THE PROMOTION OF THE RULE OF LAW IN THE DECISIONS OF THE EUROPEAN SUPRANATIONAL COURTS: A NEW CONSTITUTION FOR EUROPE?*

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"La via da percorrere non è facile, né sicura.
Ma deve essere percorsa e lo sarà!"
(Manifesto di Ventotene)

1. Introduction.

The origins of the Rule of Law are lost in time. It was suggested that "like democracy, the concept of the Rule of Law is a historical idea of an uncertain content" and that "it is not clear how to translate the English notion into other languages"[1]. According to the different versions of the Treaties and to the decisions of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), the Rule of Law was associated – without many differences – with the French *État de droit* and the German *Rechtsstaatlichkeit*[2]. Do these three terms share the same meaning? The evolution of the concept through the decisions of

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[1] See A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, Amsterdam, 2002, p. 18. For a historical analysis see B.Z. Tamanaha, *The History and Elements of the Rule of Law*, in *Singapore Journal of Legal Studies*, 2012, pp. 232-247.

[2] In many EU documents the three terms have the same meaning and are considered as synonymous. For a deep analysis on the topic see P. Craig, S. Adam, N. Diaz Abad and L. Salazar, *Rule of Law Perspectives from Practitioners and Academics*, Bruxelles, 2019 and E. Ioriatti, *Comparative Law and EU Legal Language: Towards a European Restatement?* in *the Global Jurist Review*, n. 2/2021, pp. 305-340.

the European Supranational Courts now displays a clear framework of reference[3]. Over the years and starting from a political point of view, the judicial activism of the Courts provided a form of *legalisation* of the notion (now embedded in many statutory provisions)[4]. The original core of the Rule of Law was intended to embrace only three principles: legality, legal certainty and separation of powers. Then the former UN Secretary–General Kofi Annan proposed a broad definition of the concept, saying that "The Rule of Law refers to a principle of governance in which all persons, institutions and entities, public or 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"[5]. Finally the notion has widespread its autonomous identity, through the process of political and economic integration of the European Union and thanks to the influence of the ECJ and the work of the Venice Commission (as deputy consultant of the Council of Europe)[6].

2. The concept of the Rule of Law into the European Union legal system.

Before the first Treaties applying to the European Union (EU) were enacted, the ECJ had already tried to elaborate a proper definition[7]. In *Les Verts* the judges of Luxembourg stated

[3] For a detailed overview see M. Carta, *Unione Europea e tutela dello Stato di diritto negli Stati membri*, Bari, 2020.
[4] The concept of the Rule of Law is present in many documents and decisions. The Venice Commission is continuously working for a clear definition of the notion. See venice.coe.int.
[5] K. Annan, *Rule of Law and Transitional Justice in Conflict and Post – Conflict Societies, Report of the Secretary-General* (UN. Doc. S/616), New York, 2004, p. 4. The concept influenced many comparative law classifications. For an overview see V. Varano and V. Barsotti, *La tradizione giuridica occidentale*, Torino, 2021.
[6] The Venice Commission, officially European Commission for Democracy through Law, is an advisory body of the Council of Europe, composed of independent experts in International and Constitutional Law. It was created in 1990; nowadays it counts more than 60 Member States and many observers. The participating Countries appoint the experts for four years. The Venice Commission's leading aim is to support the functioning of democratic institutions and promote the protection of human rights all over the World. According to the founders of the Committee, the respect of the Rule of Law is a crucial purpose; it's therefore that Member States have to comply with it and safeguard its content. For a deep analysis see S. Bartole, *The Internationalisation of Constitutional Law. A view from the Venice Commission*, London, 2020.
[7] See T. Van Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, in *Fordham International Law Journal*, 2014, pp. 1311-1347 and D. Spielmann, *The Rule of Law Principle in the Jurisprudence of the*

that «the European Community is a Community based on the Rule of Law»[8]. In the decisions *Union de Pequeños Agricultores* and *Kadi*, the Court affirmed that the respect of the Rule of Law requires the protection of fundamental human rights[9]. Nowadays Art. 2 and Art. 7 of the Treaty on European Union (TEU) contain clear references to the Rule of Law[10]. The concept explicitly represents a founding value of the EU, such as human dignity, freedom, democracy and gender equality and expressly belongs to the general principles common to the laws of the Member States. Furthermore the treaties provide a mechanism of political reaction in case of serious and systematic violations of the Rule of Law[11]. In these years two notions of the Rule of Law have been discussed the most: the

