respective reports.

### **II.1.3. Bilateral agreements of the EU**

Bilateral international agreements in the field of development cooperation represent a widely spread instrument the EU uses to

promote the RoL worldwide. International agreements can be concluded by the EU acting alone or jointly with the Member States. Art. 216 TFEU provides for external competencies of the EU (cases, where the EU is legally able to conclude an agreement with a third state alone)<sup>114</sup>. The provision, contained in Art 216 TFEU, usually allows the EU to conclude international development cooperation agreements, encompassing human rights clauses, alone. Earlier, the EEC and EC also tended to have an opportunity to conclude such agreements alone due to the fact that agreements concentrated on economic and trade issues that fell within the scope of Communities' external competences.

The history of the European Economic Community as an important actor in the field of international development cooperation starts with signing Yaounde Convention (Yaounde I) with 18 African states in 1964<sup>115</sup>. Yaounde I was followed by the second Yaounde Convention<sup>116</sup> and Arusha Agreements<sup>117</sup> with Kenya, Tanzania and Uganda. The peculiarity, shared by the EU early bilateral development cooperation agreements lies in the fact that they concentrate on the promotion of economic and financial development without mentioning political issues.

The Community's having joined by Great Britain, Denmark and Ireland in 1973 called forth the geographical expansion of the Community's development cooperation policy. In 1975, already 46 ACP states entered the first Lome Convention (Lome I) with the EEC and their Member States that replaced Yaounde and Arusha

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<sup>114</sup> Foster, EU Treaties, p.78.

<sup>115</sup> Convention of Association between the European Economic Community and the African and Malagasy states associated with that Community and annexed documents (Yaounde I), available at [http://www.epg.acp.int/fileadmin/user\\_upload/YaoundeI.pdf](http://www.epg.acp.int/fileadmin/user_upload/YaoundeI.pdf) (24 April 2015)

<sup>116</sup> Convention of Association between the EEC and the Overseas states associated with that Community and annexed documents (Yaounde II), available at <http://aei.pitt.edu/35497/1/A1588.pdf> (27 April 2015).

<sup>117</sup> Overseas countries and territories and the EEC. Annexed texts. The Arusha Convention, available at <http://aei.pitt.edu/35497/> (27 April 2015).

Agreements. While not directly providing for political issues, Lome I contained an emphasis on the need of preserving sovereignty of participating states, as well as adhering to the United Nations principles<sup>118</sup>.

The debates on the need of including political aspects into the area of development cooperation continued in terms of Lome II negotiations. ACP countries opposed human rights clause being included into the new agreement, viewing it as a prospect for the EU to intervene into ACP states' internal affairs<sup>119</sup>. By the time of Lome II conclusion in 1980, no agreement was reached on the inclusion of human rights into the agreement. However, as negotiations on the renewal of Lome II formally started at the end of 1983, the discussion of the possibility on including the reference to human rights into a renewed Convention got a new impulse by the EP<sup>120</sup>. As opposed to the case of Lome II negotiations, ACP states preferred to discuss human rights issues and impose their own conditions, rather than block this topic. In the face of ACP states' position, the EEC decided not to insist on its previous intention to include a mechanism for suspension of aid in the event of human rights' violation in ACP states. Despite containing no human rights clause, Lome III includes references to human rights, such as referral to them as one of the objectives of cooperation<sup>121</sup>.

The inclusion of the genuine human rights clause into the bilateral agreement between the EEC and ACP states became irreversible in terms of Lome IV negotiations. Such irreversibility was called forth by the fact that newly adopted SEA granted the European Parliament

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<sup>118</sup> ACP-EEC Convention of Lome, available at <http://aei.pitt.edu/4491/1/4491.pdf> (28 April 2015).

<sup>119</sup> Arts, Integrating human rights into development cooperation, p.169.

<sup>120</sup> Fierro, European Union's approach to human rights conditionality in practice, p.56.

<sup>121</sup> ACP-EEC Convention Lome III, available at [http://aei.pitt.edu/1778/1/Lome\\_III\\_dossier.pdf](http://aei.pitt.edu/1778/1/Lome_III_dossier.pdf) (28 April 2015).

the right to assent to association agreements by an absolute majority, and the Parliament was the major institutional proponent of human rights provisions being included into EEC external agreements. In the body of the Lome IV, the human rights references were contained in Art.5. The norms, united under the umbrella of this article, referred to the link between human rights and development; indivisibility of different categories of human rights; commitment to the elimination of all forms of discrimination, as well as the possibility of financial resources to be allocated by the EEC for the promotion of human rights in ACP states<sup>122</sup>.

“While no legal mechanism for the suspension of aid in the event of persistent human rights violation was included into the Lome IV, it is generally considered to be implied”<sup>123</sup>.

The relations between the EU and ACP states gained a new impulse for development after the Commission published a famous Green Paper “On relations between the European Union and the ACP countries on the eve of the 21st century”. Emphasizing common challenges and a new impetus to the development of political dimension of the EU integration that emerged due to changes in the international environment, the Paper provides the basis for strengthening political cooperation between the EU and ACP states<sup>124</sup>. As a result of long-running negotiations, Cotonou Agreement was signed by the EU and its Member States on one side, and ACP states on the other. The politicization of the relations between the EU and ACP states finds its manifestation in both the major principles, governing the partnership, and substance of the Agreement. According

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<sup>122</sup> ACP-EEC Convention Lome IV, available at [http://www.epg.acp.int/fileadmin/user\\_upload/LomeIV1989.pdf](http://www.epg.acp.int/fileadmin/user_upload/LomeIV1989.pdf) (4 February 2015).

<sup>123</sup> Hoffmeister, Menschenrechts- und DemokratieklauseIn in den Außenbeziehungen, p.9.

<sup>124</sup> European Commission. Green Paper of 20 November 1996 “On Relations between the European Union and the ACP countries on the Eve of the 21<sup>st</sup> Century – Challenges and Options for a New Partnership”, COM (96) 270 Final.

to Art.2 of the Agreement (as revised in Ouagadougou on 22 June 2010), the Partnership is based on four principles, such as

- Equality of the partners and ownership of development strategies
- Partnership’s openness to actors, different from governments
- The key role of dialogue and fulfillment of mutual obligations in terms of the partnership and cooperation relations
- Regionalism and differentiation<sup>125</sup>

Title II of the Cotonou Agreement is fully dedicated to political dimension of the Partnership. Art. 9 (4) of the Agreement states that

“the Partnership shall actively support promotion of human rights, processes of democratization, consolidation of RoL and good governance”<sup>126</sup>

These areas are recognized as important subject for the political dialogue between the EU and ACP states.

