

ROLLING BACK THE RULE OF LAW

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HUNGARIAN BORDER POLICY

AND PRACTICE

Presentation by
Boldizsár Nagy at the
international conference:

Borderline decisions

University of Lucerne,

9 March 2017

„I urge you, Secretary-General, to initiate negotiations on sharing this burden at a global level. All major stakeholders of international politics will have to take some of the migrants to their countries as part of a global quota system.”

*Statement by H.E. Mr. Viktor Orbán Prime Minister of Hungary
at the High Level Side Event on “Strengthening cooperation on migration and refugee movements
in the perspective of the new development agenda” 30 September 2015 United Nations*

New York at

http://un.newyork.gov.hu/accessibility/download/5/02/21000/Statement_of_Viktor_Orb%C3%A1n_High-Level_Meeting_on_Migration.pdf (20170208)

Motto No. 2

*„First of all, I find it very important that **we should preserve our ethnic homogeneity**. ... life has confirmed that too much mixing causes trouble. ...I'm convinced that if we maintain ethnic homogeneity, and if we can **keep cultural diversity within certain limits of cultural homogeneity**, that will enhance the value of Hungary as a place.”*

Prime Minister Viktor Orbán's speech at the Hungarian Chamber of Commerce and Industry's ceremony to mark the start of the 2017 business year

Motto No. 3

„First **they were hitting us all in the group**, after they started doing it individually. ... They didn't even bother to see who was older and who was younger, they just started hitting us right away. There was one man. ... **They grabbed him and smashed his head against the ground breaking his teeth. Blood was coming out of his ears and from his nose.** His mouth was cut where the teeth broke. **When they dropped us in Serbia he was done**, he couldn't move. He just lied down on the ground. We carried him to the Horgos transit zone and they let him stay the night there.”

Migsaw: Testimony #3 – The Helicopter.

19/2/2017 at <http://www.migsaw.com/border-violence/testimony-3-the-helicopter> (20170305)

THE ORDERS OF MAGNITUDE (STATISTICS)

APPLICATIONS AND RECOGNITIONS IN HUNGARY

Year	Applicant	Recognised as refugee	Subsidiary protection	Non-refoulement
2000	7 801	197	–	680
2001	9 554	174	–	290
2002	6 412	104	–	1 304
2003	2 401	178	–	772
2004	1 600	149	–	177
2005	1 609	97	–	95
2006	2 117	99	–	99
2007	3 419	169	–	83
2008	3 118	160	88	42
2009	4 672	177	64	156
2010	2 104	83	132	58
2011	1 693	52	139	14
2012	2 157	87	328	47
2013	18 900	198	217	4
2014	42 777	240	236	7
2015	177 135	146	356	6
2000–2015 Total	287 469	2 310	1 560	3 834

ARRIVALS, COUNTRIES OF ORIGIN, HUNGARY, 2016

Citizenship	2016
Afghan	11 052
Syrian	4 979
Pakistani	3 873
Iraqi	3 452
Iranian	1 286
Moroccan	1 033
Algerian	710
Turkish	425
Somali	331
Bangladeshi	279
Kosovar	135
other	1 877
Total	29 432

Source:
Immigration and
Asylum Office:
Booklet on Statistics
http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en
20170305)

HUNGARIAN DECISIONS 2015-2016

	2015	2016
Total number of applicants	177 135	29 432
Refugee Status	146	154
Subsidiary Protection	356	271
Non-refoulement	6	7
Termination of procedure	152 260	49 479
Rejection	2 917	4 675
Pending Cases (on December 31 of present year)	36 694	3 413

8 125
persons not
accounted
for!

Source:

Immigration and Asylum Office:: Booklet on Statistics

http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en 20170305)

THE THEORETICAL FRAME

**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.

**NON-ACCESS PRACTICES AND
EXCEPTIONAL MEASURES IN A
SECURITISING CONTEXT**

NON-ACCESS PRACTICES AND EXCEPTIONAL MEASURES IN A SECURITISING CONTEXT - OVERVIEW

NON-ACCESS TO THE TERRITORY

- Building a fence (two fences)
- The relocation of control beyond Hungary and inside Hungary
- Punishment of the irregular crossing
- The fiction of not having entered Hungary while in the transit zone

NON-ACCESS TO THE PROCEDURE

- Safe third country and safe country of origin rules

EXCEPTIONAL MEASURES

- Transit zones, border procedure
- Crisis situation in mass influx and the the planned detention of every asylum-seeker

