

Harmonize with cacophony!

New Member States, the EU Acquis and the
Fate of the European Tradition

Presented by Boldizsár Nagy,

at the

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Judges European Chapter

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Photo of Javier Balauz

- To keep the file small, and not to infringe copyrights I have removed two photos of Javier Balauz.
- This showed a couple sunbathing and a body lying on the sand in the background

Photo of Javier Balauz

- The photo removed from here showed four men carrying a coffin (presumably with the body seen in the background on the previous photo) and the couple playing at the sea

The structure of this talk

- Phases of the development of the Hungarian asylum system (1989-2005)
- The accession process
- The construction of a Common European Asylum Regime and its effects on the accession (new member) states
- Critical elements in the acquis and in its reception in Hungary
- Competing narratives of the past and the present
- The fate of the European tradition
Civilize? Brutalize?

Phases of the development of the Hungarian asylum system (1989-2005)

Phases of the development of the asylum system. (1989-2005)

1. Up to October 1989:

no formal rules on refugee protection
only ideological phrase in the Constitution

2. 1989-1998:

First set of rules (not Acts of Parliament) on:

Temporary and subsidiary protection developed
in practice

1993 Act on entry and stay of foreigners: detailed
non-refoulement rule;

BUT: geographic limitation – UNHCR proceeds
in case of non-European asylum seekers

3. 1998 March 1 - 2002 January 1:

New Asylum Act and implementing Government
decrees

- abolishes the geographic limitation

Phases of the development of the asylum system. (1989-2005)

- incorporates three major forms of protection:
 - * Convention status
 - * temporary protection in mass influx
 - * a weak subsidiary protection
- the restrictive techniques developed by the EU member states appear

4. 2002 January 1 - 2004 May 1:

The amended Act brings further harmonisation with the (old) *acquis* of the mid-nineties but removes subsidiary protection to the law on foreigners.

The refugee authority loses its independence, becomes part of the Office for Immigration and Nationality (of the Ministry of the Interior)

5. 2004 May 1- :

Further amendments:

Dublin II incorporated

Decision levels reduced from 4 to 2 (1 admin, 1 court review)

The accession process

- The Copenhagen European Council stated:
"membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities".
- Article 6 Maastricht Treaty:
"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law".
- Art. 7 Maastricht (and 58 of planned Constitution): sanctions in case of serious and persistent breach of Art 6 principles

Enlargement: the ten new member states

- A map showing the ten new member states in Europe appeared here.
- I removed it to reduce the file-size

Major steps of negotiations and the accession process

- 31 March 1998: negotiations start with 6 states (Cs, Cy, Et, Hu, Pl, SI)
- 15 February 2000: negotiations start with the next 6 states (Bg, Lv, Lt, Mt, Ro, Sk)
- 16 April 2003 Athens: signing of the Accession Treaty, the Act of Accession, its 18 annexes with several appendices, 10 protocols and 44 declarations (See O.J. (2003) L 236)
- 2003-2004 Interim period: active observer status in EU working parties etc.
 - Participation without a vote
 - Consultation could be asked if interests seriously affected by the rule in preparation
 - Convention and IGC, 2003 -2004: full rights

Major steps of negotiations and the accession process

- 1 May 2004 Entry into force of the Accession treaty for the ten new member states: full membership (with derogations and safeguards but not in justice and home affairs)
- 15 June 2004 Bulgaria concludes the accession negotiations
- 18 June 2004: Croatia becomes a candidate state.
Negotiations were scheduled to start on 17 March 2005, but were postponed because of the lack of Croatia's "full co-operation" with the ICTY
- 14 December 2004 Romania concludes the accession negotiations
- 17 December 2004 The European Council decides to open accession negotiations with Turkey
- 3 October 2005 Turkey and Croatia open accession negotiations with the European Union

The Transformation of Asylum In Europe

The construction of a Common European Asylum Regime and its effects on the accession (new member) states