In accordance with the Art. 10-11 of the Agreement, the political environment of the Partnership needs to be characterized with a range of elements, such as

- sustainable and equitable development (including access to productive resources, essential services and justice);
- greater involvement of an organized civil society and private sector;

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<sup>125</sup> Partnership Agreement between the members of the African, Caribbean and the Pacific Group of states of the one part, and the European Community and its Member States of the other part, available at <http://www.europarl.europa.eu/document/activities/cont/201306/20130605ATT67340/20130605ATT67340EN.pdf> (28 April 2015), p.18.

<sup>126</sup> *Ibid*, pp.22-23.

– an active and comprehensive policy of peace-building and conflict management.

Revision of development strategies, as well as strengthening of the institutional aspects of the Agreement's implementation also contributed to the practical enhancement of the political aspect of the Partnership. Multifaceted strengthening of the political dimension of the Partnership was repeatedly recognized both by the EU and the ACP states.

The RoL, human rights and good governance as key principles and objectives are laid down in a range of other EU multilateral and bilateral instruments for development cooperation. The Declaration of Rio De Janeiro, following the EU-Latin America and Caribbean Summit, views strengthening democracy, individual freedom, the RoL and good governance as major common objectives behind cooperation<sup>127</sup>. Similar provisions are incorporated into the former EEC cooperation agreements with the Andean Community<sup>128</sup> and states of Central American Common Market<sup>129</sup>. A substantive human rights clause, as contained in the Cotonou Agreement is considered to be the model to emulate respective provisions<sup>130</sup> for the purposes of other international agreements of the EU. Such consideration is to be attributed to refinement of the procedure that provides any party with the right to withdraw from the agreement of “take appropriate

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<sup>127</sup> Latin America/Caribbean/European Union: First Summit. Declaration of Rio de Janeiro. available at <http://www.europarl.europa.eu/delegations/noneurope/idel/d12/docs/cumbrederio/declaracionfinalen.htm> (29 April 2015).

<sup>128</sup> Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries, of the other part of 15 December 2003, available at <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=3101> (29 April 2015).

<sup>129</sup> Political dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and states of El Salvador, Nicaragua, Honduras, Guatemala, Costa Rica and Panama, of the other part of 12 November 1995, available at [http://eeas.europa.eu/ca/pol/pdca\\_12\\_03\\_en.pdf](http://eeas.europa.eu/ca/pol/pdca_12_03_en.pdf) (29 April 2015).

<sup>130</sup> Kuon, Good Governance, p.35.

measures” in case where another party does not fulfill an obligation, associated with respect for human rights, democratic principles and the RoL (referred to as “essential elements of an agreement<sup>131</sup>).

The key issue that stems from the abovementioned formulation of the clause and context of respective agreements is the lack of common conceptual understanding of standards, constituting the basis of essential elements clauses. As in case of suspension clauses, contained in unilateral financial and technical instruments, absence of specific benchmarks to assess the state of parties’ compliance with essential elements of an agreement, including RoL lead to the politicization of the Union’s applying suspension mechanisms. Such lack of any RoL-related minimum requirements or benchmarks to be applied with regard to the use of various EU external relations instruments will be addressed in the following subsection of the thesis.

## **II.2 The definitions of the rule of law in the rule of law promotion instruments of the European Union**

The EU instruments, aimed at external promotion of the Union’s fundamental values, seldom provide for the attributes of the RoL. When concise definitions are included, they are normally rather superficial and do not allow forming a unified conceptual understanding of the RoL as a key value promoted by the EU<sup>132</sup>. This statement can be substantiated by referral to definitions of the RoL, contained in the instruments of RoL promotion, described in the previous subsection of the paper.

Soft instruments of RoL promotion tend to emphasize the RoL as a priority issue without providing for specific definition of the RoL. The EU official documents, providing for the Structured Dialogue on

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<sup>131</sup> *Ibid*, pp.35-36.

<sup>132</sup> Wennerstrom, *The Rule of Law and the European Union*, supra note 27.

the RoL also do not exactly mention what the RoL means within the context of the abovementioned dialogue.

At the same time, the major elements, encompassed by the umbrella notion of the RoL, can be extracted from the RoL Assistance Strategy in Kosovo 2016-2019 that was significantly influenced by the EU-Kosovo RoL Dialogue. The Strategy provides for three major objectives to be reached<sup>133</sup>. Firstly, it concentrates on the improvement of the justice system in a range of dimensions, such as independence, efficiency, effectiveness, accountability and impartiality. The second strategic objective is improvement of prevention and fighting of corruption and organized crime, including trafficking in human beings, drugs, economic crime and money laundering, as well as arts smuggling, cybercrime and terrorism. Thirdly, the Strategy is aimed at improving access to justice. The important feature of the Strategy lies in the fact that it contains progress indicators that are defined to monitor and assess the state of the Strategy's implementation. Twenty five indicators allow considering implementation of all the strategic objectives, and provide for different sources of information to be assessed, including the ones, coming from the EU, the World Bank and the World Justice Project (WJP).

Diverse understandings of the RoL are contained in the EU regulations, establishing legally binding unilateral instruments of technical and financial assistance. In terms of the EIDHR, improvement of democratic control, domestic accountability and the

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<sup>133</sup> Government of the Republic of Kosovo, Ministry of Justice, Rule of Law Assistance Strategy in Kosovo 2016-2019 (Justice and Internal Affairs)m), available at [http://www.md-ks.net/repository/docs/Rule\\_of\\_Law\\_Assistance\\_Strategy\\_in\\_Kosovo\\_2016-2019\\_%28Justice\\_and\\_Internal\\_Affairs%29.pdf](http://www.md-ks.net/repository/docs/Rule_of_Law_Assistance_Strategy_in_Kosovo_2016-2019_%28Justice_and_Internal_Affairs%29.pdf) (28 April 2015).

separation of powers are viewed as necessary developments to promote the RoL and independence of the judiciary<sup>134</sup>.

The Regulation establishing the ENI mentions the objective of the RoL along with the ones of promoting human rights and fundamental freedoms, establishing democracy and governance, fighting corruption, as well as strengthening institutional capacity at different levels and developing thriving civil society<sup>135</sup>. At the same time, Annex II to the Regulation, providing for Union support being granted under the Regulation establishing the ENI, mentions reforms of justice, of the public administration and of the security sector as major elements of the RoL-related changes that can be addressed with the help of the ENI<sup>136</sup>.

In terms of the functioning of the DCI, the objectives of development cooperation are divided into the ones, common under geographic programmes, and specific ones. Democracy, human rights and the RoL represent a key area of cooperation, common under different geographic programmes. In terms of common objectives, the RoL is mentioned in line with “the independence of the judicial and protection systems and ensuring unhindered and equal access to justice for all”<sup>137</sup>. Dependently on multifaceted domestic contexts, the RoL is associated with different issues in terms of objectives, developed for specific regions. For instance, the RoL is associated with reforms of justice and security sectors with regard to programmes, being launched in North and South East Asia. In terms of Central Asia and Middle East geographic programmes, the RoL

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<sup>134</sup> The European Parliament and Council Regulation (EU) No 235/2014 of 11 March 2014 establishing a financial instrument for democracy and human rights worldwide.