NON-ACCESS TO THE TERRITORY

The fences

The first fence

A barbed wire dual fence at the Serbian-Hungarian border called a “temporary security border closure” completed on 15 September 2015 and its continuation at the Hungarian-Croatian border, completed on 16 October 2016



Fences

The second (parallel) fence

Started on 27 February 2017 a second line of fence, a few meters from the first, equipped with electronic devices to register any attempt to cross and alarm the law enforcement agents. (Video and night vision devices, touch sensors)



Source: Ásotthalomnál már épül az okoskerítés (The clever fence being built at Ásotthalom) Délmagyar, 27 February 2017 at http://www.delmagyar.hu/szeged_hirek/asotthalomnal_mar_epul_az_okoskerites/2509001/

The relocation of control beyond Hungary

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externalisation

- Repeated calls by the government to stop asylum seekers and other migrants before they reach the EU-s external borders. Suggestions to establish reception centres in Libya or Egypt.

See also the „German-French note” of 17 february 2017

- V. Orbán, PM: „The European Union should set up a ,giant refugee city’ on the Libyan coast and process asylum claims there from refugees arriving from other African countries, Hungarian Prime Minister Viktor Orban said on Saturday [24 September 2016]” - speaking in Vienna after a summit of European and Balkans countries on the refugee crisis, Reuters reported.

The relocation of control – expanding the border internally
Spreading it first to an 8 km wide zone then to the whole country

The „8 km rule” in force since **6 July 2016**

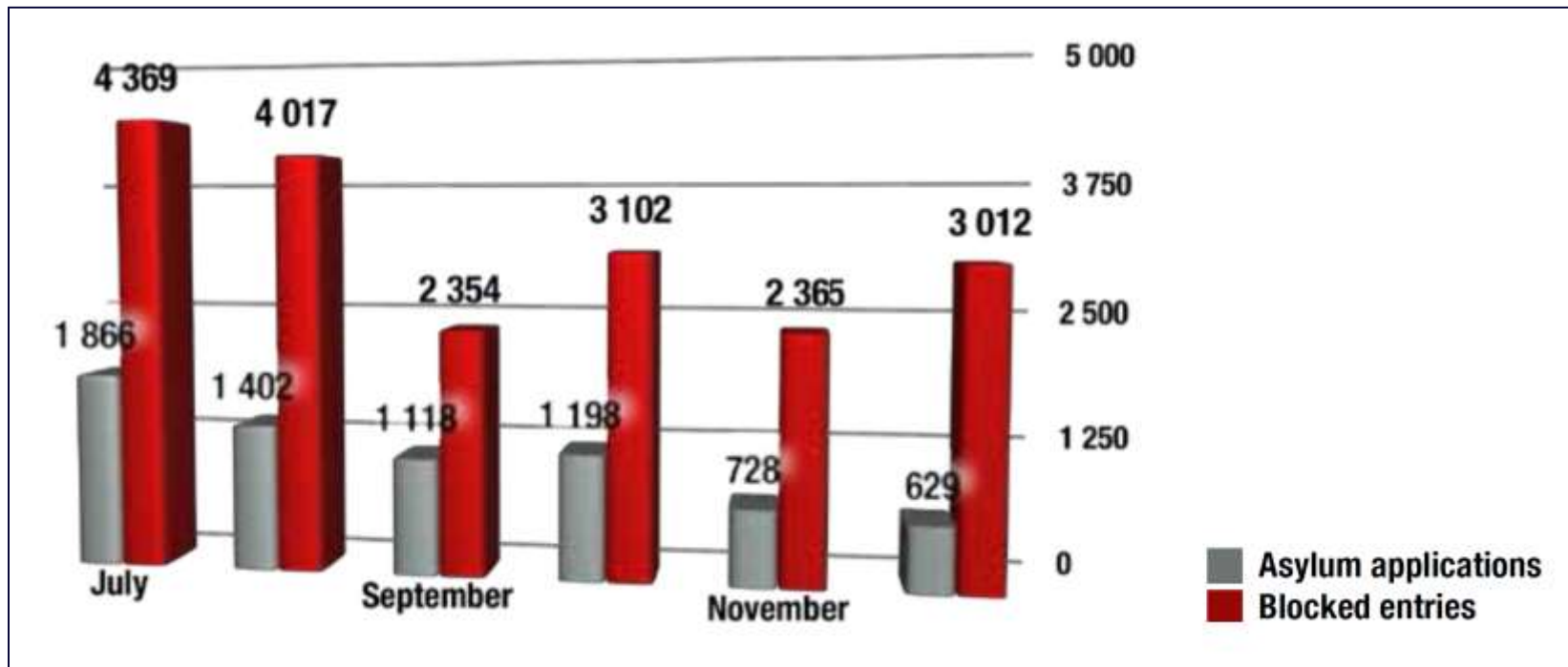
If an “illegally present” third country national is apprehended “within an 8 kilometre strip from the border line or border sign **of the external border” of the EU,**

- then this **person may be forcefully escorted to the fence and pushed through** using the doors available in the fence
- **with a view** towards making this person **submit their application for protection from outside, by approaching the transit zone** from the external side—i.e. from the Serbian green border.