The Transformation of Asylum In Europe

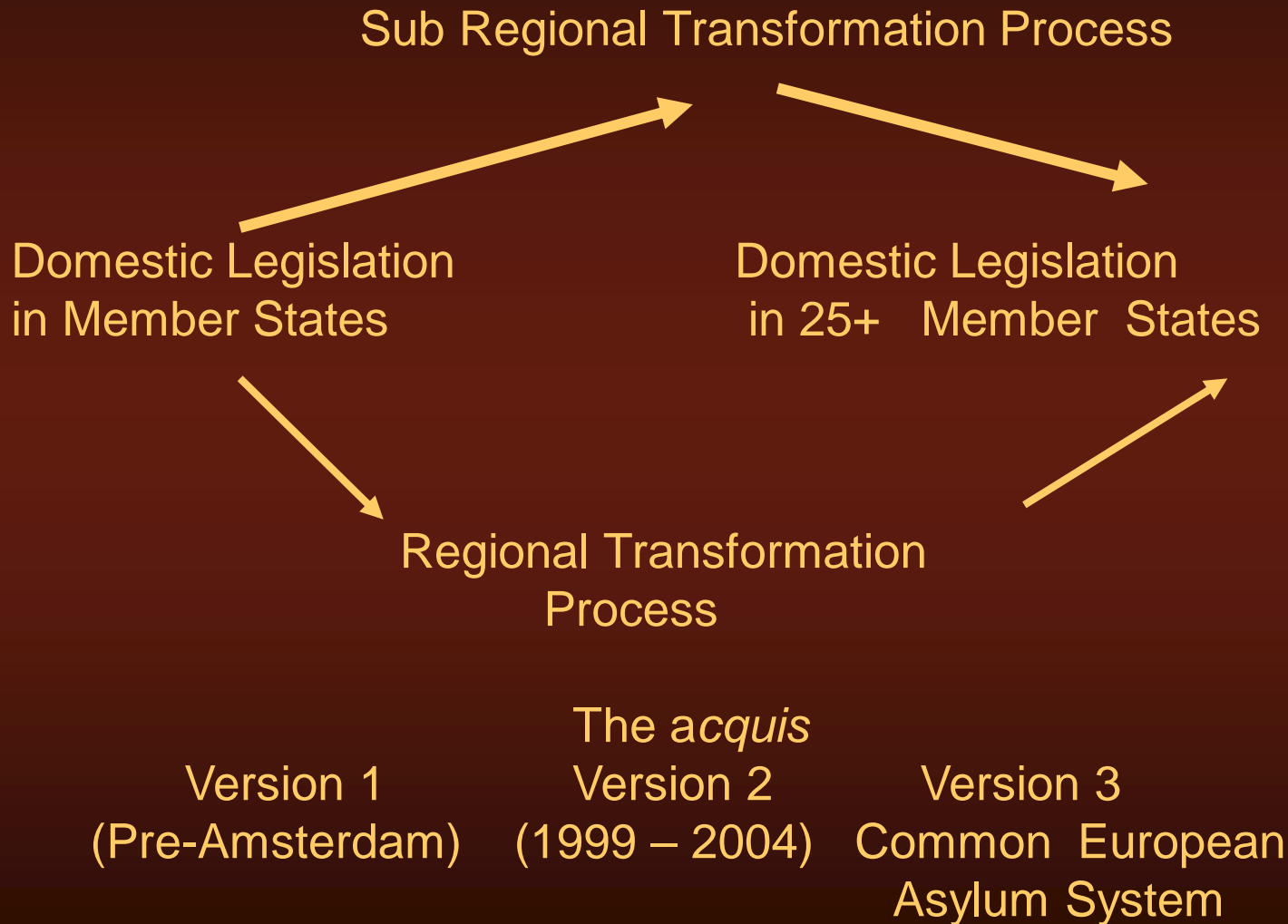
The Construction of a Common European Asylum Regime and its effects on the accession states

Stages of Transformation

- **Formative Stage**
central norms, notions and principles
conceived on the national level
- **Transformative Stage**
regionalisation of national norms and
practices
- **Reformative Stage**
regionalised legal instruments reconsidered

