

# The dialectic of isolationism and engagement (solidarity)

Hungary – Visegrad countries – European Union

Presentation by

Boldizsár Nagy

2018 Harvard European Law Symposium

# Two billboards, March 2018, Hungary



For us: Hungary first!

Billboard for the candidate of the ruling FIDESZ-KDNP party, István Simicskó, Minister of Defence, for the national elections, 8 April 2018

The UN wants us to continuously receive (settle into Hungary) migrants

Hungary decides, not the UN



# Isolationism – ethnicism - engagement

## Hungary

|                                | Regular   | Irregular („illegal”)                                | Forced  |
|--------------------------------|---|--|---|
| Ideology / political discourse | „Migration is bad” Péter Szijjártó, Hungarian Minister of Foreign Affairs in the UN (HRC) | Securitization<br>We protect Europe<br>Crimmigration | Securitization and denial<br>They are „illegal immigrants”<br>Resisting relocation and resettlement |
| Practice                       | Settlement bond<br>Ethnic preference<br>Large scale emigration from Hungary               | Hardly any removal                                   | Barring access to territory ,<br>obstructing access to protection,<br>constant detention            |

## Visegrad four (Czech Republic, Hungary, Poland, Slovakia)

|                                | Regular   | Irregular                                   | Forced  |
|--------------------------------|---|---|---|
| Ideology / political discourse | EU mobility: welcome  | Emphasis on „defending” the external border | Resisting relocation and resettlement<br>Slovakia, Poland: religious preference |
| Practice                       | Czech Republic:<br>ethnicisation after separation from Czechoslovakia | Hardly any removal                          | Poland: access for Ukrainians as if they were regular migrants                  |

## The European Union

|                                | Regular   | Irregular   | Forced  |
|--------------------------------|---|---|---|
| Ideology / political discourse | EU’s core principle – full openness for EU+ citizens<br>Global regular migration beneficial | Voluntary departure preferred<br>Need for more effective removals                 | Ad hoc and permanent relocation (responsibility sharing).<br>Resettlement of 50 000             |
| Practice                       | Family unification and competition for qualified workforce from 3rd countries               | Efforts to prevent access to territory<br>Restoration of internal border controls | Germany, Sweden, Austria left alone<br>Hypocritical efforts for externalisation (Turkey, Libya) |

Conceptual frame:  
Securitisation, Majority identitarian populism, and  
Crimmigration

## Securitization

Securitization refers to a set of **speech acts** and practices which posit a phenomenon or **process as threatening the well-being of the society** and calls for **extraordinary reaction** on behalf of the **securitizing agent**, most frequently entailing the demand to **set aside the normal** functioning of the legal system and its guarantees, as 'extraordinary challenges require **exceptional responses**'.

# Conceptual frame: Securitisation, Majority identitarian populism, and Crimmigration

## Majority identitarian populism

“Majority identitarian populists claim to speak for what they see as the (current) majority group”. The populist actor distances herself/himself from an elite, which may be presented as conspiring against the people. Politicians may be presented as being complicit „in mass immigration or European integration or both (depending on the nature of the Other)”\*

\* Quotes from: G. Lazaridis & A. M. Konsta, *Identitarian Populism: Securitization of Migration and the Far Right in Times of Economic Crisis in Greece and the UK*, in *THE SECURITISATION OF MIGRATION IN THE EU: DEBATES SINCE 9/11* (G. Lazaridis & W. Khursheed eds., 2015) p. 186

# Conceptual frame: Securitisation, Majority identitarian populism, and Crimmigration

## Crimmigration

Immigration is no longer seen as a purely a civil or administrative law matter. Ever more criminal law measures are applied to migrants solely because they circumvented immigration rules and border controls. These kinds of criminal sanctions have no element of rehabilitation, of preparing the “criminal” for participation in the society the rules of which she may have violated. Instead criminalization of immigration related acts solely serves the purpose of deterrence and retribution.

