

Rule of law crisis in the new EU Member States

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1. Introduction

One of the hot topics of constitutional discussion in Europe during the last few years is the non-compliance with the principle of the ‘rule of law’ in a number of European Union Member States. The situation has become particularly worrying in the last year, as the ‘constitutional backslidings’ or ‘constitutional crises’, included a shining example of the ‘new’ European nations, one rated as first-in-class for economic progress and democratic stability, namely Poland.

Of these constitutional crises and the threat they pose to the preservation of European values much has been written. Opinions more or less agree in acknowledging a regression of democratic and constitutional culture in the new EU Member States owing mainly to the absence of constitutional traditions and the haste of their admission into the Union¹.

A broader classification also includes Italy and Greece because of the general inefficiency of public administration, the high rate of corruption, the slow pace of justice, the pervasiveness of organized crime, or, as in the case of France, regarding the treatment of Roma (in 2010)². The first concerns about the compliance with democratic values within the EU arose, as is well known, in connection with the electoral success of a far-right party in Austria in the 1999 parliamentary elections. In this case, as for Italy, France and Greece, concerns have faded away because of electoral turnover, or the shelving of the more controversial projects. However, the question remains unresolved for Hungary and Poland.

The most serious ‘constitutional crises’ among the new EU Member States are in fact those of Hungary and Poland. There is also the case of Romania which however is treated, depending on the commentator, as further proof of the weakness of the rule of law in the country or as an example of successful post-access compliance, given the ‘happy’ resolution of the confrontation between the Government, the President and the Constitutional Court in the crisis during the summer of 2012 (concluded with a political solution in an institutional context forever at risk of permanent stalemate). Therefore, there are important similarities between Hungary and Poland while the

¹ A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing, Oxford and Portland, 2015; V. Perju, *The Romanian double executive and the 2012 constitutional crisis*, in *International Journal of Constitutional Law*, Vol. 13, no. 1, 2015; A. Di Gregorio, *Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?*, in *DPCE on-line*, n. 4, 2016, pp. 173-202.

² D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rethoric and Reality*, in *European Constitutional Law Review*, Vol. 11, Issue 3, 2015, pp. 512- 540.

Romanian case, despite some common features (the Constitutional Court has been under attack) is very different for the political situation (at the time of the crisis there was political cohabitation between the Government and the President in Romania). In some respects a case similar to the Polish situation is that of Slovakia where President Kiska has, since 2014, refused to appoint new constitutional judges from candidates proposed by the Parliament. However, even in this case the conflict is more of a political nature caused by the head of State and the Government being of opposite political orientations.

My comments will be focused on a series of issues:

1. How to frame and limit the principle of the ‘rule of law’, being mindful of the different concepts at both national and international levels;
2. The constitutional crisis in Hungary, Romania and Poland (similarities and differences);
3. The role of constitutional courts in the former communist countries (strong leadership and anti-majoritarian role);
4. The failure of European conditionality (lack of an enforcement mechanism following admission, the absence of a social dimension in democratic conditionality) and of the rule of law mechanism in relation to the Article 7 of the Treaty on the European Union;
5. Problems and perspectives for the constitutional crisis (social and identity peculiarities of the new EU Member States)

2. Delimiting the rule of law principle in terms of the ‘European’ rule of law

We must first delimit the rule of law principle, since we could have a broad or narrow, formal or substantial definition of it. There are different cultural traditions on the subject including a past notion of *socialist rule of law*, which continues to influence to some measure former communist countries. However, as academics have amply demonstrated, thanks to the role of constitutional and international courts, a broad convergence on the content of the principle has been reached over time to the point of mitigating the original differences.

In recent years several publications have appeared, which are dedicated to the topic of the *international rule of law*³. Nevertheless, this ‘international’ rule of law seems to derive more from a sum of elements of different traditions rather than being a summary or synthesis of them.

³ P. Costa, D. Zolo (eds.), *Rule of Law: History, Theory and Criticism*, Netherlands, Springer, 2007; L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09; M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Netherlands, Springer, 2010; M. Krygier, *Rule of Law*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford

This is clearly not the place for a thorough examination of this pillar of the liberal-democratic State. However, I would like to state that the concept to which we currently refer in Europe to measure the extent or fact of the violation of the rule of law is based on some documents that merely summarize the characteristics of the principle. These have been ‘produced’ by the Venice Commission of the Council of Europe, by a number of European Union institutions and by the OSCE. So when we speak of violations of the rule of law by new EU Member States, we refer to the reconstruction of the principle carried out by the European institutions and used as a benchmark for democratic conditionality prior to admission to the EU, the Council of Europe or the OSCE⁴.

