

ABUSIVE CONSTITUTIONALISM IN THE HEART OF THE EUROPE: CASES OF HUNGARY AND POLAND



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Abstract

The European Union (EU) has been one of the most important representatives of democracy, both in the Union and in its policy towards neighboring countries, with the liberal values it has defended since its inception. However, while the EU has been intensively tested in recent years, the radical changes experienced on a global scale have also deeply affected the policies within the Union and resulted in the alienation of the member states from the values that the Union has upheld so far. The cases of democratic backsliding created especially in Hungary and Poland on the basis of legal regulations over the last decade and that the delayed and poor reaction from the Union to these regulations are currently being intensely debated. Therefore, the present study addresses the developments in Hungary and Poland in the light of the term “abusive constitutionalism” introduced by David Landau and Rosalind Dixon and intends to answer the question of “*how liberal democracies are eroded by means of the amendments or replacements on constitutions*”. The examples of Hungary and Poland are quite remarkable in respect to the transformation that their constitutional systems have gone through. Because these transformations occurred in a way contrary to the values of the Union, despite the fact that both countries are members of the EU. The present study argues that the reaction of the European Union and its related organs to the judicial reforms in these countries is insufficient and weak, and that the delay in imposing sanctions paves the way for Poland and Hungary to become increasingly anti-democratic by official means.

Keywords: Abusive Constitutionalism, Hungary, European Union, Poland, Constitutional Amendment.

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AVRUPA'NIN KALBİNDE İSTİSMARCI ANAYASALCILIK: MACARİSTAN VE POLONYA VAKALARI



Özet

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Avrupa Birliği (AB) kurulduğu yıllardan bu yana savunduğu liberal değerler ile gerek Birlik içerisinde gerek ise komşu ülkelere yönelik politikasında demokrasinin en önemli temsilcilerinden birisi olmuştur. Ancak son yıllarda AB önemli sınavlardan geçerken, küresel çapta yaşanan köklü değişimler, Birlik içerisindeki politikaları da derinden etkilemiş ve üye ülkelerin Birlik değerlerinden uzaklaşmasına neden olmuştur. Özellikle Macaristan ve Polonya'da neredeyse son 10 yıl içinde yasal düzenlemeler temelinde oluşturulan demokratik gerilemeler ve Birliğin bu düzenlemelere tepki vermekte geç ve yetersiz kaldığına yönelik tartışmalar yoğun bir şekilde mevcuttur. Bu noktada bu çalışmada, Macaristan ve Polonya'da yaşanan gelişmeler David Landau ve Rosalind Dixon'ın "istismarcı anayasacılık" terimi ışığında değerlendirilmiş ve liberal demokrasilerin anayasalar üzerinde yapılan yasa değişiklikleri ile nasıl aşındırıldığı sorusuna cevap vermeye çalışılmıştır. Macaristan ve Polonya örnekleri, iki ülkenin de AB üyesi olmasına rağmen anayasal sistemlerinin Birlik değerlerine aykırı bir şekilde dönüşüme uğraması açısından oldukça dikkat çekicidir. Çalışmada Avrupa Birliği'nin ve ilgili organlarının bu ülkelerdeki yargı reformlarına tepkilerinin yetersiz ve zayıf olduğu, yaptırımların gecikmesinin Polonya ve Macaristan'ın resmi kanallar yoluyla giderek daha anti demokratik bir düzene dönüşmesinin önünü açtığı savunulmaktadır.

Anahtar Kelimeler: İstismarcı Anayasacılık, Macaristan, Avrupa Birliği, Polonya, Anayasa Değişikliği.

I. Introduction

Constitutions have been one of the most important tools used by states for the establishment of democratic order for centuries. As a reflection of this importance in the literature, there has been an increasingly extensive volume of comparative constitutional studies and other studies examining the effects of constitutions on the democratic order in countries. Especially after Cold War, constitutional changes have come to impose restrictions on political power and compliance with international norms (Uitz, 2015).