Court of Justice of The European Union, in M. Elósegui, A. Miron, and I. Motoc (eds.), *The Rule of Law in Europe*, Bern, 2021, pp. 3-20.

[8] See ECJ Case C-294/83, *Les Verts vs. Parliament*, Judgement of 23 April 1986, available at www.eur-lex.europa.eu. In *Cas Succhi di Frutta,* the ECJ confirmed that «In a community governed by the Rule of Law, adherence to legality must be properly ensured». See Case C-496/99, *Cas Succhi di Frutta vs. Commission*, Judgement of 29 April 2004, available at www.eur-lex.europa.eu.

[9] See ECJ Cases C-50/00, *Union de Pequeños Agricultores vs. EU Council*, Judgement of 25 July 2002; C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation vs. Council and Commission*, judgment of 3 september 2008 and C-584/10 P, C- 593/10 P and C-595/10 P, *Kadi v. Council, Commission and UK*, judgment of 18 july 2013, available at www.eur-lex.europa.eu.

[10] Art. 2 of the Treaty on European Union (TEU) states that: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». Then Art. 7 (TEU) provides a political reaction in case of serious breaches of the Rule of Law. It reads: «1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Art. 354 of the on the Functioning of the European Union».

[11] The norm refers to the political procedure of Art. 7. For a deep analysis on the mechanism see W. Sadurski, *Adding Bite to a Bark: the Story of Article 7 and the EU Enlargement*, *in Columbia Journal of European Law*, n. 3/2010, pp. 385-426 and U. Villani, *Istituzioni di Diritto dell'Unione Europea*, Bari, 2020.

formal or thin conception and the substantial or thick conception[12]. According to the first thesis, some scholars reject the normative force of the proposition. However the second theory promotes a broad definition of the content and demands the respect of many principles (such as the protection of democracy, human rights, gender equality, solidarity, freedom, equality and justice). Over the years, the Venice Commission, the European Court of Human Rights and the European Court of Justice adopted and fostered the second conception. Many and famous decisions of the ECJ embraced the thick version of the Rule of Law (such as the *Rosneft, Associação Sindical dos Juizes Portugueses vs. Tribunal de Contas (ASJP)* case and the recent decisions against Poland and Hungary)[13]. In particular the Court explained that the actual content of the Rule of Law finds regulation not only in Art. 2 TEU but also in many other provisions that enrich the concept with specific principles and rules (such as Art. 19 TEU, concerning the right to an effective remedy and to a fair trial)[14]. For these reasons, it finds application not only during the execution of EU law but also through the exercise of domestic competences, influencing the national

[12] On the point R. Baratta, *Rule of Law Dialogues within the EU: a Legal Assessment* in the *Hague Journal on the Rule of Law*, 2016, pp. 357-372.

[13] See ECJ Cases C 72/15 *PJSC Rosneft Oil Company*, Judgment of 28 March 2017; C 64/16 *ASJP vs. Tribunal de Contas,* Judgement of 27 February 2018 and C 156/21 and C 157/21, *Republic of Hungary and Poland vs. European Parliament and Council of the European Union,* Judgements of 16 February 2022, available at www.eur-lex.europa.eu. For a detailed overview see M. Graziadei and R. De Caria, *The Constitutional Traditions Common to the Member States in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest, Riv. Trim. Dir. Pub*. N.4/2017, pp. 949-971 and K. Lenaerts, *The European Court of Justice and the Comparative Law Method*, in *European Review of Private Law*, n. 2/2017, pp. 297-312.