However, a too broad notion of the rule of law (as evidenced in the recent Venice Commission’s Rule of Law Checklist which contains 6 different requirements each of which is subdivided into further sub principles) is likely to distort this concept thus making full compliance with it impossible, even for well-established democracies. In fact, the definition is vague as evidenced by some authors and ends up being a summation of other principles. When called upon to give a comprehensive summary and definition researchers are struggling to find a general consensus.

If we examine the application of the principle to the events of Hungary, Poland and Romania where the breach of the rule of law occurred, we notice that it is mainly about the violation of the division of powers and particularly the interference by political powers in the activity of the courts. Generally, the principle of the separation of powers is a breach of the autonomy of the ‘guarantee’ bodies. Thus delimited, the principle of the rule of law regains its autonomy from similar principles despite being closely related to them. In sum, the Hungarian and Polish events help us to reflect on concepts that until now were quite abstract.

3. Constitutional crises in Hungary, Romania and Poland: Similarities and Differences

As mentioned, constitutional scholars cite a number of reasons for the ‘backsliding’. There are two main reasons offered; the first is the inability of the countries of Central and Eastern Europe to achieve full democratic maturity because of their communist past and the second is the absence of constitutional traditions and the inability to ‘absorb’ in a few years the benefits of the struggle for the limitation of power achieved by European countries over centuries. The responsibilities of European institutions for the framework of the application criteria for entry into the EU and the

University Press, 2015, pp. 233-249; M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2016.

⁴ Venice Commission, *Report on the rule of law*, 25-26 March 2011, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e); Venice Commission, *Rule of Law Checklist* CDL-AD(2016)007, 18 March 2016, www.bii.cl.org/documents/897_vc_rol_checklist_-_cdl-ad2016007-e.pdf?showdocument=1; *ODHIR and the Rule of Law*, www.osce.org/odihr/103448?download=true.

complex procedures put in place to prevent or to correct democratic deficiencies in the candidate countries have not been extensively analysed.

The seriousness of the ongoing processes in Hungary and Poland lies in the fact that through the tool of constitutional law the role of important checks and balances such as constitutional courts is in the process of changing or has already changed, and mainly for the worse. Generally, the institutions that naturally counterbalance the power of the political majority are currently being weakened (ombudsman, self-governing bodies of the judiciary, authority for the media or the press, prosecutors, etc.). Looking at the wider context, we notice a crisis of the very principle of majoritarian democracy, one which is justified in the name of governability. Other important defects in this context are the limits of post-communist constitutional ‘engineering’. In fact, certain choices, which were appropriate for a transitional context in which checks and balances were still fluid, proved to be unsustainable in the current super-majority scenery. The choice in favour of a ‘selective’ electoral system has proved detrimental as has been, in some cases, the creation of a system of government with an opaque relationship between the President and the Prime Minister (especially in Slovakia and Romania, notwithstanding amendments adopted in 1999 and in 2003, respectively).

The Polish and Hungarian constitutional crises have many common features, despite the different forms of government i.e. semi-presidential and parliamentary, respectively. Both countries have implemented or are implementing the ‘spoils system’ widely. The principle of separation of powers has been undermined against the backdrop of a right-wing populist and demagogic political vision, intolerant of democratic checks and in favour of a plebiscite-majoritarian idea of institutions. Behind it all lies the economic, and therefore social, crisis.

In both cases, the right-wing nationalist parties, who are in Government, challenge the manner in which the transition to democracy took place in 1989 although they came from the opposition to the old communist regime. The position of the Hungarian FIDESZ is clear on this point. Whereas the communists reformists have played a key role in the transition from the communist system of government and despite the fact that the heir to the Hungarian Socialist Workers’ Party, namely the socialists (MSZP), has ruled several times since the first free elections of 1990, officially bringing the country into the EU, the new Hungarian Fundamental Law is expressly directed against this political force and does not recognise any discontinuity between the communist and the post-1989 socialist leadership.