# WHAT DOES HUNGARY DO INSTEAD OF PROTECTING THE REFUGEES?

**1.**  
**IT IS IN DENIAL**

**2.**  
**DETERS**

**3.**  
**OBSTRUCTS**

**4.**  
**PUNISHES**

**5.**  
**FREE RIDES**  
**Denies solidarity**

**7.**  
**ENGENDERS HATRED**

**6.**  
**BREACHES EU AND DOMESTIC LAW**

## Diversity within the V4

|  | Hungary                       | Poland                        | Czech Republic                      | Slovakia             |
|--|-------------------------------|-------------------------------|-------------------------------------|----------------------|
| Rule of Law procedure / Article 7 procedure          | In preparation                | Started                       | Not an issue                        | Not an issue         |
| Rhetoric on EU                                       | Anti EU                       | Anti EU                       | Mixed (Babiš, Zeman)                | Pro EU               |
| „Core EU”<br>Euro                                    | Hesitant, not in close future | Hesitant, not in close future | In favour willing to adopt the euro | In favour already in |
| Attitude towards Russia                              | Very pro-Russian government   | Anti Russian government       | Distanced (but: Zeman)              | Distanced            |
| Attitude towards Germany                             | Distanced, negative           | Negative                      | Positive                            | Positive             |
| Posted workers directive amendment – vote in Council | Against                       | Against                       | For                                 | For                  |



# Diversity within the V4

|   | Hungary                     | Poland  | Czech Republic               | Slovakia                    |
|---|-----------------------------|---|------------------------------|-----------------------------|
| <b>Compulsory emergency relocation (2015)</b>         |                             |   |                              |                             |
| <b>Decision</b>                                       | Against                     | In favour   | Against                      | Against                     |
| <b>CJEU procedure</b>                                 | Suing Council for annulment | Intervening for annulment (after government change) | Refraining from intervention | Suing Council for annulment |
| <b>Persons relocated</b>                              | 0                           | 0   | 12                           | 16                          |
| <b>Infringement proc. against the country started</b> | Yes                         | Yes   | Yes                          | No                          |

# Solidarity/Engagement

## Intra EU

### „Old tools”

- Temporary protection (voluntary responsibility sharing)
- Asylum Migration and Integration Fund
- European Asylum Support Agency (EASO)

### „New tools”

- Hotspots
- Emergency relocation (40+120 thousand planned, approx. 34 thousand actually relocated)

## With third states/refugees

### „Old tools”

- Capacity building
- Bilateral resettlement of refugees

### „New tools”

- EU **resettlement program** (20 + 50 thousand refugees)
- „Evacuations” from Libya
- **Funding**
  - Facility for refugees in Turkey (3 billion euros)
  - EU Regional Trust Fund in **Response to the Syrian Crisis**
  - **Emergency Trust Fund for stability** and addressing **the root causes** of irregular migration and displaced persons **in Africa.**

# Isolation

## Intra EU

### „Old tool“

- Dublin system

### „New Tools“

- Hotspots
- Enhanced external border controls
- Restoration of border controls at internal Schengen borders
- Barriers / fences built

## From third states / the refugees

### „Old tools“

- Visa
- Carrier sanctions
- Safe third countries
- Return agreements

### „New tools“

- Interception at sea
- Turkey – EU statement (16 March 2016)
- Externalisation techniques (Libya!) + „assisted voluntary returns“ from Libya
- EBCG involved in Albania (in the future in Serbia and Macedonia)

# THE PROPOSED CHANGES AFFECTING INTER-STATE SOLIDARITY IN DUBLIN IV.

- In take back situations – only notification – no request – duty to take back. (Responsibility does not expire with time)
- Chapter VII: **Corrective allocation mechanism**
  - Disproportionate number of applications (after eligibility)
  - Exceeds **150 %** of reference key (including resettled refugees)
  - **Reference key** = total of application in EU – share by MS based on
    - **population size**
    - **total GDP**