Despite being seen basically as the protectors of the democratic order, the constitutions might fail to accomplish this purpose in some instances. Because as Aziz Huq and Tom Ginsburg said, democracies can “collapse or erode beyond repair, but they can also suffer substantial deterioration in the quality of democratic institutions” (2018:1); moreover, these decays are produced also through the constitutions themselves. The recent dangers that the liberal constitutional democracies have faced from different aspects constitute the corroborative evidence in this respect. While there have been notable decays disguised as legalism especially in countries that are considered to be democratic, the list of terms describing these decays becomes increasingly diverse, and in the literature, such terms as “populist constitutionalism”, “abusive constitutionalism”, “autocratic legalism”, “democratic backsliding” and “democratic recession” are used to refer to these recessions that are exerted under in the guise of legal regulations (Daly, 2019:9). Jan-Werner Müller for example defines the scene where the government tries to take control of all aspects of the political and social life in Hungary and Romania as “constitutional capture (Müller, 2014), while Kim Lane Scheppele uses the term “autocratic legalism” to describe the decays occurring in democracy under the veneer of legalism (Scheppele, 2015) and utilizes the examples of Hungary and Poland to describe the legal changes that deliberately attack the basic principles of liberalism. In the present study, the term “abusive constitutionalism” of David Landau is used to describe these decays that countries put into effect through constitutional arrangements. In this regard, abusive constitutionalism basically means the undermining of democracy by means of constitutional arrangements (Landau, 2013:195); however, according to him (2013) it also incorporates a different and important intention to make a country less democratic than before by using the mechanisms of constitutional amendment in that country.

Constitutions are basically written agreements for countries to reinforce their democracy and to protect their civil rights both against other states and their own state. However, constitutions do not always set out with this intention and, especially when used by the ill-advised people, they can easily be diverted to a different path from this core purpose that they are supposed to serve for. Governments elected by the majority may prepare abusive constitutions by replacement or amendment, and while doing so, their actions appear to be in accordance with the laws because they are executed through elected governments. Yet, such constitutions bear indeed serve far more importance overall as highly potent tools that promote authoritarianism and democratic backsliding in those countries, whether through replacement or amendment. The piece (2019) with which Rosalind Dixon and David Landau have contributed greatly to the comparative constitutionalism literature, holds an important place as they analyze how authoritarian rulers damage democracy using liberal democracy by case studies.

Especially in recent years, similar developments have also taken place in some of the Central and Eastern European countries which demonstrated that abusive constitutionalism may also take place in a country that seems to have adopted the values and norms of the EU. At this point, the developments in Hungary and Poland in recent years remain as examples of the abusive constitutions that Landau draws attention to. The new constitution passed by means of replacement i.e. complete abolition of the existing constitution in Hungary and the amendments to the existing constitution in Poland proves that Hungary and Poland are two distinctive cases of abusive constitutions among the member states of the EU.¹ In this sense, it is important to examine the examples of Poland and Hungary to understand how abusive constitutionalism is created within the EU, which is a precursor to liberal democracy for world countries.

Additionally, judging from the enthusiasm that the two countries have had for accessing the Union since the beginning of their accession process, the transformation that they have undergone and how constitutionalism has become abusive in these countries seem to be among the frequently discussed issues. According to Ivan Krastev and Stephen Holmes (2020), the experiences of democratic change in these countries show that these countries refuse to adopt the core values of the EU already at the beginning of the accession process. Thus, having set out with the aim of promoting democracy

1 For detailed information regarding the concepts of constitutional amendments and constitutional replacements, see Law and Whalen, 2020.

in the first few years of its inception, the EU is now faced with the danger of quitting its liberal core to replace it with “illiberal-authoritarian periphery” in the V4 countries² like Hungary and Poland, which represent a group of the member states of the Union whose democracy is less developed than that of other member states (Onis and Kutlay, 2019). At this stage, these countries deviate from the norms of liberal democracy such as the protection of human rights and minority rights, which proves that the core values of the Union have not yet been fully grounded within the borders of the Union.

In the light of all these discussions, the first part of the study addresses the legislative arrangements in Hungary and Poland to expose how the democracies were eroded on the basis of the constitutions in these two cases. Then, the current control mechanism of the EU regarding “democracy and rule of law standards” is discussed and the effectiveness of these control mechanisms on abusive constitutions is questioned. It is argued that the reactions from the Union to judicial reforms in these countries are insufficient and weak, and that the much-awaited sanctions by the Union against these regulations encourage Poland and Hungary to establish constitutions that are getting worse and worse. A current debate topic of the recent years, abolishing the voting rights of these two countries is claimed to be infeasible in the near future because the decision-making process of sanctions is highly difficult and complex.

II. Abusive Constitutionalism by Reform and Replacement: Hungary

“Europe can only be saved if it returns to the source of its real values: its Christian identity” (Hungary Today, 2019). In recent years, Hungary has been questioning European values and practices, as stated by Victor Orban, the leader of the conservative right-wing party FIDESZ, who emphasizes that the Union needs an administration based on “Christian values”. Hungary has gradually evolved into a conservative and Eurosceptic structure and deviated from the European values day by day since the Orban government came to power with 52.73 percent of the votes in the 2010 elections. According to Jan-Werner Müller, what has happened in recent years in Hungary is therefore not only one of the ordinary crises experienced in a state of law but also an indication that democracy is under attack (Hegedűs and Véghe, 2015).