In the case of Poland, the Law and Justice Party, or PiS, created by the Kaczyński twins in 2001 is a fragment of the Solidarity movement that promoted, along with other actors (including the Catholic Church), the transition from communism. At that time the Kaczyński’s were opposed to the policy

of ‘tabula rasa’ with the past but in the end just such a policy prevailed. In 2006-2007, when Jarosław Kaczyński was the prime minister in a coalition Government (his twin brother Lech was elected President of Poland in March 2005 and then died in a plane crash near Smolensk in 2010), the twins attempted to make the lustration mechanism more severe as it was originally designed, but the Constitutional Tribunal in 2007 rejected this attempt, making the lustration law virtually unenforceable⁵.

The intolerance towards the new post-communist and pro-European course was expressed openly once PiS obtained an absolute majority of seats in the parliament in the 25 October 2015 elections. Following the Hungarian model (which appears to have been carefully studied) the new Polish leadership has gradually and systematically started to bring back the main counter-majoritarian powers under the control of the governing majority, starting with the Constitutional Tribunal⁶ and continuing with the media. Ordinary judges and prosecutors have been also affected by negative changes in both countries. One of the most negative aspects of the Polish Government’s initiative is the refusal to publish (some) judgments of the Constitutional Tribunal, and the general disrespect towards it (which has also happened in Hungary, where the provisions declared unconstitutional by the Constitutional Court, however, have been included in the Constitution). In the meantime, other laws restricting fundamental rights have been adopted (concerning media, prosecution, police, civil service, immigration, etc.).

However, there are relevant political and institutional differences between the two countries. In Hungary the FIDESZ, together with the small centre-right ally KDNP, obtained 133 seats, accounting for 66.83% of the National Assembly in the 2014 elections, which is precisely the two-thirds majority threshold they enjoyed in the previous 2010-2014 legislature. Such a huge majority, favoured by the electoral system (which was changed to the advantage of the ruling coalition in 2011) allowed the majority to adopt a new constitution with subsequent amendments thereto, and to carry out further changes to the system of checks and balances through the passing of ‘cardinal’ laws. Following by-elections in February and April 2015, this constitutional majority was ‘broken’, despite having lost only two seats. Although the most burning issues seem to have been settled thanks to European intervention, the real situation is a little more complex.

Opinions about the current situation of the rule of law in Hungary are contradictory and depend on interpretation. Some believe that as a result of the reforms carried out by the Government and

⁵ J.P. Massias, *Droit constitutionnel des Etats d’Europe de l’Est*, Paris, Puf, 2008; A. Di Gregorio, *Epurazioni e protezione della democrazia*, Milano, FrancoAngeli, 2012.

⁶ It is not only about the intricate affair of the appointment of new constitutional judges but also the limitation of the autonomy of the Constitutional Tribunal through new rules for appointing and dismissing the President and the Vice-Presidents, the order of consideration of petitions, and a series of other aspects. For an up to date constitutional information both in Poland and Hungary please refer to www.verfassungsblog.de.

especially the replacement of the ordinary and constitutional judges, the courts have now been 'housebroken'. Others believe that as a result of the opinions of the Venice Commission and of the European Commission infringement procedures, some of which led to the ECJ decisions, the most controversial provisions have been amended or shelved entirely⁷.

The Polish case is different as until October 2015 it was difficult to find a stable and cohesive ruling majority because of the political framework and the electoral system. In fact this was the first time in the history of the former communist Poland that a one-party Government was formed. Another political aspect that is worth noting is that the centre-left forces are completely unrepresented in parliament (which has not happened in Hungary).

Despite the differences in party and electoral systems, in both countries there is a majority conservative Government with overwhelming power. But while FIDESZ has had a constitutional majority since 2010 (constitutional 'outrages' were perpetrated before the adoption of the new FL, with 12 laws amending the old Constitution), the PiS could limit itself to implement its legislative program and take advantage of some mistakes of the old laws regulating the activity and composition of the Constitutional Tribunal, such as the election of constitutional court judges by a simple majority of the Sejm (this is a communist heritage as the election by a simple majority was provided for in the Sejm Regulation of 1986). As we know, this procedure had many negative consequences.

The case of Romania is very peculiar. The Romanian constitutional crisis - with the involvement again of European institutions, primarily the European Commission and the Venice Commission - 'exploded' rather suddenly between June and July 2012. The crisis was resolved almost immediately even though it was preceded (and followed) by unresolved problems of political and institutional nature.