<sup>135</sup> The European Parliament and Council Regulation (EU) No 232/14 of 11 March 2014 establishing a European Neighbourhood Instrument

<sup>136</sup> Ibid, Annex II.

<sup>137</sup> The European Parliament and Council Regulation (EU) No 233/2014 establishing a financial instrument for development cooperation for the period 2014-2020.

deals with public institution-building, as well as transparency of the judicial process.

The RoL Platform, functioning in Central Asia, tends to associate the RoL with a range of factors, including institution-building, distinguished qualification of legal professionals, as well as reforms of legal and judicial systems. In practice, the RoL promotion projects, implemented by the EU in Central Asia, concentrate on administrative law, criminal law and procedure, judicial reform and legislative procedure. It is worth mentioning that practical activities, conducted in abovementioned fields, tend to emphasize human rights issues. For instance, in terms of criminal law and procedure, ensuring the right to a fair trial is specifically tackled, while judicial reforms is concerned with the establishment of the national human rights protection system<sup>138</sup>.

Within the context of the IPA II, the RoL promotion is strongly linked to the principle of good governance that includes *inter alia* public administration reform and establishment of democratic institutions, as well as the development of an independent and efficient justice system. The Regulation views the fight against corruption and organized crime as an essential element of the RoL.

As it was mentioned in the previous subsection of the paper, Mechanism for Cooperation and Verification (CVM) that the EU launched in Bulgaria and Romania uses a benchmarking approach to address these states' progress in the field of the RoL. In terms of the CVM the issues of the judicial reform, as well as fighting corruption and organized crime were explicitly linked to the RoL that was defined as implying

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<sup>138</sup> The Rule of Law Platform - Central Asia. Overall Plan of activities for the period 2012-2014, available at <http://ruleoflaw.eu/wp-content/uploads/2013/07/Overall-Workplan.pdf> (28 April 2015).

“the existence of an impartial, independent and effective judicial and administrative system, properly equipped, inter alia, to fight corruption and organized crime”<sup>139</sup>.

The example of the way the EU sets benchmarks in terms of the CVM can be extracted from Annex to the Commission Decision 2006/929/EC that provides for benchmarks to be addressed by Bulgaria. These benchmarks are as following

- Adopting constitutional amendments providing for the independence and accountability of the judicial system.
- Adopting a new judicial system act and civil procedure code to ensure transparency and efficiency of the judicial process. Reporting on the impact of these laws, as well as penal and administrative procedure codes.
- Reforming the judiciary with regard to professionalism, accountability and efficiency. Evaluating the impact of this reform and publishing results on the annual basis.
- Conducting of and reporting on non-partisan investigations into high-level corruption-related allegations. Reporting on conduct of internal inspections of public institutions and the publication of assets, owned by high-level officials.
- Taking further steps to prevent and fight corruption, in particular at the borders and local government.
- Realizing a strategy to fight organized crime with an emphasis on serious crime, money laundering, as well as on the systematic confiscation of assets of criminals. Reporting on new and ongoing investigations, indictments and convictions in this area<sup>140</sup>.

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<sup>139</sup> Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime, C (2006) 6570 final.

<sup>140</sup> *Ibid.*

Bulgaria's progress is considered by the Commission Reports on an annual basis in the light of the above-mentioned benchmarks. For the purposes of the in-depth understanding of the criteria that are used by the Commission to assess the progress, made by a state in accordance with respective benchmarks, is required. Reports on Bulgaria's progress in terms of the CVM include seven major headings, such as reform of the judicial system; transparency and accountability of the judiciary; judicial practices in criminal cases; fight against organized crime; asset forfeiture; fight against corruption and preventing corruption<sup>141</sup>

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<sup>141</sup> Report from the Commission to European Parliament and the Council of 22 January 2014 On progress in Bulgaria under the Cooperation and Verification Mechanism, Com (2014), 36 Final.

**Table 1. The analysis of the 2014 Report of the Commission to the EP and the Council “On Progress in Bulgaria under the CVM” (by the example of reforming the judiciary and law enforcement systems)<sup>142</sup>**

<b>Benchmark</b>	<b>Criteria</b>
Independence, integrity and accountability of the judiciary	<ul style="list-style-type: none"> <li>–Public confidence in the judiciary (information of the World Economic Forum<sup>143</sup>)</li> <li>–Appointing procedures and election procedure for the Supreme Judicial Council</li> <li>–Effort, aimed at tackling systemic issues of the judiciary, such as excessive workload and impractical allocation of resources</li> <li>–The Supreme Judicial Council’s being perceived as an autonomous authority, capable of defending the judiciary’s independence vis-à-vis executive bodies</li> <li>–Objective appraisal and promotion procedures, consistency of disciplinary proceedings</li> </ul>
Efficiency of the judicial and law enforcement system	<ul style="list-style-type: none"> <li>– System of workload redistribution among courts</li> <li>– Functioning of the centralized system for keeping track of random case allocation</li> <li>– Activities of the Inspectorate attached to the Supreme Judicial Council</li> <li>– Identification of specific remedies for enhancement of prosecution’s functioning</li> </ul>

The important peculiarity of the assessment, provided in the Commission Report under study, lies in the fact that it considers both actual changes (e.g., enhanced publicity of judges’ election and

<sup>142</sup> *Ibid.*

<sup>143</sup>The World Economic Forum is an international institution, focusing on improvement of the world through the promotion of public-private cooperation. Its reports concern variety of economic and social issues.

nomination) and prerequisites for changes (e.g., conducting audit at the Prosecutor's office). Furthermore, the assessment is conducted by mentioning a state's success and failures in terms of respective benchmarks without applying indicators, developed beforehand. At the same time, CVM-related reports represent an exception to the general situation, whereby the RoL tends to remain undefined. Thus, the example of CVM assessment is of significant use for developing specific RoL indicators in terms of independent judiciary, as well as fighting corruption and organized crime.

Along with democracy and human rights, the RoL is normally considered to constitute an essential part of the EU bilateral agreements. The majority of the agreements do not contain the definitions of the RoL. However, Cotonou Agreement between the EU and ACP states refers to the RoL with regard to effective and accessible means of legal redress, executive, fully subject to law, as well as independent judiciary that guarantees citizens' equality before the law<sup>144</sup>.