2 The regional partnership formed by Hungary, Poland, Czechia and Slovakia is known as the Visegrad Four (V4).

Described as a leader who built illiberal democracy in the heart of Europe by international actors (Onis and Kutlay, 2019) and dragging the country towards a majoritarian democracy (Lijphart, 1999), Orban has transformed the country into a majoritarian autocracy since the day he took office and quickly distanced Hungary from the values of the EU. However, especially in recent years, the constitutional amendments and the new constitution in the country show that the constitutional control over the government has gradually declined and the government has evolved into a structure that is more reluctant to comply with the standards of constitutionalism (Uitz, 2015).

In fact, having started the preparations for a constitutional amendment the week it came to power in 2010, the FIDESZ party gave strong hints as to what kind of policy it would follow in the future. The press law passed by the Parliament in the last months of 2010 was indeed a precursor to the future constitutional amendments to be made by Hungary, which was set to assume the Presidency of the European Council on January 1, 2011. The press/media law, which consists of approximately 200 pages, stipulates that a National Media and Communications Board is founded as a supervisory body to monitor the written and visual media and that the members of the Board are selected from members of the ruling party. The concerned law also includes a number of regulations restricting the freedom of expression since it puts various news networks from television to webpages under their control and imposing high fines on any media organizations violating the law. Although these practices – enforced by an EU member state – were perceived by the EU as a situation that required immediate intervention and criticized by the member states of the Union pointing out that they contradicted Article 11 of the European Charter of Fundamental Rights, the government declared that “we do not intend to change the law” (Rankin, 2011) and thus signalled the parting of the ways with the EU in many respects in the future.

On the EU front, in the first half of 2011, Luxembourg Minister for Foreign Affairs Jean Asselborn brought up the question as to whether Hungary be worthy of the Presidency of the Council of the European Union, while Barroso, 11th President of the European Commission, also stated that Hungary should act in a way that will support all EU countries and carry the EU Presidency to success. However, all the controversies and warnings about Hungary’s democratic identity did not remedy the problems; on the contrary, a critical change took place in 2011 and preparations for a new constitution were started after the passing of the press law.

Although the new Hungarian Constitution, called the “Basic Law”, was adopted on April 18, 2011 by a 2/3 majority and entered into force on January 1, 2012 despite the harsh criticism for violating the principle of participatory democracy, the disputes claiming that neither the opposition parties nor the civil society had a say in the constitutional process have been among the reasons that cast a shadow over the transparency of the constitution-making process (Ratip, 2011). The draft of the constitution was not submitted to the public approval during the preparation stage and the public was only asked about their opinion on the constitution with a questionnaire containing 12 superficial questions. And these facts were among the most important factors that justify the constitution’s being described as non-participatory. The introduction part where the religious elements of the constitution are used to refer to Christian Europe also shows that the social identity defined by the Orban Government in its policies will be nurtured by conservative elements.

One of the areas regulated and largely limited by the new constitution was the electoral law and the Constitutional Court, which were taken under control with the new constitution. Accordingly, the new Constitution included regulations for changing the electoral districts by dispersing the places where the opposition is strong and raised the number of members of the Constitutional Court from 11 to 15, the term of office of the judges from 9 to 12 years, and transferred the power to elect the president of the court from the Constitutional Court to the Parliament.

In addition to all these major changes, two years after the new constitution came into force, a constitutional amendment package was adopted by the parliament on March 22, 2013, thus making the fourth amendment to the constitution since the Orban Government came to power in 2010. This constitutional amendment abolished many of the decisions made by the Constitutional Court preceding January 1, 2012 to regulate important issues such as the prohibition of the death penalty, the right to life of the fetus, and the civil rights of homosexuals were annulled (Demirkan, 2012). With the annulment of these decisions and the new regulations made, in line with the resolute dismissal of same-sex marriage in the new constitution where only marriages between men and women are acceptable, it is clearly seen that the unlawful regulations in Hungary have moved to a point that poses restrictions to the individual freedoms in social life. While all this was going on, the disputes on death penalty in the country and Orban’s statement “the punishment of life imprisonment for murder is not enough deterrent” resurrected heated discussions on the freedom to live in the country (Deutsche Welle, 2015).

Moreover, given the harsh attitude of the Union against the death penalty, such statements by the Hungarian Prime Minister appear to be real evidence that the country's policies are now split from the Union's values.