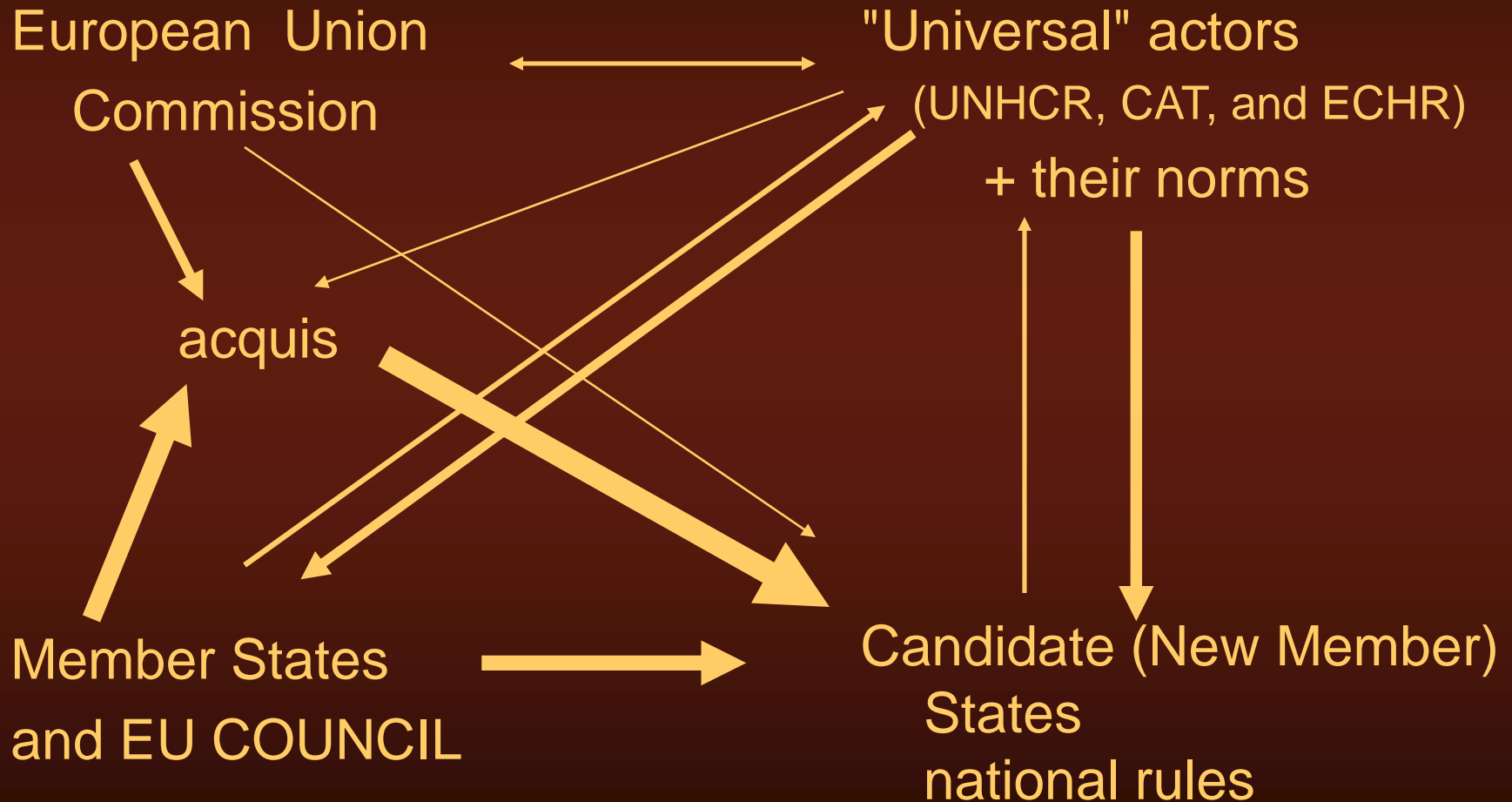
These considerations rely heavily on ideas developed by R. Byrne, G. Noll and J. Vedsted-Hansen as an outcome of our common research

Processes of Transformation



Universalism – regionalism – bilateralism

A scheme on influences in the asylum field in the accession period



The role of the new member states in the formation of the EU asylum acquis

- Until accession: the urge to submit to the EU expectations and conditions
- Transitory phase: 2003 April – 2004 May (?)
Comments on the two key directives (definition, procedure) invited, without voting rights
- After accession:
 - Majority voting after adoption of the „common rules and basic principles” of the Common European Asylum System – what alliances will form? (Border states vs. core states? The Salzburg group /A, Cs, H, Pl, Sk, Sl/)
 - Will there be a true sharing of cases or their consequences – beyond Dublin II?
 - Will the new member states reproduce the same pressure on the external neighbours as they had to endure?

Where are the CEEs heading?