The need for critically assessing the Union's RoL promotion policies and systemic conduct of activities in partner states calls forth the fact that the EU produces numerous thematic and country-specific progress reports. It is very common for such progress reports to concentrate on states' specific achievements in the field of the RoL, rather than assess their compliance with specific benchmarks, previously set out by EU RoL promotion instruments. Nevertheless, it is still possible to mention a rare example of a progress report, adopted by the Commission and tackling the partnership between the EU and the group of ACP states. The 1998 Progress Report on

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<sup>144</sup> Partnership Agreement between the members of the African, Caribbean and the Pacific Group of states of the one part, and the European Community and its Member States of the other part, available at <http://www.europarl.europa.eu/document/activities/cont/201306/20130605ATT67340/20130605ATT67340EN.pdf> (28 April 2015), p.21.

democratization, the RoL, respect for good governance provides for an extensive list of areas that fall within the scope of the RoL as to be observed by partner states. This list is designed as follows:

- “a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary
- effective and accessible means of legal recourse
- a legal system that provides for the equality before the law
- a prison system that respects a human person
- a police force that serves the law
- an effective executive that is capable of establishing the social and economic conditions necessary for the life in society”<sup>145</sup>

As in case of the CVM progress report in the light of the EU unilateral instruments, the Progress Report, quoted above, represents a seldom issue of rather clear benchmarks, designed to monitor states’ compliance with the RoL.

The analysis of the concept of the RoL in terms of the EU soft law, a range of the EU legally binding unilateral technical and financial instruments (EDIHR, ENI, DCI, IPAII and CVM) and the Union’s bilateral agreements allows making the following statements. Legal documents, establishing RoL promotion instruments, tend not to address the RoL from a definitional standpoint. At the same time, almost all above-mentioned instruments establish the context, within which the RoL needs to be promoted. While linkages between the RoL, democracy and human rights are highlighted in the vast majority of considered instruments, some of them also consider the RoL in line with good governance, non-discrimination, strengthening of institutions’ capacities and civil society’s development. Presence of

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<sup>145</sup> European Commission, Report of 24 February 1998 on Democratization, the rule of law, respect for human rights and good governance, COM (98)146.

such linkages testifies to the fact that the EU seeks to promote a broad understanding of the RoL as a principle that encompasses both formal and substantive components<sup>146</sup>.

Apart from establishing the context of the RoL's functioning, some of the considered documents provide for components of the RoL. While varying approaches to addressing the components of the RoL in county-specific and regional instruments can be explained by the referral to specific contexts, even framework (thematic) documents fail to contain a unified approach towards the RoL. At the same time, the analysis of the EU activities in specific states and regions (Kosovo, Central Asia, Bulgaria and Romania) testifies to the Union's growing attention towards the application of benchmarking approach with regard to the RoL promotion. A positive aspect of applying clear benchmarks and indicators (as in the case of Kosovo) lies in providing basis for elaborating on reform strategies, their implementation and monitoring of their effect, as well as enhancing credibility of the EU RoL promotion activities.

Thus, developing a conceptual document that will comprehensively address the scope of the RoL and assess states' compliance with it with the help of specific indicators is to allow the EU to act more effectively as an international standard-setter and may also be helpful with regard to RoL promotion policies development, as well as monitoring partner states' progress. These suggestions are further developed in the following section of the paper.

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<sup>146</sup> Pech, Cleer Working Papers 2012/2013, p.27.

## Chapter 3. The development of the EU rule of law indicators

### III.1. Methodological approaches to using indicators vis-à-vis umbrella legal concepts by the example of human rights indicators

Along with democracy and the RoL, the protection of human rights and fundamental freedoms represents one of the basic values, being promoted by the international community<sup>147</sup>. The international normative human rights framework has been developing since the adoption of the Universal Declaration of Human Rights by the UN General Assembly on 10<sup>th</sup> December 1948<sup>148</sup>. Together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Declaration forms the International Bill of Human Rights that represents a key element of the international human rights framework. In a wide range of other legal instruments the UN addresses human rights protection of specific populations<sup>149</sup> or with regard to specific issues<sup>150</sup>.

Human rights, formulated in above-mentioned documents, are generally viewed as representing standards that are to be implemented in terms of national policies. However, in practice it is rather difficult both to develop a concrete plan to implement a human rights standard and assess its efficiency. Human rights indicators are designed in order to help different groups of stakeholders exercise the following tasks:

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<sup>147</sup> OHCHR, 2012, p.iii.

<sup>148</sup> *Ibid*, p.14.

<sup>149</sup> For instance, The Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>150</sup> For instance, the International Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

- Formulate public policies and programmes that facilitate realization and protection of human rights.
- Assess effectiveness of implementing measures, aimed at facilitating respect for human rights, their fulfillment and protection.
- Manage international cooperation in the field of human rights promotion.<sup>151</sup>

According to a rather broad definition, a human rights indicator is addressed as

“a specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns ; and that can be used to assess and monitor the promotion and implementation of human rights”<sup>152</sup>.

Broad understanding of human rights indicators allows assuming their existence in various forms, such as qualitative and quantitative, as well as fact-based and judgment-based. Quantitative indicators are the ones that are primarily expressed in the form of numbers, percentages and indices, while qualitative indicators are usually represented by checklists, sets of questions, as well as narrative and categorical data. In practice, quantitative indicators may serve as a prerequisite for qualitative evaluations, whereas they can facilitate narrative information by measuring the magnitude of a described event or state. It is also possible to classify human rights indicators into fact-based (objective) and judgment-based (subjective).

Fact-based indicators are derived from facts that can be directly observed and verified, while the development of subjective indicators is grounded on opinions and assessments. Judgment-based indicators

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<sup>151</sup> OHCHR, Human Rights Indicators, p. 2.

<sup>152</sup> *Ibid*, p.16.

are especially useful to take into account the peculiarities of economic, socio-political and cultural contexts in a given state.

Another important notion with regard to human rights measurement is the one of a benchmark. Benchmarking is used to assess one's performance with the help of indicators. Thus, an application of the benchmarking approach is secondary vis-à-vis development of indicators that will be used in the process of assessment.

Transferring to the methodology of an indicators-based approach, it is necessary to mention that the primary task of elaborating on a set of indicators is to find out what is to be measured. In case of the UN human rights indicators, their aims lie in measuring the enjoyment of rights by rights holders and assessing the progress states made in meeting human rights obligations, set out in the normative framework<sup>153</sup>. Indicators need to be designed in a way to link specific policy outcomes with initial human rights, provided for in the international treaties. The broadest possible assessment of the state of human rights in a state needs to be conducted with the help of a set of the following indicators:

- **Structural indicators** are used to reflect on the ratification and adoption of the legal instruments, as well as creation of institutional mechanisms, necessary for realizing human rights standards (e.g, the inclusion of the Bill of Rights into the constitutional framework)

- **Process indicators** are the ones that assess a duty bearer's ongoing activities to translate human rights commitments into feasible results (e.g., coverage of targeted population groups by public programmes)

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<sup>153</sup> *Ibid*, p.32.

