

OTHERING THE ASYLUM SEEKER, MAIMING THE
SELF.

HOW HUNGARY DESTROYS THE RULE OF LAW WHILE
SECURITISING THE ASYLUM SEEKERS' ARRIVAL

Presentation by

Boldizsár Nagy at the LSA 2021 Annual Meeting „Crisis,
Healing & Re-Imagining”

„Chicago”

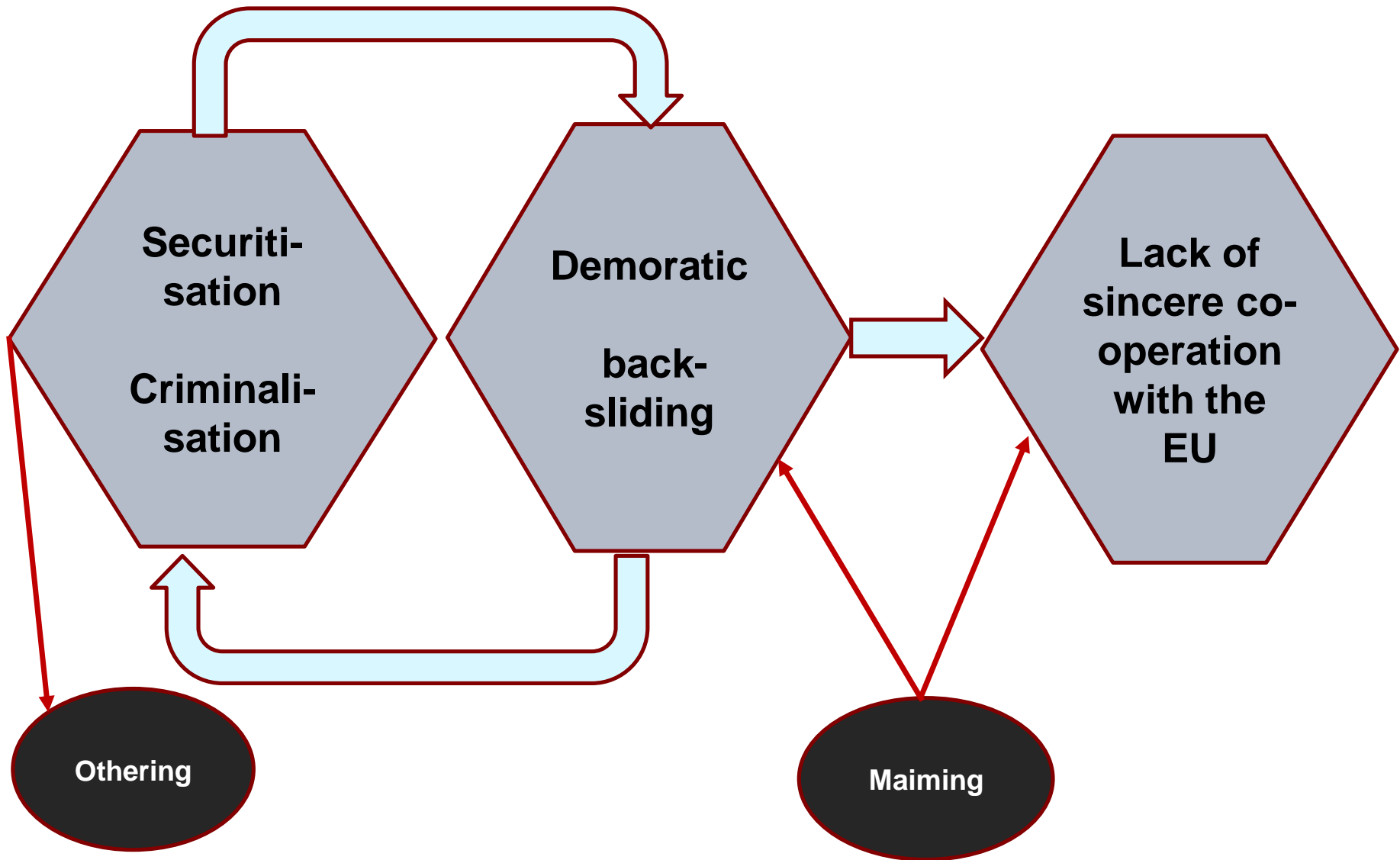
in the panel: Who is the Crimmigrant Other? Cross-National
Conversations on Border Criminology