An important change of these years was the amendment to the electoral law that Orban implemented to ensure that his party would remain in power in the next election. As a matter of fact, this arrangement on the electoral law led the mixed electoral system of the country to a system where the small parties are absorbed and the large parties constitute the majority. Thus, although it did not actually win the majority, the party won two-thirds parliamentary majority (Scheppele, 2014) and after it came to power again in the elections in 2014, it was criticized by the International Election Observation Mission of the Organization for Security and Cooperation in Europe on the grounds of unfair competition in the elections.

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The refugee crisis that broke out during these years allowed Hungary to move away from the values of the Union and to simultaneously continue executing its policies on the basis of legal adjustments. Hungary is at the top of the list of the countries that have opposed the refugee policies of the EU since the first day of the migration of refugees to Europe and took inhumane measures to prevent refugee migration. Having voted against the relocation of 120,000 refugees in the European Parliament in 2015, in a referendum in 2016, Hungary asked the public opinion about its decision to relocate 1294 refugees to Hungary in an attempt to gain public support against the EU. The referendum question "*Do you want the European Union to decide to relocate non-Hungarian citizens to Hungary without even the approval of the National Assembly?*" is actually thought-provoking because of its manipulative wording aimed at influencing the decision of the voters. Additionally, during the same period, Hungary was also criticized by international actors for having spent a budget on the election as large as the budget size that would ensure the employment of refugees. The government became increasingly authoritarian and kept acting to the detriment of refugees in 2016 when the government proposed – despite the reactions from the EU – a prison sentence of up to three years for people crossing the Hungarian border illegally and approved a law on the immediate detention of asylum-seekers entering the country in 2017 and cleared the way for sentencing those who help immigrants with permanent settlement to imprisonment in 2018. These continuous adjustments draw attention as striking examples of the abusive constitutionalism that we have addressed in the present study.

Though the opposition party accepted the year 2019 to be the “year of resistance” for them, the decrees adopted by the Hungarian government for transferring of the properties of the local governments in the midst of the pandemic measures across the globe last year, and upon the proposal of the ruling party last June, the adoption of the law banning the commercials that normalize non-heterosexual sexually explicit media products and imposing “the role of motherhood onto women and fatherhood onto men” in its description of family and excluding trans and LGBT individuals from this description (Özkan, 2021) indicate that democratic backsliding in the country will continue for a long time through adjustments disguised as legal regulations.

III. Abusive Constitutionalism by Amendment: Poland

“The Treaty of the EU is subject to the constitution in the Polish legal system... and, like any part of the Polish legal system, it must abide to the constitution”.

Judge Bartłomiej Sochanski
(BBC News, 2021)

On 7 October 2021, the Polish Constitutional Court initiated something new in the history of the EU and signed a decision rejecting the supremacy of EU law over national legislation in certain areas. Actually, this decision of the Constitutional Court should be interpreted as a result of the judicial reform that has been tried to be implemented in Poland in recent years and has focused especially on the Constitutional Court. The developments from 2015 up until today, have some crucial turning points in terms of starting a process that undermines the independence of the judiciary in Polish Constitutionalism. At this point, The Polish Constitutional Court’s decision that the EU laws are not absolutely superior to the Hungarian constitution has been debated a lot recently and is a result of the amendments made in the last six years by the conservative populist Law and Justice Party (Prawo i Sprawiedliwość or PiS). As a country, which ended the negotiations in a short time in 7 years with the desire to join the parliamentary system after the Cold War and joined the Union in 2004 with a great desire, Poland is rapidly moving

away from the values of the Union which can be observed by the recent events occurring in the country.

PiS, which came to power in 2015 with 37.58 of the votes, started to implement legal changes starting from this year, once it has obtained the administration as in the case of Hungary and started to create policies that would endanger the independence of the judiciary by signing constitutional amendments in significant areas. The government changed five judges in the Constitutional Court in the first weeks of its office and also organised the procedure for the appointment of new judges to be elected with the enactment of "Law on the Status of Judges" on 4 November 2016. Moreover, this amendment enabled the judge with the longest seniority to serve as the "interim President" until the new President is elected in the event of a vacancy and paved the way for the President Rzepliński to be replaced by PiS supported Judge Julia Przyłębska after Rzepliński's resignation.

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In a similar way, with the amendment made in 2017, the authority to appoint judges was taken from the National Council of the Judiciary and given to the Sejm- which is the lower house of the Polish Parliament. On the one hand, this shows that political factors will be effective in the election of judges in the future. Furthermore, the establishment of the institution called the Disciplinary Chamber which is responsible for imposing disciplinary punishments on judges serves as a crucial tool to pressure judges who oppose these regulations. On the other hand, the decrease in the retirement age from 70 to 65 for men and 60 for women, the retirement of more than 20 judges from the Supreme Court and the fact that the newly appointed judges would take a crucial role in the election of the government are factors that reduce confidence in the independence of the judiciary in the country. Moreover, at this point, the Polish legislation on lowering the retirement age of judges is contrary to EU law as it violates both the principle of judicial independence and the principle of non-removal of judges (Pech et al, 2021:9). Moreover, with this package of laws, the executive branch has the right to control over the judiciary, as well as the restructuring of the Supreme Court (Śledzińska-Simon, 2018).