– **Outcome indicators** represent the key group of indicators that are designed to reflect the state of the human rights’ enjoyment within a given state (e.g., the number of reported discrimination cases)

Indicators can be based on different sources and types of data, such as events-based data, socio-economic and administrative statistics, perceptions and opinion survey, as well as expert judgments<sup>154</sup>.

The analysis of illustrative indicators on human rights, set out in the Universal Declaration, allows making several important notes.

– Indicators of all types (structural, process and outcome) are used on equal basis.

– The scope of each human right tends to include multiple attributes. For instance, the right to education can be assessed in the light of universal primary education; accessibility of secondary and higher education, curricula and educational resources, educational opportunities and freedom<sup>155</sup>.

– Some of the indicators are applied to all aspects of a right (mainly structural ones), while others are used to address specific aspects of the right (mainly, process and outcome-related ones).

– Combination of all indicators allows reconstructing an exhaustive reading of the assessed standard.

Apart from considering different aspects of an assessed object and creating a feasible combination of indicators and data sources, it is important to consider intersections between different attributes of an assessed object and include contextually relevant factors.

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<sup>154</sup> *Ibid*, p.51.

<sup>155</sup> *Ibid*, p.93.

Brief examination of the way indicators-based approach is to be applied with regard to human rights shows that indicators represent a useful tool to address implementation of the umbrella legal concepts, such as human rights, democracy and the RoL. Furthermore, an elaboration on indicators represents a way to consider a researched legal concept as a set of aspects that constitute its scope. The development of a set of attributes, constituting the EU understanding of the RoL, and suggesting respective indicators to assess the RoL in partner states requires researching into existing frameworks, used to assess the RoL and the way they are organized. Thus, the next subsection of the paper will concentrate on the design of the World Justice Project (WJP) RoL Index and the UN RoL indicators, used in the sphere of criminal law and justice.

### **III.2 An overview of existing systems of assessing the rule of law**

The World Justice Project (WJP) is an autonomous multidisciplinary organization that works in order to advance the RoL in the world<sup>156</sup>. The RoL Index, developed by the WJP, is designed to offer a multidimensional view of states' adhering to the principle of the RoL in practice.

As opposed to the illustrative design of the methodology to measure human rights, presented in the previous subsection of the paper, the Index concentrates on measuring policy outcomes, rather than including structural and process indicators. The WJP understanding of the RoL is based on four major principles that serve as a basis for the development of RoL attributes and indicators. In the WJP RoL Index of 2014 these principles are formulated as follows:

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<sup>156</sup> For the in-detail information about the World Justice Project, see *supra* note 31.

- “The government and its officials and agents, as well as individuals and private entities are accountable under the law.
- The laws are clear, publicized, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
- The process, by which laws are enacted, administered, and enforced is accessible, fair and efficient.
- Justice is delivered timely by competent, ethical and independent representatives and neutrals, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve”<sup>157</sup>.

The WJP RoL Index 2014 comprises nine aggregate attributes (factors) that are further assessed with the help of 47 specific indicators. The attributes are designed in the following way:

- **Constraints on Government Powers.** The factor addresses constitutional and institutional means that limit the powers of the government, its officials and agents. It is tightly interconnected with, but not limited by the design of the system of checks and balances in the light of classical principle of separation of powers.

- **Absence of corruption.** The factor measures corruption in the executive branch, the legislature, the judiciary, as well as the military and the police.

- **Open government.** Openness of government is essential for effective public oversight. Subfactors, singled out in terms of open government factor, include presence of clear, publicized, accessible and stable laws; administrative proceedings’ openness to public participation and official information’s availability to the public.

- **Fundamental rights.** The factor includes variety of subfactors to be measured, such as effective enforcement of laws that

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<sup>157</sup> The WJP Rule of Law Index 2014, available at [http://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf) (28 April 2015).

ensure equal protection; due process of law and the rights of an accused person; freedom of assembly; freedom of assembly and association and protection of fundamental labour rights (the prohibition of forced and child labour; protection of the right to collective bargaining)

– **Order and security.** The major aim of the factor is to find out how well security of persons and property is ensured. The factor considers such threats as crime; political violence and social acceptance of violence as a means to redress personal grievances

– **Regulatory enforcement.** The attribute measures the degree of fairness and effectiveness of regulations' enforcement.

– **Civil justice.** The factor deals with the functioning of the judiciary in terms of its accessibility and affordability, as well as freedom from corruption, discrimination and improper influence of governmental officials.

– **Criminal justice.** The factor encompasses effectiveness of criminal investigation system; timeliness and effectiveness of criminal adjudication system; impartiality of criminal system; freedom from corruption and improper governmental influence, as well as due process and protection of human rights.

– **Informal justice.** In many countries, official systems of justice coexist with “informal” ones (e.g., traditional, tribal and religious courts). The factor addresses functioning of such systems in terms of timeliness and effectiveness, impartiality and freedom of improper governmental influence and the protection of human rights.

Analysis of the design of factors and subfactors, stemming from the four WJP RoL principles shows that they combine formal and substantive aspects of the RoL. A substantive aspect is reflected in several attributes, namely fundamental rights protection itself, criminal justice and informal justice.

The data, used to assess the RoL by factors and subfactors, stems from the results of five questionnaires that are filled in by experts and general public. The fact that the WJP methodology uses only the data, coming from perceptions and opinions, the WJP RoL Index tends to be combined with other qualitative and quantitative instruments<sup>158</sup>. While the WJP methodology does not make best use of varied data sources, its usefulness for current research lies in the fact that it represents an elaborated example of considering the RoL in the light of attributes (factors), subfactors and indicators. Thus, the WJP provides for creating a structural image of the RoL.

Another example of using indicators to measure the RoL is the UN RoL Indicators. The peculiarity of the UN RoL promotion lies in the fact that it tends to target countries in transition or the ones, suffering from the consequences of armed conflicts. The foundation for the UN RoL promotion and RoL Indicators under study is represented by the RoL definition, articulated by the UN Secretary-General in a report to the UN Security Council in 2004. According to this definition, the RoL

“refers to a principle of governance in which all persons institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”<sup>159</sup>.

While the UN understanding of the RoL includes a variety of elements, the RoL Indicators are currently designed to apply to the state of the RoL in criminal justice system. 135 RoL Indicators, used by the UN, are grouped in accordance with three institutions: the

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<sup>158</sup> *Ibid*, p.6.