No return decision or expulsion order adopted, no procedure according to the return directive (DIRECTIVE 2008/115/EC) applied, **no judicial control over the use of coercion.**

The „other side of the fence” is **still Hungarian jurisdiction** for a few meters. **Re-entering Serbia** through the green border is **illegal according to Serbian law**

Push backs to beyond the fence (Blocked entry)



„[B]etween 5 July and 31 December 2016, 19,219 migrants were denied access (prevented from entering or escorted back to the border) at the Hungarian-Serbian border”

Punishment of irregular crossing of the fence

A maximum of **three years imprisonment** threatens all who **cross the fence illegally** (Article 352 A of the penal Code).

The **damaging of the fence** is a separate crime with a maximum penalty of **five years** imprisonment. (Article 352 B)

Crossing the international border at sections **where no fence** has been erected—e.g. the Hungarian-Romanian border — **remains a minor offence**.

The fiction of not having entered Hungary

Asylum Act, § 71/A

„If the foreigner submits his/her application

a) **before entering** the territory of Hungary, [or after being escorted through the gate to the external side of the border] in the transit zone” then

- he/she is **not entitled to stay on the territory** of Hungary (and to a temporary residence permit). (§ 71/A (2))
- „**After** the expiry of **4 weeks** from filing the application, the alien police **authority shall authorise entry** [into Hungary] on the basis of the law” (§ 71/A (4))

 No guarantees related to detention apply, neither are most of the reception conditions provided.

The fiction of not having entered Hungary

Amuur v France (App. No. 17/1995/523/609 (June 25, 1996),

„Despite its name, the **international zone does not have extraterritorial status.**” (§ 52);

„**holding the applicants in the transit zone** of Paris-Orly Airport **was equivalent** in practice, in view of the restrictions suffered, **to a deprivation of liberty**” (§ 49)

„**The mere fact that it is possible for asylum-seekers to leave voluntarily** the country where they wish to take refuge **cannot exclude a restriction on liberty**, the right to leave any country ... Furthermore, this possibility becomes **theoretical if no other country** offering protection ... **is inclined** or prepared **to take them in**” (§ 48)

NON-ACCESS TO THE PROCEDURE

Serbia – not a safe third country

„ In any event, **UNHCR maintains** the position taken in its observations on the Serbian asylum system in August 2012 **that asylum-seekers should not be returned to Serbia.**”

UNHCR: *Hungary as a country of asylum*, **May 2016**, p. 25

NGOs share the view (Hungarian Helsinki Committee, ProAsyl)

Practically all irregularly arriving asylum seekers come through Serbia, and presently their application is declared inadmissible on safe third country grounds.

THE STATE OF EXCEPTION

Transit zones

Since September 15, 2015 – the completion of the fence

The “transit zones” are parts of the fence.



They consist of a series of containers which host public officials responsible for refugee status determination procedures.

- Police who record the flight route,
- Refugee officer deciding on admissibility of the claim
- Judge — or a court clerk— in a “court hearing room,” or through internet communication to adjudicate appeals on admissibility.

Border procedures in March 2017

From 15 September 2015

A new **border procedure** was introduced, only applicable **in the transit zone**.

Not linked to crisis situation,
only to arrival from the south

Detention + extremely **fast procedure** + **no real** access to **legal assistance** + dramatically **reducing legal remedies**.

Fiction of not having entered Hungary.