In the case of Poland, the concentration of the amendments on the Constitutional Court includes the intention of the government to control the Constitutional Court and to block the way to the objections to unconstitutional laws by applying to it in the following year. On the one hand these

regulations also have an important intention to discredit the judges and undermine the public's trust in the judiciary through social media and advertisements. On the other, the law which is named "muzzle" amongst the society and paves the way for the punishment of judges in varying ways from fines to dismissal if they criticize the judicial reform, shows the repressive character of the regime.

Although criticism was received both from citizens and international actors through non-governmental organizations during this period, PiS' executive committee chairman Joachim Brudziński stated that "Citizens can protest as much as they want, but this does not make the party shift from its path it has determined." The statement also indicates that the party will not take into account the criticisms made by the public.

Today the judicial independence in Poland is at a rough stage. The report published by The Council of Europe's Group of States Against Corruption (GRECO) underlines that the reforms made between 2016-2018 specifically weakened the independence of the judiciary in the country, and that despite some positive step the aforementioned steps were not at a satisfactory level (Council of Europe, 2021). Although there have been recent discussions of *Polexit*³, it can be observed that the majority of the population is in favor of the EU in the country, is not expected to make such a decision in the near future.

After the UK's departure from the Union, it was expected that separatist voices would create a domino effect in the Union. However, the fact that Britain's farewell to the Union happened after a painful process, does not make the threats of Poland's secession from the Union realistic who does not have strong leverage like the UK in terms of economy. Therefore, what is happening in Poland today poses dangers to undermine the legal order that has been achieved in the Union and to shake the system within the Union, rather than the country's departure from the Union. Moreover, the PiS party that won the general elections again in 2019, continues with the regulations that will harm the independence of the judiciary. Thus, it will not be difficult to state that the party, which has recently received popular support, can also form alliances with other Visegrad countries to undermine the system that the EU has been trying to provide for years. Hence, the EU has the risk

3 *Polexit* is a term used to describe Poland's departure from the European Union.

of losing its values , within an order in which it is not possible to discharge of a violating country.

IV. European Unions' Response to Member States' Illiberal Challenge

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While the EU is an actor that promotes democratic, free and egalitarian policies and aims to protect the basic democratic values in its member states, these values that motivate the countries to become a member of the Union are explained in detail in the second article of the Lisbon Treaty. This article protects citizens from “state arbitrariness” on the one hand and serves for “constitutional troubleshooting” on the other. Thus, in the event that these values are violated or there is a clear danger for these values to be violated by a member state, the EU will handle these violations in accordance with Article 7(I) and 7(II) of the EU Treaty (AB Başkanlığı, 2020).

At this point, the preventive mechanism and the sanctioning mechanism are therefore the two different options for the Union to protect the values of the EU (Bayram, 2018:67). The preventive mechanism serves to identify any potential risk of violation of the values before the violation occurs, thereby preventing the member state from producing a violating policy. A reasoned proposal by one third of the member states or from the European Commission (upon the consent of the European Parliament) is required for a preventive mechanism to be initiated. However, subsequent to these requirements, acting by a majority of four fifth of the members of the European Council is another requirement and the Council should listen to the relevant member states before acting and make recommendations to the concerned state in accordance with the same procedure. A second option of the Union, as per Article 7(II), the sanctioning mechanism allows the Council to decide unanimously that a member state has seriously violated the EU values, either upon the proposal of the European Commission or the proposal from one third of the member states as in the preventive mechanism.

On the basis of these legal bases, the European Commission initiated an infringement procedure on the Hungarian refugee legislation in 2015 (European Commission, 2015). The Commission reviewed particularly the legislative amendments adopted by the Hungarian Parliament in July and September 2015 and sent a letter to the Hungarian authorities expressing its concerns. Although sending this official notification letter represents the first step of the violation procedure, the Union has often emphasized over the years that

it has become increasingly impossible for Hungary to be loyal to internationally accepted values, both through its own reports and through the reports of the Venice Commission. At this point, it is crucial to examine the effectiveness of the European Commission and the Venice Commission on this issue.