<sup>159</sup> UN Secretary General Report “On the rule of law and transitional justice in conflict and post-conflict societies” of 23 August 2004, S/2004/616.

police, the judicial system and prisons. Apart from being grouped by institutions, indicators also address different dimensions of the abovementioned institutions' activities, such as performance; integrity, transparency and accountability; treatment of members of vulnerable groups, as well as capacity (possession of necessary human and material resources).<sup>160</sup> In terms of institutions and dimensions, indicators are grouped into so-called baskets that allow specifically addressing important aspects of criminal justice institutions' performance, integrity, transparency and accountability etc. The structure of the Instrument is exemplified by the referral to measuring performance of the judiciary in the table below.

**Table 2. Assessment of judiciary's performance with the help of the UN RoL Indicators<sup>161</sup>**

<b>Performance of the judiciary</b>	
<b>Basket 1. Public confidence</b>	<ul style="list-style-type: none"> <li>– Judiciary's respect for the rights of defendants and victims</li> <li>– Impartiality of the courts</li> <li>– Confidence in public prosecution</li> </ul>
<b>Basket 2. Access to justice</b>	<ul style="list-style-type: none"> <li>– Availability of interpreters</li> <li>– Protection of the rights of defendants and victims</li> <li>– Access to redress for miscarriage of justice</li> <li>– Fees to obtain access to courts</li> <li>– Availability of free legal assistance for indigent defenders</li> <li>– Quality of legal representation</li> <li>– Response to gender-based violence</li> </ul>
<b>Basket 3. Effectiveness and efficiency</b>	<ul style="list-style-type: none"> <li>– Undue delays</li> <li>– Public perception of undue delays</li> <li>– Pre-sentence detention</li> <li>– Children in pre-sentence detention</li> </ul>

<sup>160</sup> DPKO, OHCHR, The UN Rule of Law Indicators, p.4.

<sup>161</sup> Ibid, p. 7

Core concepts that are applied in the UN RoL indicators include budgetary transparency; availability of public information on complaints about officials; entry-level salaries; administrative systems, record management capacity etc. As it can be seen from the table, the vast majority of the UN RoL indicators are quantitative. As opposed to the WJP, the UN RoL Indicators are based on highly varied sources of data that include public surveys, expert surveys, document review, as well as administrative and field data.

Thus, the WJP RoL Index and the UN RoL Indicators represent examples of systems, aimed at measuring the RoL in the light of respective RoL definitions. Both the WJP RoL Index and the UN RoL Indicators view the RoL as a set of factors (attributes) that are to be assessed with the help of specific indicators. Having adopted different understandings of the RoL, the WJP and the UN developed different attributes of the RoL to be assessed.

However, considering both systems is helpful for elaborating on the ways to address the meaning of the RoL in the light of the EU RoL promotion, because they represent examples of structured approach to measuring the RoL. While the WJP concentrates on qualitative data, the UN RoL Index represents a valuable example of quantification of qualitative data. The advantage of the UN system of measuring the RoL lies in the fact that it is designed to consider a broad scope of data sources, so that a multidimensional understanding of the state of RoL within a particular institution can be formed.

### **III.3. Towards the system of the EU rule of law indicators**

The multifaceted analysis of the scope of the RoL concept, conducted in the light of the legal theory, constitutional traditions of the EU Member States and different aspects of the law of the EU testifies to the existence of the following paradox. On the one hand,

the RoL represents an “essentially contested concept”<sup>162</sup> that tends to lack precise definition, despite being universally recognized as a major principle of states’ and non-state actors’ functioning. On the other hand, different sources still contain information, concerning the components of the RoL. Summarizing attributes that constitute the RoL is a prerequisite for developing an attributes-based model of the RoL that can serve as a basis for creating the EU RoL indicators to assess the EU RoL promotion activities. The first step towards creating such model is bringing together different components of the RoL, as contained in the legal theory, constitutional traditions of the Member States and the law of the EU. The summary is presented in the table below.

**Table 3. Summary of the components of the RoL (as highlighted in terms of previous chapters of the master thesis)**

Source	Envisaged components of the RoL
<b>Legal doctrine</b>	<ul style="list-style-type: none"> <li>– Limitation of power of every authority, including a sovereign, who can only exercise his/her powers as long as his acts are authorized through existing law</li> <li>– Separation of powers</li> <li>– Limited discretion of the criminal justice institutions, so that they do not pervert the law</li> <li>– Stability of the law and law enforcement practice (possibility to foresee the way an authority will use its coercive powers)</li> <li>– Prohibition of arbitrary punishments (also addressed as legality)</li> <li>– Everyone’s equality before the law</li> <li>– Constitution’s being based on previous judicial decisions, determining the rights of private persons</li> <li>– Prospective, open and clear laws</li> </ul>

<sup>162</sup> See supra note 5.

	<ul style="list-style-type: none"> <li>– Open, stable and clear rules of law-making</li> <li>– Guaranteed independence of the judiciary</li> <li>– Courts’ review powers over the principles, contained in legislation and administrative action</li> <li>– Accessibility of courts</li> <li>– The right to fair and public trial without undue delay</li> <li>– Presumption of innocence</li> </ul>
<b>Constitutional traditions of Member States</b>	<i>English constitutional tradition</i> (the rule of law)
	<ul style="list-style-type: none"> <li>– Government must be able to point to a specific legal basis (legality as emerging from non-arbitrariness of punishments)</li> <li>– Stability of legal norms (providing one with a capability of planning his/her conduct)</li> <li>– Fundamental rights protection</li> <li>– Public participation in the decision-making process</li> </ul>
	<i>German constitutional tradition</i> (the Rechtsstaat)
	<ul style="list-style-type: none"> <li>– State’s ensuring that people exercise their strengths in a free and comprehensive way</li> <li>– Protection of individual freedom</li> <li>– State’s self-limitation</li> <li>– Protection of subjective rights</li> <li>– Primacy of law</li> <li>– Abstract nature and impersonality of law</li> <li>– Proportionality</li> </ul>
	<i>French constitutional tradition</i> (etat de droit)
	<ul style="list-style-type: none"> <li>– Judicial control of authorities, aimed at ensuring that they respect formal and substantive rules, as provided by the Constitution</li> </ul>

<b>EU fundamental value</b>	<ul style="list-style-type: none"> <li>– The principle of confidence in the stability of a legal situation</li> <li>– Legal certainty</li> <li>– Proportionality</li> <li>– The right to be heard</li> <li>– The right of access to one’s files</li> <li>– The right of defence</li> <li>– Authorities’ obligation to motivate legal acts in a proper way</li> <li>– Institutional balance</li> </ul>
<b>EU      RoL promotion instruments</b>	<p><i>Soft instruments</i></p> <ul style="list-style-type: none"> <li>– Specific design of the justice system (independence, efficiency, accountability and impartiality)</li> <li>– Accessibility of justice</li> <li>– Combating corruption and organized crime</li> </ul> <hr/> <p><i>Legally binding unilateral technical and financial instruments</i></p> <ul style="list-style-type: none"> <li>– Separation of powers</li> <li>– Democratic control of authorities</li> <li>– Domestic accountability of authorities</li> <li>– Unhindered and equal access to justice for all</li> <li>– Transparency of judicial process</li> <li>– Distinguished qualifications of legal professionals</li> <li>– Combating corruption and organized crime</li> </ul> <hr/> <p><i>Bilateral development cooperation agreements</i></p> <ul style="list-style-type: none"> <li>– Legislature, respecting and giving full effect to human rights and fundamental freedoms</li> <li>– Effective and accessible means of legal redress</li> <li>– Executive, fully subject to law</li> <li>– Independent judiciary</li> <li>– Ensuring equality before the law</li> </ul>