Let us just summarize the main events. In February 2012 a political crisis occurred, which led to the resignation of Prime Minister Boc belonging to the same party as President Basescu (i.e. PDL, the democratic-liberal party). After a failed attempt to appoint a caretaker Government pending elections scheduled for December 2012, the centre-left parties (USL, Social Liberal Union) managed to form a new Government headed by Victor Ponta in May 2012. The new Government, while continuing the same austerity policies as the previous one, soon found itself in open conflict with President Basescu and tried to invoke his suspension by parliament and then by popular recall.

⁷ For the first position see, Z. Szente, *Challenging the basic values- problems in the Rule of Law in Hungary and the failure of the European Union to tackle them*, in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017. For the second one, F. Hoffmeister, *Enforcing the EU Charter in Member States*, in A. Von Bogdandy, P. Sonnevend (eds.), cit., p. 231 and also J. Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania*, *ibidem*, pp. 307-308.

The new Government very rapidly introduced a number of measures affecting the principle of separation of powers. It adopted a series of emergency orders circumventing parliamentary procedures, ignored the Constitutional Court's ruling that prohibited the Prime Minister to represent the Government in the European Council without the express authorisation of the President (justifying it with the excuse that the ruling had not been officially published), removed the ombudsman and replaced him with an individual loyal to the ruling part⁸, limited the Constitutional Court's competences through an emergency order⁹, withdrew the right of parliament to manage the Official Gazette (*Monitorul Oficial al Romaniei*), openly criticized the Constitutional Court, etc. These are behaviours and acts directly or indirectly targeted against the President (and against the Constitutional Court, perhaps not entirely incorrectly perceived as favourable to the President), which was suspended by Parliament at the end of this 'crusade'. To defend themselves against these acts Basescu (who considered himself a victim of a real coup d'état) and the Court have invoked the protections provided by European institutions.

Even in this case we must consider the constitutional crisis of the summer of 2012 in a wider context. We must examine the limits of the transition to democracy and the flaws of the 1991 Romanian Constitution, adopted in haste by former communists suddenly recycled in a democratic 'revolution' and with a highly unbalanced institutional system. Despite the constitutional amendments of 2003, the political and institutional balance between the President on the one hand and the Prime Minister, the Government and the parliamentary majority on the other hand, continued to be uncertain, as evidenced by the involvement of the Constitutional Court on several occasions even before the summer of 2012. To all this we must add a very different political context from that of Hungary and Poland. Romanian politics has never had the problem of 'tyranny by the majority'. In fact, because of the electoral system, the party system, the ethnic composition of the population, a political climate marked by corruption scandals, transformism and general instability, the shelf life of Romanian cabinets has always been short and unstable. Under President Basescu (head of State from 2004 to 2014) the political situation became more complicated because of the President's strong leadership, coinciding in the summer of 2012 with the involvement of European

⁸ The ombudsman is the only institution allowed to challenge *a priori* the emergency orders of the cabinet before the Constitutional Court.

⁹ This would be excluded by the Romanian Constitution as outlined in the opinion of the Venice Commission. See *Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania*, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), in [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)026-e).

institutions. The latter tried to settle what looked like a real struggle for political power with no holds barred. The Constitutional Court itself, while painted as the last bulwark of democracy and the rule of law, has over the years issued contradictory rulings, been often in favour of the head of State without clear legal grounds. But in the case of Romania the pressure levers of the EU were much more effective. Considering the political and democratic immaturity of the country, after its hasty admission into the Union in 2007, a post-admission monitoring mechanism, the ‘Cooperation and Verification Mechanism’, has been put in place for both Romania and Bulgaria. This will especially target the fight against corruption and the independence of the judiciary and mandates six-monthly verification reports.

The situation of Romania is therefore not comparable to those of Hungary and Poland. There has been no genuine transition to democracy but, instead, a continuity of structures and people. The Constitution was adopted quickly by selective out-of-context copying of foreign models, especially the French one. The role of Constitutional Courts was limited from the beginning and only partially reinforced with the constitutional amendments of 2003. The population is not homogeneous, and the strong presence of minorities promotes the growth of nationalism. Further, the political and constitutional culture is undeveloped.