[14] Art. 19 TEU states that: «The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Arts. 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed. 3. The Court of Justice of the European Union shall, in accordance with the Treaties: a) rule on actions brought by a Member State, an institution or a natural or legal person; b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; c) rule in other cases provided for in the Treaties». Moreover Arts. 41 and 47 of the Charter of fundamental rights of the European Union identify some principles. Art. 41 concerns the right to good administration; Art. 47 founds the right to an effective remedy and to a fair trial. The Charter is available at www.eur-lex.europa.eu. See also M. Parodi, *Il ruolo degli Stati membri nella tutela dei valori dell'Unione Europea: il ricorso agli strumenti giurisdizionali*, in *Diritti umani e diritto internazionale*, n, 3/2021, pp. 671-697 and F. Donati, *Un nuovo scontro sullo Stato di diritto e sull'indipendenza della magistratura nell'Unione Europea*, in *Quaderni AISDUE*, n. 1/2022, pp. 15-22.

identities of the Member States[15]. Nowadays it might be held that the Rule of Law has horizontal and vertical effects: "horizontal because it affects the horizontal relations between the Member States (it undermines mutual trust and sincere cooperation, the system of mutual recognition of judgements in the framework of judicial cooperation, the arrest warrant mechanism and the Schengen Area) and vertical because it may deform the mechanism of cooperation between the Union Institutions and the Member States, resulting in a risky process or trend of renegotiating the most fundamental values and principles, […] including the primacy of Union law and the respect for uniform interpretations issued by the Court of Justice"[16]. The ECJ built the concept like an umbrella principle that founds its content in other principles and provisions and that needs to be implemented – case-by-case – by the procedures provided by Arts. 258 and 263 of the Treaty on the Functioning of The European Union (TFEU, which are the infringement procedure and the preliminary ruling)[17]. Then a question could arise: is the judicial activism of the Court trying to promote a new Constitution for Europe?[18]

Over the years, the reached importance of the Rule of Law has been demonstrated through the external action of the Union (with the adoption of restrictive sanctions and conditionality clauses) and by the introduction of a new mechanism concerning the financial statements of the European Union[19].

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[15] Poland and Hungary have criticized the normative force of the concept and the judicial activism of the Court. See the opinion of M. Carta, *Unione Europea e tutela dello Stato di diritto negli Stati membri*, Bari, 2020.

[16] See M. Safjan, *The Rule of Law and the Future of Europe*, in *Il diritto dell'Unione Europea*, n. 3/2019, pp. 425-440.

[17] See Arts. 258 and 263 TFEU. On the point K. L. Scheppele, D. V. Kochenov and B. G. Moroz, *EU Values are Law, after all: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, n. 1/2020, pp. 3-121.

[18] See R. Sabato, *Judicial Dialogue. The Experience of Italy*, in A. Müller and H. E. Kjos (eds.), *Judicial Dialogue and Human Rights*, Cambridge, 2017; T. Horsley, *The Court of Justice of the European Union as an Institutional Actor*, Cambridge, 2018; X. Groussot and G. Martinico, *Mutual Trust, the Rule of Law and the Charter: a New Age of Judicial Activism*, in *EU Law Live*, 2020 and E. Castorina, *Valori fondanti e concezione europea dello Stato di diritto: la necessità di leale cooperazione nelle questioni identitarie dell'Unione*, in *Federalismi.it*, n. 4/2022, pp. 202-210. For some criticism M. Tushnet, *Taking the Constitution Away from the Court*, Princeton, 1999 and R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard, 2007 and A. von Bogdandy et al., *Defending Checks and Balances in EU Member States*, Berlin, 2021.