In particular, the Commission has issued important reports that call attention to erosions in the institutions that should safeguard democracy through constitutional reforms and ordinary legislation and has consistently warned that the transformation in Poland and Hungary amount to power grabs by incumbent rulers and pose a serious risk to democracy. Similarly, against the amendments made in 2015 in Poland, the Commission called for a re-consideration of the resolution and after the Parliament passed the resolution, which was then signed by the President, the Commission commenced launched a detailed investigation. Just as the reactions that were given to the developments happening at the time in Hungary, the Foreign Minister of Luxembourg Jean-Asselborn indicated that the updates in Warsaw seemed like the “path of dictator regime” (Rinke, 2015). From the same standpoint, the vice-president of the European Commission Frans Timmermans stated a warning that the right to vote of Poland can be withdrawn due to the updates in the country (BBC News, 2016). Thus, the European Commission initiated an inquiry against the changes made in Poland in 2016 and for the first time in the history of the Commission, such a harsh response to a legal change in a Country was demonstrated.

In addition to the European Commission’s anti-breach/punishment mechanism, another observant actor for constitutional law is the Venice Commission. The Venice Commission, or The European Commission for Democracy through Law is known as the consulting organ regarding the constitutional laws (Council of Europe, 2021). The fundamental duty of the Commission is to deliver an opinion on resolutions and laws of the member states and international organizations and to be of assistance to the Council of Europe in legal terms. The Venice Commission works as an active Commission not only in EU Countries but also in Central Asia and Latin America. Especially, in the steps taken towards democratization in Latin American countries, the EU conducts its fundamental duty with Venice Commission within this field. The Commission which helped the constitution-making process of the mentioned country has been carrying out projects in recent years in Brazil, Mexico, Chile for the before-mentioned end, democratization (Kırbaş-Canikoğlu, 2017:349). This Commission, also supported by the EU, completed a project targeted for the implementation of the new constitution in Bolivia

between 2011-2012 successfully. The Venice Commission warns against threats to preserve democracy and publishes crucial reports that highlight the erosion of institutions that exist to protect democracy through constitutional reforms and ordinary legislation. Though the decisions of the Venice Commission are not binding, its opinions are taken into consideration by the European Commission. When we consider the cases of Poland and Hungary, the opinions of the Venice Commission were influential in the decisions of the European Council to initiate the violation procedure and investigation. The Commission found that Hungary's constitutional amendments between 2011 and 2013 were not participatory and transparent (Bayar, 2018:91). They were especially criticized for the exclusion of the opposition. During these years, the Commission warned the Hungarian authorities that the decisions were contrary to the EU values and delivered recommendations on making the necessary arrangements. The Venice Commission expressed its concern about the restriction of the powers of the Constitutional Court regarding the amendment made in 2013 and stated that this would affect the functioning of the legal order of Hungary (Council of Europe, 2013).

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However, despite all of these, laws that are still made in both countries through abusive constitutionalism against the spirit of the EU. At this point, it is observed that EU institutions and the international actors do not possess the stopping power for the breaches over these countries. For instance, a daily fine of 100,000 Euros given by the CJEU for Poland's violation of the law in the past years could not prevent Poland's sudden turn to authoritarianism over the years. Herein, while the Council of the EU is only in a position to regularly remind its concerns about the rule of law, the European Commission's late intervention and showing an ineffective appearance as well as the complex procedure of sanctions and the ongoing crises in Hungary and Poland make them pose a serious threat to the legal order of the EU.

Two particular examples of the EU member states where rules are violated, Hungary and Poland do not vote against each other because of their membership in the Visegrad Group and their political and historical ties. For instance, in July 2018, the European Commission stated that Hungary's refugee policy is against the EU law and therefore the Commission applied to the European Court of Justice and decided to initiate a violation procedure against the law restricting the right to asylum in January 2019. However, the need for unanimity in the decision of the Council of Europe for implementing the sanction procedure has also paved the way for countries to adopt a

supportive attitude towards each other by prioritizing their political interests while making this decision.

Even it is not a realistic prediction for both Poland and Hungary's right to vote to be taken away in the Union, in response to the request of the European Commission, the Court of Justice of the European Union has recently declared a fine of 1 million Euro for each day that Poland does not implement EU laws (Wanat, 2021). This indicated that both countries will be exposed to economic threats such as not being able to benefit from the EU budget and post-pandemic rescue packages in the following years.

V. Conclusion

Today, the EU is dealing with many problems, both within the Union and globally, such as the refugee crisis, economic problems, debates on the democracy gap, and increasing Euroscepticism. However, in addition to all these problems, the EU has faced a new problem in recent years: Anti-democratic practices formed on the basis of abusive constitutions and laws in the Union's member states. Every crisis that the EU has faced has reminded the question of who possesses the driving force in integration and thus this has led to the reconsideration of integration theories. Herein, in fact, while Stanley Hoffmann's "Obstinate or Obsolete? While his work *The Fate of the Nation-State and the Case of Western Europe* defines national governments as "stubborn and active actors" in the integration process rather than "outdated actors" (Hoffmann, 1966), it actually helps us understand the crises EU is encountering today.