The three countries examined are not comparable in terms of their historical and democratic development. However, from a constitutional perspective each has specific defects of its own in terms of their constitutional engineering.

Hungary

- The procedure for amending the constitution and for adopting a new constitution is the same (the parliament is both the legislative and constituent body). The process is easy to implement not only in terms of the majority required but also because the initiative for amendments is easy to put forward as it only requires a request from a single deputy and there are no explicit limits to the constitutional amendments.
- There is an excessive use of cardinal laws.
- There are no provisions to fight against ‘anti-system’ political parties (at least in the FL).
- The rules for the election of constitutional judges have been simplified for the benefit of the ruling majority.

Poland

- The judges of the Constitutional Tribunal are elected by one house of the Parliament based on a simple majority (the proceeding is required by law but not by the Constitution).
- The Constitutional Tribunal is regulated by ordinary and not constitutional law.
- Requirements to elect judges of the CT provided by the Constitution are quite vague

Romania

- The role of the President and the Prime Minister are not well demarcated and this causes problems even outside of cohabitation (a distorted and incomplete copy of the French model).
- Abuse and excessive use of emergency decrees by the Government; this aspect is not well regulated in the Constitution.
- A poorly differentiated bicameralism especially regarding legislative powers of the houses.
- The autonomy granted in 2003 to the organ of self-government of the judiciary is leading to its politicization.

4. The role of the constitutional courts in the post-communist transition

Considering that in all three countries constitutional courts have been under attack by the political majority, it is worth reflecting on their role in the post-communist transition. Most of them had a very active role, which has repeatedly brought them into conflict with the Government in office.

This strong role has been possible for a number of reasons. First, some of these courts have been super-equipped and have often delivered judgments on the relationship between the branches of government, so determining the real functioning of the form of government, thereby counterbalancing the shortcomings of the constitutional text and of the political system. The access to the courts is very broad. In some cases the constitutional courts have been forced to work with interim or otherwise incomplete constitutional texts, or with constitutional ‘patchworks’ (as in Poland until 1997) so they had a great deal of freedom of action (and made free use of international standards on human rights). The ‘moral’ legitimacy of constitutional judges (no compromises with the past, famous dissidents or leading actors of the transition period) has been a relevant factor in some countries in order to increase the authoritativeness of the courts¹⁰.

The powerful role of the courts has been criticized by some commentators because it was perceived they had overshadowed the legitimacy of new parliaments. The latter were in some cases considered by public opinion to be the same as their powerless predecessors¹¹. In fact such a leading role was acceptable and necessary perhaps only in the first few years following the transition.

The common features of the so-called ‘fourth generation’ constitutional courts, however, should not overshadow the differences between countries. The Polish Constitutional Tribunal arises from a communist concession to the opposition forces and had a series of functional limitations until 1997.

¹⁰ Please refer to A. Di Gregorio, *La giustizia costituzionale in Russia*, Milano, Giuffr , 2004.

¹¹ S. Holmes, *Back to the Drawing Board*, in *East European Constitutional Review*, Vol. 2, no. 1, 1992, p. 22.

Only after 1997-1999 was there a definitive consecration of *res judicata* for the judgments of unconstitutionality of laws. The Constitutional Tribunal was therefore of fundamental importance in the terminal phase of the communist period, especially from the symbolic point of view, but it was not as disruptive an institution as in the Hungarian case.

The Hungarian Constitutional Court was even called a ‘supreme moral authority analogous to a Politburo’¹², both with reference to its width of competence (preventive and following control of legislation, *actio popularis*, *autosaisine*, etc.), and to the fact that through the principle of human dignity extrapolated from the ‘invisible Constitution’, the Court addressed and resolved many sensitive issues from the perspective of human rights. The Court ensured that the transition to democracy was not monopolized by a particular interest group. All this despite (or perhaps because of) the absence of a complete Fundamental Law as a basis for a wide and stable national unit.

The Romanian Constitutional Court, according to the original version of the 1991 Constitution, had few competences and the parliament was the final arbiter on the constitutionality of laws. Although the situation has improved since the 2003 constitutional amendments, the Romanian Constitutional Court had never had powers or authority comparable to the Hungarian and Polish Courts. It also had various responsibilities in the 2012 constitutional crisis.