A Katja Franko quote for a start

„The border has become a site of symbolic politics and an opportunity to wow electorate with promises of firmness, security and protection”

K.F. : The Crimmigrant Other. Migration and Penal Power, Routledge, 2020, p. 43

THREE TRENDS



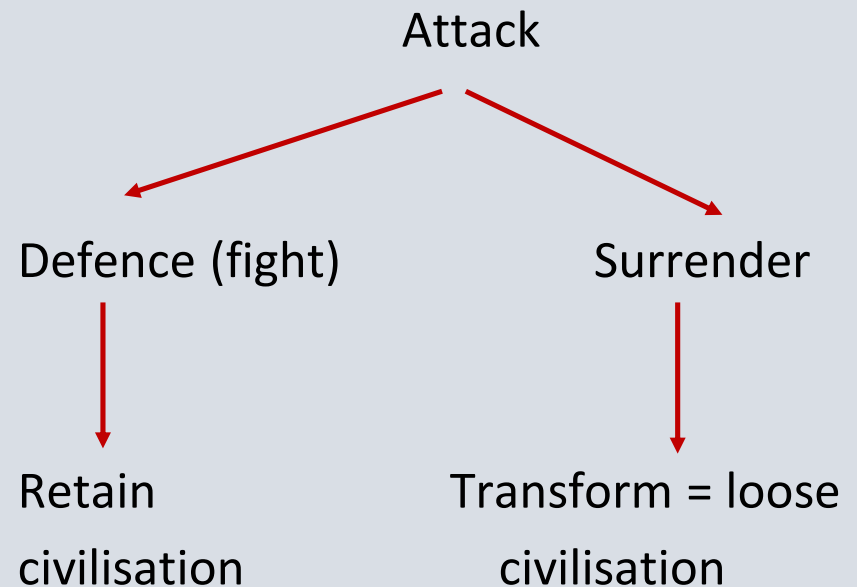
Setting the scene – The Prime Minister (Orbán) in
„To answer our calling – on the V4’s thirtieth birthday”
February 17, 2021

<http://abouthungary.hu/speeches-and-remarks/to-answer-our-calling-on-the-v4s-thirtieth-birthday/>

„...the waves of people crossing the Mediterranean are now pushing the tide towards us, and these waves could reach all the way to Scandinavia. The masses of migrants now appearing are, in fact, part of the waves of those longing for European life, against whom our ancestors always sought to defend themselves with all their might. Not to defend oneself is de facto surrender, and its consequence will be complete civilisational transformation...”

Dehumanising language of „waves”
„tide” „masses of migrants”

Securitising, othering (and Schmittian) language use:



**The gradual loss of the rule of law
(Democratic backsliding)**

Three elections 2010, 2014, 2018

How the electoral system transforms (relative) majority
Results of the Fidesz/KDNP coalition

	2010	2014	2018
% of all votes in the list voting	52,73	44,87	49,27
% of parliamentary seats	67.88	66,83	66,83
		Source: Data of the National Election Office, compiled by BN https://www.valasztas.hu/web/national-election-office (20210219)	

Democratic backsliding - dismantling the rule of law

Major stations

2011

New Constitution (Fundamental law) without national consultation - adopted only by the majority votes.

Curtailment of the powers of the Constitutional Court.

One round elections in individual districts + gerrymandering

2015

Dramatic **curtailment of asylum seekers rights** – **detention** in transit zones – **crisis situation** caused by mass migration

2016

By April the Constitutional **Court only has judges chosen by the Fidesz majority** – all appointed for 12 years

2017

Law on **Transparency of Organisations Receiving Support from Abroad** - stigmatising foreign funding. Replaced by another vexatious law in 2021 due to ECJ judgment in the case C-78/18

2018

Criminalising assistance to irregular migrants

Taxing activities presenting migration in positive light

2020-
2021

Extensive use of „situation of danger“ - a special legal order – governing by decrees even in matters unrelated to pandemia