	<ul style="list-style-type: none"> <li>– Police force, serving the law</li> <li>– Prison system that respects a human person</li> </ul>
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Analysis of the summary of the RoL components, contained in four major sources (legal doctrine, constitutional traditions of the EU Member States, EU internal legal order and the EU RoL promotion instruments) allows making the following statements:

- Significant number of unique components of the RoL that can be traced with the help of current analysis (the table above contains more than forty unique components of the RoL) can be explained by the long-lasting history of the concept in the EU and its revival in the light of the evolution of development cooperation.
- The evolution of the RoL in the context of its promotion and development cooperation led to the establishment of the strong link between the RoL and transition processes, and reforms. While in the legal doctrine the RoL is mostly associated with specific characteristics of the RoL, the RoL promotion-related understanding of the RoL encompasses processes, taking place within a state, such as fighting corruption and organized crime.
- All considered sources tend to include both formal and substantive characteristics of the RoL. The rights-based approach to the RoL is peculiar to the European vision of the RoL.
- The vast majority of the RoL components, highlighted in the considered sources, characterize policy outcomes, rather than ongoing processes. Only combating corruption and organized crime can be seen as a continuing process.

– All the components of the RoL, highlighted in the table above, can be divided into several major groups, accordingly to their substance.

The first group of the RoL components concerns **formal characteristics of the legislation of a state**. It encompasses *inter alia* such attributes as prospective, clear and stable laws; abstract nature and impersonality of law etc.

Secondly, adherence to the principle of RoL requires compliance with a range of requirements concerning **the design of institutions and their functioning**. With regard to the design of the institutions, it is worth mentioning **the principle of separation of powers and institutional balance** as the key institutional prerequisites of compliance with the RoL for nation-states and the EU respectively. In a more general view, the principle of separation of powers and institutional balance stem from the doctrine of state's self-limitation that has found its reflection in the German legal doctrine. Major requirements concerning **the functioning of the institutions** deal with **legality; accountability and transparency, as well as realized independence and efficiency**. The requirements of transparency and accountability are tightly interconnected with the characteristics of **processes and procedures** (e.g, openness, stability and clarity of the rule-making process; transparency of a judicial process).

The third group deals with creating a **viable national human rights protection system**. Its existence is to be ensured through **substance of legislation**, containing fundamental rights and necessary procedural guarantees (e.g., the right to be heard, the right to defence), as well as **effective means of legal redress, being contained in the legislation**. Apart from respective substance of the legislation, establishment of a viable national human rights protection system

requires an **independent, efficient, accountable and impartial judicial system that can be easily accessed.**

Finally, the last group of RoL components is peculiar to the context of the EU RoL promotion in terms of its external action. It encompasses **states' making efforts to combat corruption and organized crime.**

In a schematic view, the RoL can be laid down as follows.

**Table 4. The RoL as combination of factors and subfactors**

The RoL	Quality legislation	<ul style="list-style-type: none"> <li>– Clear, prospective and stable laws</li> <li>– Abstract nature and impartiality of laws</li> <li>– Open, stable and clear rule-making process</li> <li>– Consideration of individual rights in terms of the rule-making process</li> </ul>	
	Institutions	Institutional design	<ul style="list-style-type: none"> <li>– State self-limitation by law</li> <li>– Separation of powers</li> <li>– Institutional balance</li> <li>– Judicial control over the activities of the legislature and administrative action</li> </ul>
		Functioning of the institutions	<ul style="list-style-type: none"> <li>– Legality</li> <li>– Domestic accountability</li> <li>– Transparency</li> <li>– Democratic control</li> </ul>
		Processes and procedures	<ul style="list-style-type: none"> <li>– Transparency of judicial process</li> <li>– Openness, stability and clarity of processes, taking place within legislative and executive</li> </ul>

			branches of power
National human rights protection system	Substance of legislation		Legal regulation of human rights, procedural guarantees
			Availability of a broad range of effective means of legal redress
	Viable judicial system		<ul style="list-style-type: none"> <li>– Independence of the judiciary</li> <li>– Impartiality</li> <li>– Accessibility</li> <li>– Efficiency</li> <li>– Accountability</li> </ul>
Combating corruption and organized crime		Combating corruption	
		Combating organized crime	

Considering the RoL as a combination of factors and subfactors helps to see it as an attainable standard that requires conscientious cooperation, rather than a principle, whose scope remains unclear. Dividing RoL into factors and subfactors provides a basis for creating factor-specific indicators that can be used to assess progress of the states, where the EU conducts RoL promotion programs. Taking into account the dynamic nature of the RoL promotion activities of the EU

in partner states, it is important to include a dynamic aspect into the EU RoL Indicators.

For the purposes of the current research, indicators that can be used by the EU to monitor reforms of judiciary in partner states will be suggested. The proposed indicators will consider the judiciary in the light of five major characteristics, such as independence, accessibility, impartiality, effectiveness and accountability. An attempt will be made to suggest indicators that will highlight the state of the legal basis, providing for the organization and functioning of the judiciary; the process of reform and policy outcomes. The suggestion of the indicators will be based on the following existing projects, aimed at assessing the state of the judiciary in states, where reforms of judiciary take place:

- The UN Rule of Law Indicators
- The WJP RoL Index
- RoL Assistance Strategy 2016-2019 (Justice and Internal Affairs) by the Government of Kosovo
- Ukraine judiciary development strategy 2015-2020<sup>163</sup>

Possible structural indicators are to be formulated as follows.

- Inclusion of the major principles of organization and functioning of the judiciary into the Constitution of a state.

The rationale behind this indicator is concerned with the foundational role of the Constitution in national legal systems. Due to the specific way changes into Constitution are made, inclusion of the major principles of organization and functioning of the judiciary into

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<sup>163</sup> Support to Justice Sector in Ukraine, Ukraine Judiciary Development Strategy, available at [http://www.justicereformukraine.eu/wp-content/uploads/2015/02/Karen\\_en.pdf](http://www.justicereformukraine.eu/wp-content/uploads/2015/02/Karen_en.pdf) (29 April 2015)

the Constitution serves as a guarantee of these principles' stability and sufficient legal protection.