} 50 -50 % weight

If unwilling to participate **250 000 Euros/per each applicant**,  
who would have been allocated

Automated system

## THE PROPOSED CHANGES AFFECTING INTER-STATE SOLIDARITY IN DUBLIN IV.

– EUROPEAN PARLIAMENT'S RESPONSE (214 PROPOSALS FOR AMENDMENT)

- **Eliminate external border**, waived visa and presence in transit zone as facts establishing responsibility for status determination.  
(Allocation criteria)
- **Not based on exceeding 150%** of the reference key – not corrective but **fundamental allocation system**
- **New allocation criteria**
  - Any family member legally residing to unite with (not only refugee)
  - Academic qualification acquired in the Member State
- **Allocation** of asylum seekers – **from the outset**
- **Choice of four countries**
- **Groups, max 30** may wish to move together

**CONCLUSION**

**DEMISE OR  
SOLIDARITY**

## SUMMARY ON INTRA EU SOLIDARITY

- The very **large number of arrivals** in the form of a mixed flow in 2015-2017 constituted a **major challenge**.
- Several member States (Greece, Hungary, Croatia, Slovenia, Austria) **breach the EU law** for long periods and in respect of hundreds of thousands of persons.
- **Germany may not be expected** to provide **protection** for all in need and **return** those, who do not need it
- It is **unrealistic and morally untenable** to expect the non-EU states (Turkey, Lebanon, Jordan, Macedonia, Serbia etc.) to contribute more in the way of „retaining” the refugees in the region.
- **Intra-EU solidarity is minimal**, neither an agreed intra EU relocation rule exists nor does the Dublin III regulation address effectively the real problems of periphery states exposed to large pressures. Negotiations on a corrective allocation mechanism (within Dublin IV) progress minimally
- Instead, the EU tries to **shift the responsibility** and the burden **to third countries**, primarily Libya
- Unless an **EU – wide response** emerges the system (Dublin and Schengen) will collapse

GEOGRAPHIC PROXIMITY IS MORALLY IRRELEVANT – THEN  
WHO SHOULD PROVIDE THE PUBLIC GOOD OF PROTECTION  
GLOBALLY AND REGIONALLY?

Why would Lebanon be more obliged to protect Syrian refugees  
(or Iran to protect Afghanis, or Kenya Somalis, etc.) than Italy,  
Germany or Finland?

Protection globally is a public good to which every member state  
of the global community should contribute. Free riding is  
immoral and antisocial



# Demise or solidarity

## EU at present

### Increases coercive tools

(keeping out, penalizing for entry, detaining, transferring between countries by force = more of the policy which did not work

Pursues externalisation

Struggles with finding a principle for (flexible) solidarity

## EU should „Sollen“

See itself as a unified protection space

Introduce significant resettlement quotas and/or humanitarian visas

Contribute more to stopping the crises in the countries of origin

Open up wider routes of regular immigration

Effectively remove those without the right to stay

„Deterrence paradigm“  
Gammeltoft-Hansen and Tan

## (SOME) AVAILABLE OPTIONS

Decision making on asylum requests at the European level by EU agencies, on behalf of the EU (K. Hailbronner, G Goodwin-Gill)

Decision making at national level under national law, but with the active and intensive participation of EU staff (Heijer, Rijpma, Spijkerboer)

Conceivable arrangement: asylum seekers choose their country of preference which conducts the RSD. All costs associated with the reception, the procedure, the integration or the removal are aggregated and redistributed across the EU

# New York v. Valetta

OUTCOME DOCUMENT FOR 19 SEPTEMBER 2016 HIGH-LEVEL MEETING TO ADDRESS LARGE MOVEMENTS OF REFUGEES AND MIGRANTS

The New York Declaration, 19 September 2016

*The word „illegal” does not appear*

„4.5 We underline the **centrality of international cooperation** to the refugee protection regime. We **recognize the burdens** that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, **we commit to a more equitable sharing of the burden and responsibility** for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States.”

Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017

*The words „refugee”, „asylum” do not appear*

Priorities:

- a) Training and equipping Libyan border guard
- b) Disrupting smugglers' models and routes
- c) Enhancing resilience of local communities
- d) Reception capacities and conditions in Libya
- e) Support for IOM for voluntary returns
- f) Info campaigns in Libya and countries of origin
- g) Enhancing Libya's land border protection with neighbours
- h) Surveilling alternative routes
- i) Supporting Italy- Libya bilateral deals
- j) Dialogue and cooperation with Libya's neighbours on preventing departure and managing returns

# Boldizsár Nagy's pertinent publications

~ Hungary's hypocritical migration policy Heinrich Böll Foundation 29 May 2015

<https://www.boell.de/en/2015/05/29/hungarys-hypocritical-migration-policy>

~ Parallel realities: refugees seeking asylum in Europe and Hungary's reaction EU Immigration and Asylum Law and Policy 4 November 2015 <http://eumigrationlawblog.eu/parallel-realities-refugees-seeking-asylum-in-europe-and-hungarys-reaction/>

~ (With Kees Groenendijk) *Hungary's appeal against relocation to the CJEU: upfront attack or rear guard battle?* EU Immigration and Asylum Law and Policy 16 December 2015 <http://eumigrationlawblog.eu>

~ Hungarian Asylum Law and Policy in 2015-2016. Securitization Instead of Loyal Cooperation *German Law Journal* Vol. 17, (2016) No. 6, pp. 1032 – 1081;

~ The aftermath of an invalid referendum on relocation of asylum seekers: a constitutional amendment in Hungary Blog: EU Immigration and Asylum Law and Policy, published on 10 November 2016. <http://eumigrationlawblog.eu/the-aftermath-of-an-invalid-referendum/>

~ *Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees* Gobal Turkey in Europe Working Paper 17, May 2017 Italian Institute of International Affairs 20 p. [http://www.iai.it/sites/default/files/gte\\_wp\\_17.pdf](http://www.iai.it/sites/default/files/gte_wp_17.pdf)

~ *Restricting access to asylum and contempt of courts: Illiberals at work in Hungary* Blog: EU Immigration and Asylum Law and Policy, published on 18 September 2017 <http://eumigrationlawblog.eu/restricting-access-to-asylum-and-contempt-of-courts-illiberals-at-work-in-hungary/>

~ Renegade in the club. Hungary's resistance to EU efforts in the asylum field. *Osteuroparecht, Fragen zur Rechtsentwicklung in Mittel- und Osteuropa sowie den GUS-Staaten* 63. Jahrgang, Heft 4|2017 „Rechtsdurchsetzung durch die EU“ pp. 413 – 427

~ (with the contribution of Pál Sonnevend): Kein Asyl, keine Solidarität. Ungarns Asylrecht und Asylpolitik in 2015-2017. In: Fruzsina Molnár Gábor (ed.) Darák, Péter; Kube, Hanno Molnár-Gábor, Fruzsina; Reimer, Ekkehart Hrsg.), *Freiheit und Verantwortung: Grund- und Menschenrechte im Wandel der Zeit in Ungarn und in Deutschland* (Heidelberg, Universitätsverlag Winter, 2018) pp 145 – 177

~ und Pál Sonnevend: Das Asylrecht als Mittel der Isolation – das Beispiel Ungarns in: *Enzyklopedie des Europarechts, Nomos, Forthcoming*

~ From Reluctance to Total Denial. Asylum Policy in Hungary 2015-2018 in Vladislava Stoyanova and Eleni Karageorgiou (eds) *he New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis*, Brill, Forthcoming

# **THANKS!**

**BOLDIZSÁR NAGY**

**E-mail: nagyb at ceu.edu**

**CEU**

**Budapest, 1051**

**Nádor u. 9.**

**Tel.: +36 1 242 6313,**

„Government info” –billboards on th streets in Hungary, April 2018