[19] For a deep analysis on this topic see K. Lenaerts, *New Horizons for the Rule of Law within the EU*, in *German Law Journal*, 2020, pp. 29-34 and M. Di Donato, *The Brussels Effect of the European Union's External Action: Promoting Rule of Law Abroad through Sanctions and Conditionality, in The Italian Law Journal*, n.1/2022, pp. 91-108. The new mechanism concerning the financial statements of the European Union and the protection of the Rule of Law was set by Regulation 2092/2020 (related to a general regime of conditionality). See N. Blauberger and V. Van Hüllen, *Conditionality of EU Funds: an Instrument to Enforce EU Fundamental Values?*, in *Journal of European integration*, n. 1/2021, pp. 1-16 and E. Perillo, *Il rispetto dello Stato di diritto europeo alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità finanziaria. Quali prospettive* ?, in *Quaderni AISDUE*, n. 1/2022, pp. 407-414.

3. The concept of the Rule of Law according to the European Court of Human Rights. Brief reflections.

Since its foundation, the Council of Europe has pointed out the importance of the Rule of Law. Art. 3 of the Statute explicitly says that «every Member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council». The same notion is present in the introduction of the Convention[20]. In *Golder vs. UK*[21], the European Court of Human Rights adopted the thick conception of the Rule of Law, stating that «it would be a mistake to see in this reference a merely more or less rhetorical reference»[22]. For the jurisprudence of the ECHR the substantial conception of the notion is embedded in all the provisions and rights of the Convention. In *Stafford vs. UK*[23], the judges of the Court affirmed that «any arrest or detention to have a legal basis in domestic law requires to be compatible with the Rule of Law, a concept that is inherent in all the articles of the Convention»[24]. Recently a similar decision confirmed this conception, declaring that Member States should respect the Rule of Law in all the provisions set forth by the Convention[25]. The European Court of Human Rights fosters a notion that is useful to individual litigations and to inter-State disputes, especially in case of serious and systematic violations of the Rule of Law. In this perspective, the documents elaborated by the Venice Commission – as deputy consultant of the Council of Europe – represented another step to define and promote the thick conception inside the legal framework of the Convention for the protection of human rights and fundamental freedoms[26]. The Venice Commission elaborated a complete Rule of Law

[20] It states that «The governments of European countries, which are like-minded and have a common heritage of political traditions, ideals, freedom and the Rule of Law, should be resolved to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration».
[21] See ECHR Case C 4451/70, *Golder vs. UK*, judgement of 21 February 1975, available at echr.coe.int.
[22] See paragraph 34 of the Court's judgement. For a deep analysis see G. Lautenbach, *The concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013.
[23] See ECHR Case C 46295/99, *Stafford vs. UK*, judgement of 28 May 2002, available at echr.coe.int.
[24] See paragraph 63 of the ECHR judgement.
[25] See ECHR Case C 38967/17, *H.M. and others vs. Hungary*, judgement of 2 June 2022, available at echr.coe.int.
[26] References are to the Rule of Law checklist. For an overview see venice.coe.int. and E.Perillo, *Il rispetto dello Stato di diritto europeo alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità*

checklist, including many principles into the notion (such as legality, legal certainty, solidarity, equality before the law and non-discrimination, the right to an effective access to justice, to a fair trial and the protection of human rights)[27]. In this way, the Rule of Law has become a fundamental guiding principle for the Court. It might be held that "The principle of the Rule of Law proved to be a particularly useful tool for the Court assisting it in interpreting, supplementing and enhancing the protection standards set out in the Convention"[28].

4. How European Supranational Courts promote the thick conception of the Rule of Law: the comparative method and the Luxembourg effect.

The way European Courts promoted the thick conception of the Rule of Law is thanks to the comparative method[29]. Through its application, European judges managed to defend, define, enrich and spread the content of the notion. In all the decisions described in the first two paragraphs, the comparative method was fundamental to conceive the Rule of Law. There are not many provisions in Treaties that refer to comparative law, except for those concerning the extra contractual liability of EU institutions[30]. However European Courts

finanziaria. Quali prospettive?, See also S. Bartole, *The Internationalisation of Constitutional Law. A View from the Venice Commission*, London, 2020.

[27] European Commission for Democracy through Law, *Rule of law checklist*, n. 711/2016 (updated in 2019) and available at venice.coe.int. For a deep analysis see G. Pitruzzella, O. Pollicino and M. Bassini, *Corti europee e democrazia. Rule of Law, indipendenza e accountability*, Milano, 2019.