Democratic backsliding, observed especially in Hungary and Poland in recent years, makes us question both the reliability of the institution and its potency in ensuring democracy. These two countries have been gradually moving towards a system contradicting the values of the Union since their accession to the Union in 2004. Because far-right and populist parties have come into power in recent years in both of the two countries, there have been notable adjustments restricting the powers of the Constitutional Court in the judiciary area and these restrictions have exceeded this area over the years and have come to the point of interfering with the personal rights and freedoms of individuals in social life. These adjustments and their domain are indicators of the severity of the danger.

Today, whether by replacement as in the case of Hungary or by amendment as in the case of Poland, the constitutional amendments made in these

two countries are – rather than being democratic constitutions – shifting towards a point that is described as abusive constitutionalism. At this point, for an actor like the EU that has adopted liberal democracy since its inception, the shift from liberal democracy to illiberal democracy among its member states continues to be a difficult obstacle for the Union to overcome. Although the EU's sanctioning mechanisms seems to offer a solution to this problem, these countries will still be motivated to create abusive constitutions by their supportive position in the Visegrad Group towards each other and their alliance against the sanctions from the EU.

While the developments in Poland and Hungary, two countries, which have established similar alliances on the refugee issue and followed different policies from the EU, in recent years can be described as a challenge to values of the EU; at the same time it shows how governments are at the point of uniting on a common ground especially when it comes to high policy areas and national interests.

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At this point, these governments, as if justifying the intergovernmentalist approach, do not make sanctions possible by preventing unanimity even in cases where EU values are violated. Therefore, maintaining EU values becomes increasingly difficult in the Union system, where national sovereignty still prevails at critical points. Within this respect, what happened in Hungary and Poland can be identified as the biggest challenge to the legitimacy of the European Union in recent years (Hooghe and Marks, 2019:1125). On the other hand, it is noteworthy to state that neofunctionalist approach draw attention to the supranational pressure of the Commission and the European Court of Justice. Especially for Poland, the decision on the operation of Article 7, the discussion of the cutting of aid to the violating states, and lastly, the daily fine for Poland, demonstrates that the pressure of the EU in these countries has indeed enhanced.

Moreover, given the similarities in the histories of the two countries and their approaches to refugee policies, it would not be wrong to say how strong their motivation to act together is. At the same time, considering that the intervention of the EU against such violations in these countries may lead populist leaders with strong public support to produce increasingly nationalistic policies, it is obvious that these two countries are tough tests for the EU. In this regard, the study argues that the tools used by the EU so far are ineffective, and also argues that the Union should come up with new solutions in the upcoming period.