Types of a (Democratic) Community

Responsibility for one's own fate

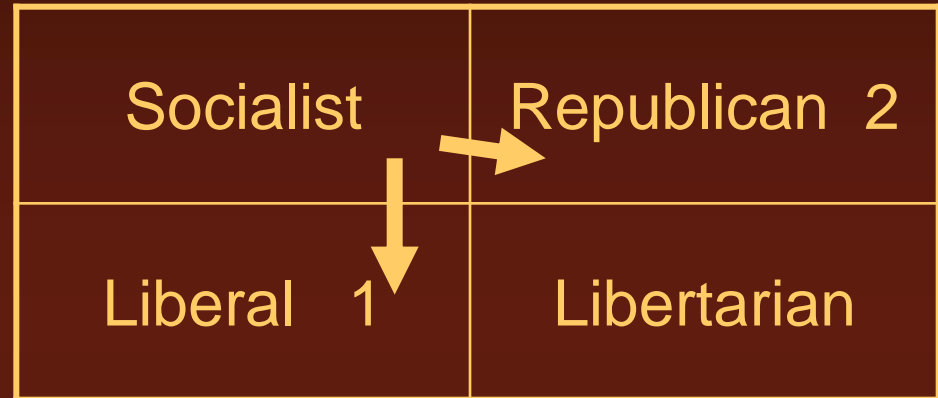
State

Self

Solidarity

Competitive

Relationship
with others



- 1: = Liberal, non-restrictive welfare state
- 2: = Nationalist, welfare chauvinist, exclusionist

*Figure adapted from and developed after
Dieter Fuchs- Hans Dieter Klingemann
Eastward Enlargement of the European
Union and the Identity of Europe, Figure 2*

Critical elements in the acquis and in its reception in Hungary

Critical elements in the present situation in the Hungarian Law – as an example

- Legal
 - Substantive law
 - Concepts, e.g.
 - Subsidiary protection
 - Safe third country
 - Detention for 12 months
 - Interpretation of terms
 - Procedural law
 - Access to lawyer
 - Appeal decision time limit (should be 30 days, was 1 year in 2004)
 - Lack of admissibility procedures (Safe third, Dublin II)
 - Repeated (subsequent) applications
- Practical
 - Disappearance of applicants
 - Lack of integration
 - Xenophobia

An example: subsidiary protection in the EU directive and in Hungarian law

• **The EU approach**

- Subsidiary protection is a full protection status intended to extend protection to further categories of persons in need of it. It is part of refugee/asylum law.

- Unless otherwise requested by the applicant the claim to subsidiary protection is investigated in a single asylum procedure.

- The guiding principle is the approximation of the rights of refugees and the rights of those enjoying subsidiary protection.

- The freedom of movement is unlimited

• **The Hungarian legislator's approach**

- Humanitarian residence permit (authorized to stay status) is the exception to be granted to those who otherwise should leave the territory. It is an aliens' law measure

- The authorised to stay status may not be requested, but is established as a side product of the refugee status determination or of the aliens' law procedure (aimed at expulsion e.g.).

- There are substantive differences in the rights, for example in the field of employment or family unification.

- The person usually has to live in a designated place and not permitted departure leads to alien policing detention.

Competing narratives of the past and the present

Competing narratives of the Hungarian past (and present)

The positive

- Effective protection was given to those fleeing from Romania, (former) Yugoslavia, *non-refoulement* is generally observed
- A comprehensive, human rights respecting and functioning legal and institutional system has emerged
- Universal standards and expectations are not rejected
- A professional ethos is developing both at the administrative and at the court level

The negative

- In the early years (1989-1998) most of those qualifying as Convention refugees had other (ill-described) forms of protection with less rights
- Fear from becoming a target country led to questionable restrictive techniques
- Incongruity in self-perception and hypocrisy prevail – there is no (political) intention to meet global responsibilities
- The gap between the EU *acquis* and the law in force has not disappeared, the harmonization is still ongoing

The Fate of the European Tradition

Civilize? Brutalize?

Harmonization – key concepts and the impact of the acquis

Civilize?

- Extended protection categories (subsidiary, temporary)
- Gender and culture sensitive procedural minimum standards
- Substantive requirements and standards on the reception of asylum seekers
- Considerable support by way of pre-accession strategy tools (Phare, etc.) and the Refugee Fund
- Solidarity with certain vulnerable groups – especially in European context
- Regional Protection Programmes – orderly resettlement schemes

Brutalize?

- A generally restrictive, exclusionist approach, based on the presumption of non-genuine claims
- Restrictive interpretation of the definitions pushing to categories with less rights
- Heavily criticized „minimum standards” of procedure
- Non-access, non-entry techniques (visas, carrier sanctions, interception, border surveillance, detention)
- Efforts to shift responsibility for status determination and care (safe third country rules, readmission agreements, processing in the region of origin, regional protection programme)

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