Continuous practice

- **Writing into the Constitution what was declared earlier as unconstitutional** – thereby making it exempt from Constitutional Court review
- **The extensive use of cardinal laws** enabling the current government, which enjoys the support of a qualified majority, **to set in stone political choices.**
- **The use of the individual members' bills procedure** lacks the guarantees of ensuring meaningful social debate and consultation,
- **Election financing** – tilted field. Government spends a lot on propaganda

Backsliding in figures

	Freedom House		Bertelsman Transformation Index/Democracy		WJP Rule of law	
	2015	2020	2014	2020	2015	2020
Hungary	82 Free	70 Partly free	8,0 Defective	6.8 Defective	0,58	0,53
Czech Rep.	95 Free	91 Free	9,6 In consolidation	9,4 In consolidat ion	0,72	0,73
Poland	93 Free	84 Free	9,4 In consolidation	8,0 Defective	0,71	0,66
Slovakia	90 Free	88 Free	9,1 In consolidation	8,7 In consolidat ion	n.a.	n.a.

The elimination of asylum and accompanying measures

WHAT DOES/DID HUNGARY DO INSTEAD OF PROTECTING THE REFUGEES?

1.
IT IS IN DENIAL

2.
DETERS

3.
OBSTRUCTS

4.
PUNISHES

5.
FREE RIDES
Denies solidarity

6.
BREACHES
INTERNATIONAL,
EU AND
DOMESTIC LAW

7.
ENGENDERS
HATRED

DETERRENCE

- The **fence at the borders of Hungary and Serbia and Croatia** (the Western Balkan route) completed on 15 September and 15 October, 2015 - In fact only diverted the route.
 - **Four** different legal **forms of detention** applied
 - **Starving asylum seekers** denied protection at first instance (suspended after repeated ECtHR interventions) 2018
-
- **Stigmatising the civil sector** (NGOs) Obligation to register as such and indicate on every publication that the NGO is an „**organisation receiving foreign funding**” (2017)
 - **Immigration tax** (Since 2018) of an immigration supporting activity „that is directly or indirectly aimed at promoting immigration (the permanent relocation of people from their country of residence to another country” (excluding persons enjoying EU rights)
 - a) **media campaigns** and media seminars and participating in such activities;
 - b) **organising education**;
 - c) building and operating **networks** or
 - d) propaganda activities that **portray immigration in a positive light.**

PUNISHMENT

■ Criminalising

- the **crossing of the fence** and assisting it (crime since 2015)
- „**Aiding and abetting illegal immigration**” (crime since 2018)

a new crime beyond the already existing human smuggling and assisting illegal residence - seriously **condemned by the Venice Commission and OSCE**
Venice Commission [Opinion 919/2018 - CDL-AD\(2018\)013](#)

- **Extending the crime of human smuggling** to acts purely within the country (since 2015)
- **Banning everyone from within 8 kilometres of the Schengen external border** – including inhabitants, if guilty in aiding and abetting illegal immigration (since 2018)

BREACHES OF LAW

- International law:
 - **Articles 31 and 33 of the Geneva Convention** relating to the Status of Refugees (No punishment for irregular entry, non-refoulement)
 - **Article 3** (Inhuman treatment) and **Article 5** (rules on detention) of the European Convention of Human Rights E.g. Case of *R.R. and others v. Hungary* (Application no. 36037/17), Judgment of 21 March 2021

EU law:

Infringement procedures in asylum related matters

Decided cases

- C-808/18. Started in 2015, extended in 2017: **procedural matters, reception conditions, rules on return** - Grand Chamber Judgment of **18 December 2020. Breaches:**
 - applications for international protection may be made only in the transit zones. Too few are admitted -= **no access to territory and procedures**
 - the **systematic detention** of applicants – illegal according to the Procedures Directive and the Reception Conditions Directive
 - **removal of all third-country nationals** „staying illegally” in Hungary – contrary to the Return directive
 - Denial of clear **right to stay during appeal** is in breach of the Procedures Directive