References

- AB Başkanlığı (2020). "AB Yapısı ve İşleyişi." <https://www.ab.gov.tr/3.html> (Accessed 25.10.2021).
- Bayar, Halil İbrahim (2018). "Macaristan Parlamentosu'nda Yasama ve Denetim." *Yasama Dergisi*, (21), 85-118.
- Bayram, Hanifi Mehmet (2018). "Avrupa Birliği'nin Dayandığı Değerlerin Korunması." *Uyuşmazlık Mahkemesi Dergisi*, 6(11), 67-82.
- BBC News (2021). "Polonya'da Anayasa Mahkemesi, AB hukukunun ulusal mevzuata üstünlüğünü reddetti." <https://www.bbc.com/turkce/haberler-dunya-58836842> (Accessed 25.10.2021).
- BBC News (2021). "Poland constitution: EU warns over threat to rule of law." <https://www.bbc.com/news/world-europe-36429325> (Accessed 30.11.2021).
- Council of Europe (2021). "Poland: Judicial independence remains at risk according to new report from GRECO." <https://www.coe.int/en/web/portal/-/poland-judicial-independence-remains-at-risk-according-to-new-report-from-greco> (Accessed 16.10.2021).
- Council of Europe (2021). "Poland: Judicial independence remains at risk according to new report from GRECO." https://www.venice.coe.int/WebForms/pages/?p=01_01_Statute_old (Accessed 18.10.2021).
- Council of Europe (2013). "Opinion on the Fourth Amendment to the Fundamental Law of Hungary." [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=c-dl-ad\(2013\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=c-dl-ad(2013)012-e) (Accessed 30.11.2021).
- Daly, Tom Gerald (2019). "Democratic Decay: Conceptualising an Emerging Research Field." *Hague Journal on the Rule of Law*, 11(1), 9-36.
- Demirkan, Tarık (2012). "Kısıtlayıcı' Macar anayasası yürürlükte." https://www.bbc.com/turkce/haberler/2012/01/120102_hungary_constitution (Accessed 17.10.2021).
- Deutsche Welle (2015). "Macaristan'da Idam Tartışması." www.dw.com/tr/macaristanda-idam-tartismasi/a-18416339 (Accessed 16.10.2021).
- Dixon, Rosalind and Landau, David (2019). "1989-2019: From democratic to abusive constitutional borrowing." *International Journal of Constitutional Law*, 17(2), 489-496.
- European Commission (2015). "Commission opens infringement procedure against Hungary concerning its asylum law." (Accessed 17.10.2021).
- Ginsburg, Tom and Huq, Aziz Z. (2018). "Democracy's "Near Misses". *Journal of Democracy*, 29(4), 16-30.
- Hegedűs István and Végh, István (2015). "Illiberal Democracies: What Can the European Union Do in Case a Member State Regularly and Systematically Breaches European Values and Regulations?" *Open Society Foundations*.
- Hungary Today (2019). "Orbán: Europe Can Only Be Saved by Returning to Christianity." <https://hungarytoday.hu/orban-christianity-europe-persecuted/> (Accessed 20.10.2021).
- Hoffmann, Stanley. (1966) "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe." *Daedalus*, 95 (3), 862-915.
- Hooghe, Liesbet and Marks, Gary (2019). "Grand theories of European integration in the twenty-first century", *Journal of European Public Policy*, 26(8), 1113-1133.
- Kırbaş-Canikoğlu (2017). "Venedik Komisyonu." *Ankara Barosu Dergisi*. (3). 345-350.

- Krastev, Ivan and Holmes, Stephen (2020). *The Light that Failed: Why the West is Losing the Fight for Democracy.* Pegasus Books.
- Landau, David (2013). "Abusive Constitutionalism". *U.C. Davis Law Review*, 47(1), 189-260.
- Lijphart, Arend (1999). "Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries". *New Haven CT: Yale University Press.*
- Müller, Jan Werner (2014). "Rising to the challenge of constitutional capture." <https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/> (Accessed 20.10.2021).
- Onis, Ziya and Kutlay, Mustafa (2019). "Global Shifts and the Limits of the EU's Transformative Power in the European Periphery: Comparative Perspectives from Hungary and Turkey". *Government and Opposition*, 71(2), 226-253.
- Özkan, Yusuf (2021). "AB ile Macaristan arasında 'eşçinsel karşıtı yasa' krizi büyüyor, AB Komisyonu yaptırım için harekete geçiyor". <https://www.bbc.com/turkce/haberler-dunya-57611691>(Accessed 19.10.2021).
- Pech, Laurent, Wachowiec Patryk, Mazur Dariusz (2021). "Poland's Rule of Law Breakdown: A Five Year Assessment of EU's (In)Action". *Hague Journal on the Rule of Law*, 1-43.
- Rankin, Jennifer (2011). "Orbán defends media law". <https://www.politico.eu/article/orban-defends-media-law/> (Accessed 18.10.2021).
- Ratip, Mehmet (2011). "Yeni Macar Anayasası Ne Anlatıyor? Türkiye'nin Katılımsız Bir Anayasa Yapım Sürecinden Çıkarılabileceği Dersler." *Türkiye Ekonomi Politikaları Araştırma Vakfı.*
- Rinke, Andreas (2015). "Luxembourg minister warns Poland against path to dictatorship". <https://www.reuters.com/article/poland-constitution-eu-idUKL8N14C1YC20151223> (Accessed 16.10.2021).
- Scheppele, Kim Lane (2015). "Understanding Hungary's Constitutional Revolution in Armin von Bogdandy and Pál Sonnevend, Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania". *Nomos Verlagsgesellschaft*, 111-124.
- Scheppele, Kim Lane (2014). "Legal but not Fair: Viktor Orbán's New Supermajority". <https://verfassungsblog.de/legal-but-not-fair-viktor-orbans-new-supermajority/> (Accessed 15.10.2021).
- Śledzińska-Simon, Anna (2018). "The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition". *German Law Journal*, 19(7), 1839-1870.
- Uitz, Renáta (2015). "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary". *International Journal of Constitutional Law*, 13(1), 279-300.
- Wanat, Zosia (2021). "Poland hit with record €1M daily fine in EU rule-of-law dispute." <https://www.politico.eu/article/poland-record-1-million-euros-daily-fine-eu-rule-of-law-dispute/> (Accessed 30.11.2021).