[28] See E. Steiner, *The Rule of Law in the Jurisprudence of the European Court of Human Rights,* in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe: from a Common Concept to Mechanism of Implementation*, London, 2016, p. 139.

[29] On the topic see P. Carrozza, F. Fontanelli and G. Martinico, *Shaping Rule of Law through Dialogue, International and Supranational Experiences*, Groningen, 2009; L. Pierdominici, *The Mimetic Evolution of the Court of Justice of the EU. A Comparative Law Perspective*, London, 2020 and O. Scarcello, *Borrowing to Survive: Investigating the Functioning of the Court of Justice of the EU through Comparative Law*, in *The Italian Review of International and Comparative Law*, n.1/2021, pp. 196-201.

[30]The extra contractual liability of EU institutions refers to the general principles common to the laws of the Member States and requires the adoption of the comparative method. Art. 340 TFEU states that: «The contractual liability of the Union shall be governed by the law applicable to the contract in question.
In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them». Art. 6 TEU also refers to Comparative Law. It states that «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law».

often turn to comparative analysis in their judgments even thought not in an explicit way[31]. First of all, the different languages of the Organizations require the comparative method: the same process of translation is a legal comparison between national notions[32]. In case of the Rule of Law, European Supranational Courts used comparative law to elaborate a better definition of its content, referring to the general principles common to the different traditions of the Member States. It is through the comparative method that the ECJ and the ECHR managed to promote the substantial or thick conception of Rule of Law, founding its force on a shared heritage of values. However the two Courts developed different approaches[33]. The European Court of Human Rights used comparative law to find a minimal standard and to provide subsidiary protection of the Rule of Law (according to the margin of appreciation doctrine and the Member States' sovereignty)[34]. However the European Court of Justice deployed comparative law not only to find a minimal standard but also to elaborate an appropriate benchmark for EU Law[35]. In *Repubblika vs Il-Prim Ministru*[36], the ECJ judges tried to resolve the *Copenhagen Dilemma* and to reinforce the *communitarian acquis* of the Rule of Law through the application of the non-regression principle[37]. In this way, EU institutions have been able to face the backsliding of many

[31]This is not the place for a detailed study on the topic. See M. Feteris, *Roadmap on Comparative Law in the Case-Law and Practice of the Supreme Courts of the EU*, in *Utrecht Law Review*, n. 1/2021, pp. 6-19.
[32] For an analysis on the matter see E. Ioriatti, *Comparative Law and EU Legal Language: Towards a European Restatement?* in *Global Jurist*, n. 2/2021, pp. 305-340.
[33] See S. Gless and J. Martin, *The Comparative Method in European Courts: a Comparison between the ECJ and the ECHR*, in *Bergen Journal of Criminal Law and Criminal Justice*, n. 1/2013, pp. 36-52.
[34] According to S. Gless and J. Martin, *The Comparative Method in European Courts: a Comparison between the ECJ and the ECHR*, in *Bergen Journal of Criminal Law and Criminal Justice*, n. 1/2013, p. 40: "Over time, the ECHR has developed a rich array of instances where Contracting States enjoy a wide margin of appreciation. For example, it is within the States' discretion how they protect mentally disabled people in procedures concerning their right to family life. Moreover, it is for the national authorities to make the initial assessment as to the existence of a problem of public interest warranting measures to be applied in the sphere of exercising the right of property, including deprivation and restitution of property. The Contracting States further enjoy a wide margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment, such as the regulation of retirement pensions of former employees or treating landowners of bigger and smaller plots of land differently for the purpose of hunting regulations. The States have broad discretion when assessing the manner in which they allow or prohibit suicide and assisted suicide and in determining the language taught at public schools. Or, as a final example, it is for the States to examine, to a certain extent, what is necessary in a democratic society when interfering with the freedom of expression".
[35] On the point see K. Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, in *The international and comparative law quarterly*, n. 4/ 2003, pp. 873-906 and more recently A. Di Gregorio, *La crisi dello Stato di diritto come occasione di perfezionamento del perimetro costituzionale europeo ?* in *DPCE*, n. 1/2022, pp. 121-154.
[36] ECJ Case C 896/19, *Repubblika vs. Il-Prim Ministru,* judgment of 20 April 2021, available at www.eur-lex.europa.eu.
[37] See M. Leloup, D. V. Kochenov and A. Dimitrovs, *Non-Regression: Opening the Door to Solving the Copenhagen Dilemma*? *All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru, Reconnect Working Paper*, n. 15/2021.