BREACHES OF LAW

- Joined Cases C-715/17, C-718/17 and C-719/17 Non performance of the **relocation** decisions. Judgment of **2 April 2020: Hungary breached** Council Decision (EU) 2015/1601 of 22 September 2015 **by not relocating asylum seekers from Italy and Greece**
- C- 78/18 Started in 2017. Hungarian law on **foreign-funded NGOs** – Judgment of the Grand Chamber **18 June 2020: „discriminatory and unjustified restrictions on foreign donations”** in breach of Article 63 TFEU (freedom of movement of capital) and of the Charter of Fundamental Rights (respect for private and family life, right to the protection of personal data, and to freedom of association)
Art 260 TFEU procedure started – formal notice 18 February 2021
Pending infringement cases
- C-821/19 Started in 2018, went to Court in November **2019 adding a new ground of inadmissibility** of asylum applications is contrary to the Procedures Directive, **criminalising assistance to refugees („aiding illegal immigration”)** violates the Procedures Directive and the Reception Conditions Directive
Hearing took place on 23 November 2020, AG opinion expected 25 February 2021

BREACHES OF LAW

- 2019 July 25 - Formal Notice „the detention conditions in the Hungarian transit zones, in particular **the withholding of food**, do not respect the material conditions set out in the Return Directive and the Charter of Fundamental Rights of the European Union”
- 2020 October 30 – Formal notice, 2021 February 18 – reasoned opinion: the **Covid-19 asylum system** requiring „**declaration of intent**” in **Belgrade or Kyiv** breaches the Procedures Directive and the Charter as it is a denial of access to asylum procedure
- **2020** December 3 - Formal Notice: exemptions from **public procurement** rules provided under **the state of crises caused by mass immigration** are illegal

Domestic law

- **Freedom of expression** rules, **privacy rules**, **illegal extension of the crisis situation caused by mass immigration**, curtailing **procedural rights and rights of the child**

Reflections, seeking interpretations

Othering the asylum seekers and their helpers

Asylum seekers and other migrants

1. **Eliminating the term refugee**/asylum seeker = excluding identification (through the Hungarian refugees of 1956 and before and after) – only the migrant, the „alien” appears in official discourse starting in 2015
2. That alien is **targeted by a securitising language**
She/he is **a threat** (terrorism, culture and religion, economy, health)
3. Subjected to various migration-related **punitive measures (criminalising the crossing of the fence) and detention**
4. Since 2017 and more so since 2020 she/he is **physically excluded**:
all irregular migrants (whether asylum seekers or not) are simply **coerced into Serbia** through the fence. Until 2020 monthly 50 could apply for asylum in the transit zone. That ended after the ECJ judgment in Joined cases C-924/19 PPU and Case C 925/19 PPU (*FMS and others v Hungary*) under the pretext of the pandemic.

Now the only access is via the submission a „declaration of intent” in Belgrade or Kyiv

Othering those who assist asylum seekers (and other migrants) 1. Foreign funding

ECJ Grand Chamber
C-78/18 , 2020, § 93
„Hungary seems to have based the Transparency Law **not on the existence of a genuine threat** [of public policy or public security] **but on a presumption made on principle and indiscriminately that financial support that is sent from other Member States or third countries and the civil society organisations receiving such financial support are liable to lead to such a threat.**”

Orbán on 19 June 2020 **reacting to the ECJ** „Well, in **Western Europe** what we see is ... **liberal imperialism....**
. This is clearly illustrated **by some court rulings**. And after **seeing the identities of the Hungarians who are also involved** in such international rulings, **especially those on human rights issues**, we can very easily **find a link with Soros’s international network** – which forms the Western European headquarters for this liberal imperialism.”

Source: <https://miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-good-morning-hungary-19/>

Otherring those who assist asylum seekers (and other migrants) 2. Criminalising assistance

Section 353/A (of the Hungarian Criminal Code = Act C of 2012 as amended)

(1) Any person who is engaged in the pursuit of **organizational activities:**

a) with a view to **initiating an asylum procedure in Hungary on behalf of a person who is not subject to persecution ... ; or**

b) **with a view to obtain the right of residence for a person who entered or resides in the territory of Hungary illegally,**

According to the **Law on the police** all persons charged with the above crime can be excluded from an **eight kilometres wide border zone.**

OPINION OF **ADVOCATE GENERAL RANTOS**

delivered on **25 February 2021**

The Criminal Code is in breach of the Procedures Directive (Directive 2013/32) and the Reception Conditions Directive (Directive 2013/33) as it **unduly limits the right of the asylum seeker to access to information and assistance**

and

the right of the civil society organisations and individuals to provide it

Othering those who assist, 3 and 4

The punitive „immigration tax” Taxable activities include media campaigns, coalition- and network-building, and advocacy activities that **directly or indirectly portray immigration in a positive light**. The tax is **25 percent** and donors have to pay or in lieu of them the beneficiary.