- The date of entry into force and coverage of the domestic law, governing the organization and functioning of the judiciary.

A domestic law on organization and functioning of the judiciary represents the framework for the functioning of the judiciary and provides for consolidation of major legal norms, governing respective social relations. Thus, up-to-date nature and extensive coverage of this law can be viewed as essential for ensuring quality functioning of the judiciary.

- Periodicity and scope of the collection and dissemination of data relevant to assessing the functioning of the judiciary compliance with the principles of independence, efficiency, accessibility, impartiality and accountability.

Collection and dissemination of data on the judiciary's compliance with abovementioned principles is necessary to reveal existing issues and create the basis for the reforms in the judiciary.

- Legal provision for multifaceted guarantees of judicial independence and impartiality, such as special procedure of judges' nomination and/or election; prohibition of the intervention into the functioning of the judiciary; a sufficient capacity of courts; a system judicial self-governing etc.

- Presence and elaborateness of legal regulations on the issue of conflict and interests and the way to resolve it in terms of the judiciary.

Independence and impartiality of judicial system requires elimination of possible avenues to exert impact on its functioning.

Multifaceted nature of such guarantees (institutional, financial, and procedural) helps to ensure system's compliance with principles of independence and impartiality.

Process indicators are elaborated to tackle a reform process in a particular sphere. In other words, they provide an international donor with an opportunity to assess a beneficiary state's efforts, aimed at the implementation of reforms. Process indicators that can be applied with regard to the reform of judiciary may be designed as follows. Firstly, it is worth paying attention to the presence and coverage of the reform strategy in the field of the judiciary, as well as the number of domestic laws that were amended with regard to the reforming of the judiciary.

Above-mentioned process indicators help to find out whether a framework of conducting judicial reform exists, and domestic legislation is being transformed in accordance with it.

A successful reform of the judiciary requires active involvement of judges into the reform process and commitment to change. One of the important indicators, aimed at measuring judges' involvement into the conduct of a reform, is the number of judges, who participated in trainings, dedicated to the reform of the judiciary. The following indicator may be formulated as the degree of judges' satisfaction in terms of whether they perceived training as having added to their knowledge, skills, understanding and attitudes. Finally, the involvement of the judges into the reform process can be addressed through judges' intentions/ideas regarding making improvements in judicial service delivery as a result of their participation in training.

While structural and process indicators are usually designed to tackle a reform in the judiciary in general, outcome indicators provide for assessing challenges that were made in relation to each of the fundamental characteristics of the judiciary.

There is a broad range of possible outcome policy indicators, aimed at assessing the independence and impartiality of the judiciary. At the first point, it is necessary to mention judges' perception of the objectivity of judges' selection/appointment process. Sufficiency of judges' salaries vis-à-vis general level of salaries in a state and sufficient state efforts to ensure judges security represent important prerequisites for the formation of the impartial and independent judiciary. Activeness of a judicial self-government association is also directly related to the independence and impartiality as the characteristics of the judiciary. Finally, the number of cases, assigned through an automatic assignment system and the annual decrease of cases, whereby the ECtHR established breaches of the independence and impartiality of a court.

As well as the independence and impartiality of the judiciary, the accessibility dimension of its functioning can be measured with the help of the broad range of indicators. Mostly wide spread accessibility indicators include fees to obtain the access to courts; availability of interpreters and the free legal aid. Inclusion of measures, aimed at protection of the rights of defendants and victims, as well as access to redress for the refusal of access to justice also need to be viewed as the important indicators of the accessibility of the judiciary. Furthermore, accessibility of the judiciary can be addressed through the presence and accessibility of the alternative dispute resolution methods.

The measurement of efficiency dimension of the judiciary's functioning is to be conducted with the help of indicators, dealing with case numbers. They may include the number of pending cases for more than a year per capita and annual number of pending and processes cases as entailed in the case management system. The number of decisions of courts of the first instance, having been found

unlawful by appellate courts and of the ones referred to ECtHR also represent reliable indicators to assess the efficiency of the judiciary.

Finally, the degree to which courts are publicly accountable can be addressed through the lens of the following indicators. First of all, the existence of a developed judicial conduct complaint process and the availability of information about complaints against judges to public serve as crucial prerequisites for judges' accountability vis-à-vis the society. In some states, the development of judges' performance monitoring system and public access to the data that it contains provide for the accountability of the judiciary. Traditional accountability indicators also include public access to court hearings (especially, criminal trials), media access to proceedings, as well as the maintenance of trial records.

The idea behind the example of applying indicators-based method to assessing judicial reforms is to show that the RoL promotion efforts can be addressed as a combination of factors that can be accessed with the help of indicators. Such approach to the RoL is helpful in terms of raising effectiveness of the EU RoL promotion and credibility of the EU as a reliable partner in conducting the RoL-related reforms in partner states.

## **Conclusions**

The absence of a uniformly manifested and precise definition of the RoL leads to the fact that the European legislation and scholarship contain variety of approaches towards addressing the scope of the RoL. Nowadays, continuation of fruitful cooperation with partner states in the field of the RoL promotion and enhancement of the Union's credibility as a RoL promotion actor requires revisiting the way the RoL is addressed in terms of the EU law. Monitoring and assessment of progress in the field of the RoL in partner states

requires elaboration of the EU RoL indicators that need to be based not only on existing approaches to the RoL, entailed in the EU RoL promotion instruments, but legal doctrine and constitutional traditions of the EU Member States.

The analysis of multiple sources (legal doctrine, constitutional traditions of the Member States, EU legislation and, specifically, the instruments of the EU external RoL promotion) allowed singling out more than 40 unique factors that can be used in order to consider and measure the state of the RoL. Significant number of such RoL factors can be explained by the long-lasting history of the concept in the European history.

While some of abovementioned factors address formal aspects of the RoL (e.g., clearness and prospective nature of the legislation), the other manifest the rights-based approach towards the RoL. As it is reflected in all the studied sources, a current concept of the RoL is tightly interrelated with democracy and human rights, as well as transition processes in states, where the RoL is being promoted. In-detail consideration of factors that constitute the scope of the RoL allowed dividing them into several groups, dependently on their substance. These groups focus on formal characteristics of legislation of a state; design and functioning of the institutions; viable national human rights protection system, as well as states' making efforts to combat corruption and organized crime.

Quality functioning of the judiciary lies at the crossroads of two groups of factors, namely the one, dealing with the design and functioning of the institutions and national human rights protection system. Taking into account the importance and intergroup nature of this factor, its example was used to suggest respective structural, process and policy outcome indicators. Example of quality functioning of the judiciary as a RoL factor allows stating that the

indicators-based approach can be extrapolated to the other RoL factors, so that a comprehensive universally applicable model can be designed.

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