Member States, although being outside the scope of the conferral[38]. At the same time the non-regression principle managed to reinforce the thick conception of the Rule of law, embracing all the principles stated by the *communitarian acquis.* In these cases, the comparative method was used not only to unify but also to discover the general principles common to the laws of the Member States. These principles now enhance the content of the Rule of Law, thanks to the incorporation theory[39]. Will the Luxembourg effect save the notion inside its borders[40]? The President of the European Court of Justice – Koen Lenaerts – stated that "today, Europeans are facing a defining moment in the history of integration. They must stand up for the values – such as democracy, the rule of law and fundamental rights – that we share in order to emphasize the point that what brings us together remains stronger than what pulls us apart. That is why the principle of judicial independence must be preserved so that the EU remains a *Union of democracies*, a *Union of rights*, and a *Union of justice.* If the next generation of Europeans is to explore new horizons for an ever-closer Union where citizens may continue to enjoy a sphere of individual liberty free from public interferences, integration through the rule of law is the only way forward"[41]. Could it be enough?

[38] On the crisis of the Rule of Law in EU see M. Smith, *Staring into the Abyss: a Crisis of the Rule of Law in the EU*, in *European Law Journal*, 2019, pp.561-576.

[39] The theory was firstly introduced in *R. Zambrano* (ECJ Case C 34/09, *R. Zambrano vs. Office national de l'emploi,* judgment of 8 march 2011, available at www.eur-lex.europa.eu) thanks to a comparison with some American decisions (especially with the case *Gitlow v. New York, 268 U.S. 652,* decided by the US Supreme Court in 1925). See R. Schütze, *European Fundamental Rights and the Member States: From Selective to Total Incorporatio*n? in *Cambridge Yearbook of European Legal Studies*, 2020, pp. 337-361. Scholars considers *Zambrano* as a landmark decision; for the first time purely internal situations were brought under the umbrella of EU law to defend fundamental rights. The ECJ implemented the US incorporation doctrine and warned Member States to comply with EU obligations also when exercising internal competences. On the matter see K. Lenaerts and K. Gutman, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic*, in *the American Journal of Comparative Law*, n. 4/2016, pp. 841-864 and M. Graziadei, *The European Court of Justice at Work: Comparative Law on Stage and behind the Scenes*, in *Journal of Civil Law Studies*, n. 1/2020, pp. 2-32.

[40] References are to A. Bradford, *The Brussels Effect. How the European Union Rules the World*, Oxford, 2020. See also F. Marques, *Rule of Law, National Judges and the Court of Justice of the European Union: let's Keep it Juridical*, in *European Law Journal*, n. 1/2021, pp.1-12. For some criticism on the lack of transparency of the comparative method adopted by the ECHR see M. Ambrus, *Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law*, in *Erasmus Law Review*, n. 3/2009, pp. 353-371. On the same topic, criticizing the judicial supremacy of Courts and their political aims, see J. Waldron, *The Rule of Law and the Role of Courts*, in *Global Constitutionalism*, n. 1/2021, pp. 91-105.

[41] K. Lenaerts, *New Horizons for the Rule of Law within the EU*, in *German Law Journal*, 2020, p. 34.