Some of the problems affecting constitutional justice today derive from the mistakes of the post-communist legislatures: the Polish parliament did not change, not even with the adoption of the new Constitution in 1997, the rules for the election of constitutional judges introduced in 1982 and 1985 (when there was only one house in which sat a single party); in Slovakia they have not clarified how the President should select the constitutional judges from candidates proposed by the National Council (in cases of cohabitation it could be an impasse). Even requirements for the selection of candidates should be stricter and should be articulated directly in the Constitution or in an act superior to that of the ordinary law.

5. Advantages and drawbacks of European democratic conditionality

Coming to the issue of European Union democratic conditionality, with the admission of the post-communist States the peculiarities of these countries have not been taken into account, especially the welfare state crisis. Instead values and conditions have been imposed. The ‘negative’ liberal constitutional model, adopted in reaction to the communist past, was not suitable for this context, at least not initially. The great sacrifices required to ‘join Europe’ were not rewarded with a treatment

¹² In an interrogative form: E. Klingsberg, *Safeguarding the Transition*, in *East European Constitutional Review*, Vol. 2, no. 2, 1993, p. 44.

equal to that reserved to the other member States. This has encouraged, in many cases, a jealous attitude to national sovereignty. The importing of Western models has not proved successful in all respects. While for the catalogues of rights there was no alternative, more gradualism in the dismantling of social benefits and a measured transition to a market economy would have been preferable.

As for the membership in the Council of Europe (and the influence of the Venice Commission and the Court of Strasbourg), conditionality was less stringent than in the EU, because of the different purposes of this regional organization, meant primarily during the last 26 years to promote in general terms 'rule of law, democracy and human rights' in the new members of the communist tradition.

A limit observed during the conditionality process is the fact that the difference between democracy and rule of law has not been sufficiently explained. The triad 'rule of law, democracy and human rights' have not been perceived as inseparable since in Romania, Hungary and Poland the Governments have invoked the principle of democracy as a means of using the majority will of the voters to contest a legalistic approach to the rule of law.

As for the involvement of European institutions, as authoritatively argued¹³ in Hungary, Romania and Poland there have been grounds for the application of Article 7 TEU, the so called 'nuclear option' which could entail the suspension of voting rights' of the Member States. But the EU has adopted different solutions in the three cases as a result of purely political considerations (the Hungarian FIDESZ is well placed in the European Popular Party while the Polish PiS is more isolated; the new Commission wants to be more assertive than the previous one headed by Barroso when it comes to the rule of law principle). All of this emphasises the weakness of the EU, especially when combined with the many legal and political problems that Art. 7 raises (e.g. it is not clear what is meant by 'serious and persistent', i.e. 'systemic', risk of violation of the rule of law).

But there is both light and shadow. European conditionality, following accession to the EU, in the form of soft law should not be underestimated at all. Infringement procedures activated by the European Commission that provoked or threatened to provoke the reaction of the European Court of Justice have to some extent worked. However, in all three cases the approach of the European institutions was different and this is likely to weigh against the EU's credibility in actively protecting and upholding EU values.

¹³ V. F. Hoffmeister, *Enforcing the EU Charter in Member States*, in A. Von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, cit., p. 231.

Hungary: Infringement procedures for individual violations of the EU law, although the European Parliament has published reports with some very harsh words; Economic pressures: in early 2012 the European Commission decided to suspend some shares owed to Hungary from the European Cohesion Fund.

Romania: Strong pressure thanks to the Cooperation and Verification Mechanism or the CVM. Sanctions applicable under the CVM mechanism do not carry out, such as those provided for by the Art. 7, the suspension of the voting rights in the European Council.

Poland: rule of law mechanism, we are already on the second step.

Another problem concerning the activities undertaken at European level is that the three main EU institutions (Commission, Parliament, Council) do not show a consistent and commensurate attitude. See for example, in the Hungarian case, the repeated appeals of the European Parliament to the Commission and European Council to act more seriously or the inconsistent behaviour of the Council with its annual Rule of Law Dialogue compared with the Rule of Law Initiative of the Commission. There is also a problem of competences, because the principle of the rule of law is not part of the Union's powers despite being a 'supposed' *acquis*. In certain spheres, such as the protection of media freedom there are no adequate legal instruments at EU level.