For a condemnation by of the tax see joint opinion of the Criminal Venice Commission and ODIHIR , 2018 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)035-e#:~:text=37.,carries%20out%20immigration%2Dsupporting%20activity](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e#:~:text=37.,carries%20out%20immigration%2Dsupporting%20activity)

Endemic hate speech fuelled by government officials and reinforced by social media

Maiming the self

Wounds (self-harm)

- 1) Hiding our own **refugee past**
- 2) **Denying genuine membership** in the society of those who are **supportive of the migrants**
- 3) By **forcing the „Newspeak“** and stifling discontent **excluding rational political debate** – engendering contagious hatred and division
- 4) **Creating a deportation regime haunted** not by colonialism (K.F. 17) but **by socialism**
- 5) Undermining the **rule of law and constitutional democracy**
- 6) **Threatening our membership in the EU**
- 7) The **brutality** against the needy **transforms us into beasts**

Summary

- A functioning asylum system had to be sacrificed and migration had to be presented by Orbán and his party as a threat, in order to perpetuate a crisis situation that calls for the leader with extraordinary capabilities to protect his people.
- In exchange for „protection” people had to offer blind trust and exceptional empowerment that became exacerbated by the pandemic.
- Rational political discourse, the democratic state and the rule of law are being dismantled
- The minority of the voters wanted that, but due to the electoral system a large majority of members of parliament is willing to maintain it, in exchange for the goodwill (and rewards) offered by their (party) leader.

Minimal hints

EU documents

„Tavares report” (2013) P7_TA(2013)0315 Situation of fundamental rights: standards and practices in Hungary
European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary
„Sargentini Report” (2018) P8_TA(2018)0340 The situation in Hungary European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))
Rule of Law report, (2020) 2020 Rule of Law Report Country Chapter on the rule of law situation in Hungary Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, 30 September 2020, SWD(2020) 316 final

Academic

Körösényi, A. (2018). The Theory and Practice of Plebiscitary Leadership: Weber and the Orbán regime. *East European Politics and Societies: And Cultures*, 33(2), 280–301. <https://doi.org/10.1177/0888325418796929>
Körösényi, A., Illés, G., & Gyulai, A. (2020). *The Orbán Regime: Plebiscitary Leader Democracy in the Making*. Routledge. 2020
Nagy, B. (2016). Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation. *German Law Journal*, 17(6), 1033–1082. <https://doi.org/10.1017/s2071832200021581>

Further talks and publications at: www.nagyboldizsar.hu

Papp, A. L. (2018) *Democratic Decline in Hungary, Law and Society in an Illiberal Democracy*’ Routledge
Scheppelle, K.L.; Kochenov, D. V., Grabowska-Moroz, B. EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union in: *Yearbook of European Law*, (2021), pp. 1–121., doi:10.1093/yel/yeaa012
Weiler, J, (2020) Orbán and the Self-Asphyxiation of Democracy EJILTalk!, 4 August 2020, <https://www.ejiltalk.org/orban-and-the-self-asphyxiation-of-democracy/>

Other

Jávör, B (2017) A brief summary of the developments in Hungary since April 2010 which are relevant to ascertaining whether there is a “systemic threat” to the rule of law (Memo to Commissioner Timmermanns) https://javorbenedek.hu/wp-content/uploads/2017/05/letter_to_vice-president_timmermans_04052017_annex.pdf

THANKS!

BOLDIZSÁR NAGY
Central European University
Budapest/Vienna
www.nagyboldizsar.hu
E-mail: [nagyboldi100 at ceu.edu](mailto:nagyboldi100@ceu.edu)