5. Conclusion. Some critical remarks.

The thick conception of the Rule of Law has widespread its force in the decisions of the European Supranational Courts. Some authors stated that it represents a fundamental component of the European public order and that it has three dimensional normative force: primarily as a general legal principle, secondly as a particular rule (considering its practical applications) and then as a hybrid provision simultaneously displaying its different nature[42]. The Rule of Law toolkit (elaborated through the comparative method and based on the incorporation theory) is promoting a new European constitutionalism in the light of the common traditions to the Member States. From side to side the judicial activism of the Courts refuses unilateralism; it tries to increase awareness and human rights standards pursuing objectives that have been universally agreed upon and that belong to a common heritage of values. The European Commission considers the Rule of Law to be the benchmark of political legitimacy and the backbone of modern constitutional democracies[43]. This paper has demonstrated that the concept presents a rich content and a clear framework of reference and that all the forms of criticism are completely groundless (considering the illiberal critique – originating from national States like Hungary and Poland –, the double standard critique, the *juristocracy* critique and the Hungarian doctrine of the Holy Crown or the Hungarian historical constitution critique)[44]. The comparative method and the judicial activism of the European Supranational Courts are trying to face the backsliding of many Member States, safeguarding the fundamental principles of the European legal order in an internationally oriented perspective. If political and legal actions have to be improved against serious and systematic violations of the Rule of Law (see, for

[42] On the point see R. Spano, *The Rule of Law as the Lodestar of the European Convention on Human Rights: the Strasbourg Court and the Independence of the Judiciary*, in *European Law Journal*, n. 1/2021, pp. 211-227.

[43] See L. Pech and J. Grogan, *Meaning and Scope of the EU Rule of Law*, Leuven, 2020, available at www.reconnect-europe.eu.

[44] The illiberal critique originates from representatives of national governments subject to the political and legal procedures of Art. 7 TEU. They reject the idea that the concept of the Rule of Law can have binding effects. The double standard critique refers to the conduct of European Institutions. Some States believe that the Organization is targeting only Eastern European Member States, having a different treatment towards Countries from Western Europe. However they are not able to provide proofs. The juristocracy critique condemns the judicial activism of the Courts, especially when its decisions influence national competences. Nowadays many provisions contain clear references to the Rule of Law and there is no doubt that it has normative force. The Hungarian doctrine of the Holy Crown is based on the historical identity of the Country. The Hungarian historical and constitutional identity represents a justification for defying Hungary's obligations under EU Law. For a deep analysis on the different forms of criticism see again L. Pech and J. Grogan, *Meaning and Scope of the EU Rule of Law*, Leuven, 2020, available at www.reconnect-europe.eu.

example, the conditionality mechanism), the concept is still deploying its effects and we hope it will continue, pouring the foundations of a new Constitution for Europe.

Abstract: The Rule of Law is continuously changing its borders. The judicial activism of the European Supranational Court has managed to promote a thick conception of the notion and face the backsliding of many Member States. The article analyses the origins and the evolution of the concept in the decisions of the European Court of Justice and the European Court of Human Rights. It tries to highlight the different approaches of the Courts and how the comparative method influenced its content. The Rule of Law can be considered a fundamental component of the European public order and a backbone of modern constitutional democracies.

Abstract: Il concetto di Rule of Law è in continua evoluzione. L'attivismo giudiziario della Corte di Giustizia di Lussemburgo e della Corte Europea di Strasburgo è riuscito a promuovere una concezione sostanziale della nozione e a contrastare il mancato rispetto dello Stato di diritto da parte di diversi Paesi membri delle due organizzazioni. L'articolo analizza le origini e l'evoluzione del concetto attraverso le decisioni delle Corti sovranazionali europee e cerca di mettere in risalto le differenti tecniche di tipizzazione del suo contenuto (come il metodo comparativo). Lo Stato di diritto rappresenta una componente fondamentale dell'ordine pubblico europeo ed è la colonna portante delle moderne democrazie costituzionali.

Key words: Rule of Law – European Supranational Courts – EU law – comparative law.

Parole chiave: Stato di diritto – Corti sovranazionali europee – diritto dell'Unione Europea – diritto comparato.