6. Conclusions

As we have tried to demonstrate so far, an out-of-context analysis may not show all aspects of the question of 'the rule of law violation in new EU Member States'. An analysis that includes a diachronic (historical development) and synchronic comparison (relative to other countries in the region), combined with the inconsistencies and limitations of European conditionality could help answer the main question which is: Is what happened to or is happening in the new EU members the effect of a failed transition or is there a case to be made for the concurrence of guilt on the part of European bodies?

Secondly, we must avoid making general remarks given that Hungary and Poland were considered first-in-class until recently. If the Polish case is so striking even more so than the Hungarian one, it is because its democratic stability was taken for granted. We must also distinguish the inconsistencies in the constitutional text from those of the political system (including the electoral system) and the 'resilience' of the constitutional culture that has arisen so far, an aspect that is very

well described by Solyóm in the Hungarian case¹⁴. The Hungarian Constitutional Court, which has experienced a kind of ‘anticipatory democracy’ proved to be useful in the current slowdown phase. On the subject of constitutional culture, it is useful to remember what the Venice Commission stressed in its 2012 opinion regarding the events in Romania, which can also be applied to the other two cases. The Commission reflected on the Romanian institutional context noticing the absence of a genuine constitutional culture of mutual respect and sincere cooperation between the institutions: “Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them ... Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections”.

We must therefore look back at the modalities and protagonists of the transition and the following period. In Poland, for example, the roots of today’s phenomena are to be found in the dynamics of the transition as well as in the events of the short-lived Government of PiS (in coalition with two smaller right-wing parties) between 2006 and 2007. Even the emotional impact of the tragic and sudden death of President Lech Kaczyński should not be underestimated.

Other negative things come out of the transition period such as certain opaque institutional mechanisms whose danger over time is compounded if left in the wrong hands. As mentioned above, the hostility towards the role of constitutional courts, both in Poland and in Hungary, is based on their counter-majoritarian role and in particular on their potential threat to the parties *currently* in power. But if it is easy to identify the reasons for this offensive against the court in the Hungarian case given, as mentioned earlier, its high prestige and the fact that it virtually dictated the constitutional law of the transition period (Solyóm), it is less obvious in the Polish case. Here, the roots of the conflict are to be found not so much in the authoritativeness of the CT (gradually increased from 1997 onwards) but rather in a series of rulings that it delivered in 2006-2007 during the first Government ruled by PiS (but in a political condition much less favourable than today).

This leads us to a number of further reflections concerning the post-communist constitutionalism in general, and that of the most advanced countries, such as Poland and Hungary, in particular. Firstly, we need to consider the limits of post-communist constitutional engineering, including electoral legislation. Secondly, the mistakes due to the haste of post-communist constituent legislatures.

¹⁴ L. Solyóm, *The Rise and Decline of Constitutional Culture in Hungary*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, cit.

Finally, the clauses for the protection of democracy and the rules on anti-constitutional parties: post-communist constituents took into account a way of precluding a return to the past, but such remedies, although strong, remain in the hands of constitutional courts. If these courts are ‘domesticated’ they become effectively toothless.

Given this complex context, the peculiarities of the countries of Central and Eastern Europe particularly from a constitutional point of view, will remain for a long period, because they are based on the ‘differential aspects’ of an ethnic -national, institutional and social nature. In addition, their economic transition was based on a great injustice, i.e. the appropriation of public assets by the old nomenclature that is, by those who already enjoyed significant privileges in the past. Also individualism and egalitarianism are not good for a society so socially and ethnically fragmented.

How can these countries get over these crises? I do not believe they are insoluble. We need to wait for the electoral turnover, and hope (paradoxically) in the reunification of the leftist (former communist) forces, while continuing with moral and perhaps economic persuasion.

If there is *a crisis of constitutional democracy* in new EU Member States, this is as much due to the limits of the EU itself and of the entry criteria for admission into the Union. The role of the Council of Europe proves to be equally weak, unless you consider it, as it indeed is, a venue for the continuous promotion of democratic development. But you cannot promote democracy by force, or with the threat of sanctions or constant criticism. Applying or threatening to apply sanctions is likely to create new cleavages in Europe.

Undoubtedly it takes time for the ‘sedimentation’ of democratic values. But we are talking about European countries where, in spite of a troubled history and earlier periods of authoritarian rule, constitutional development is generally solid and in some cases was started before the actual collapse of the communist regime.