The procedure in February 2017 **only** extends to the **admissibility** phase. Once admissible (no safe third country), or belonging to a vulnerable group the applicant is allowed to enter the country and the normal reception conditions must be provided,

Decision on admissibility within **8 days**. Time for appeal: **7 days**. „Court” review: within **8 days**

The planned border/crisis procedure

A new procedure introduced under the heading
„Procedural rules applicable in case of a crisis situation caused by mass
immigration”

(Planned § 80/J of the Asylum Act /Act no. LXXX of 2007/)

Personal scope: **all asylum seekers** (except if detained or regularly in Hungary)

Material scope: **merits** (not only admissibility)

Procedure:

- **Escorting back** to the transit zone **from the whole territory** of Hungary (not only from the 8 km stripe)
- **Appeal: 3 days** (No appeal if denies fingerprint or leaves the zone)
- Court hearing may be done by **clerk, over electronic device**
- **No time limit** for completion of the two stage procedure (administrative, court review), albeit **detention during the whole procedure**, including appeal (Border procedure is limited to 4 weeks)

The relocation of control – expanding the border internally
Spreading it to the whole country (Bill No T/13976 of 20 February 2017)

Crisis situation caused by mass influx

Preconditions declaring the crisis situation

- **Flow data:** Arrivals on average in excess of **500 per day** for a month, or **750** per day for two weeks or **800** per day for a week.
- **Stock data:** On average **the number of persons in the transit zone** exceeds **1,000 per day** for one month, 1,500 per day for two weeks, or 1,600 per day for one week.
- **Any situation** „related to migration” that
 - **„directly endangers the protection of the border** of Hungary as set out in Article 2 (2) of the Schengen Borders Code,”
 - **„directly endangers the public security, public order or public health** in a 60 m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark **or in any settlement in Hungary**, in particular the **outbreak of unrest or the occurrence of violent acts in the reception centre or another facility** used for accommodating foreigners located within or in the outskirts of the settlement concerned.”

The relocation of control – expanding the border internally
Spreading it to the whole country
(Bill No T/13976 of 20 February 2017)

Crisis situation caused by mass influx

- covering the whole territory
- **application for asylum only in the transit zone** (from Serbia's side) unless
 - = otherwise detained
 - = legally staying in the territory (on other grounds)

The exceptional becomes the norm – every irregularly arriving or staying person **is removed to the Serbian side of the fence**, without immediate access to the authorities, i.e. with no possibility to submit an asylum application without (weeks of) delay

It is detention: „The person seeking recognition **can leave** the territory of the transit zone **via the exit** [to Serbia - BN] **gate.**” Planned § 80/J (5)

See the *Amuur* case (later)!

The combined effect of the planned modification

The extension of the crisis situation to the whole country entitles the law enforcement agents **to escort almost every asylum seeker to the transit zone** at the border.

However, the bill's authors **pretend that this is not a border procedure** and **no detention** is practiced in the transit zone (The justification originally openly spoke of detention but was replaced a week later „due to a technical error”).

In effect this is an **accelerated border procedure** with **no** access to **genuine and effective legal remedy** and entailing **unlimited detention without court control**

UNHCR Statement, 7 March 2017

„In practice, it means that every asylum-seeker, including children, will be detained in shipping containers surrounded by high razor wire fence at the border for extended periods of time.

This new law violates Hungary's obligations under international and EU laws, and will have a terrible physical and psychological impact on women, children and men who have already greatly suffered.”

„The Special Rapporteur would like to emphasize that there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum. Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, the number of irregular arrivals has not decreased. This may be due, inter alia, to the fact that migrants possibly see detention as an inevitable part of their journey”

Para 8 of the report

Contempt of the law

- **Building the fence** in violation of domestic law on the environment and on construction
- **Extending the crisis situation** (in time and geographically) without meeting the legal conditions
- Repeatedly **curtailing the procedural and the material rights of the asylum seekers**, in respect of effective remedies, access to reception conditions and in an increasing measure concerning their human dignity
- **Ignoring EU law (and international law) on return** to a (safe) third country
- Constantly **violating the Dublin regulation** by hindering take charge and take back
- **Breaching the rights of minors** to interpretation and translated documents in the criminal procedure

Bill of 20 February 2017

- Proposal to **keep minors of the age of 14 – 18 detained**

Brutality – leaving the law behind

„As highlighted by FRA in past months, in Hungary, reports of **violence, excessive use of force and humiliating practices** increased significantly after ... July 2016. ... Reported practices include the use of **unleashed dogs**, the use of a pepper **spry, beatings**, yelling at people, and, most recently, **taking away warm clothing and making people kneel**. Civil society representatives noted that **in most cases the authorities deny the occurrence** of such incidents and are unwilling to investigate them.” (Footnotes omitted – BN)

FRA: *Current migration situation in the EU: Torture, trauma and its possible impact on drug use*
Vienna, February 2017, p. 8.

<http://fra.europa.eu/en/publication/2017/february-monthly-migration-focus-torture>

Testimonies at <http://www.migszol.com/border-violence>
(20170305)

INTERPRETATION

WHAT DOES HUNGARY DO INSTEAD OF PROTECTING THE REFUGEES?

1.
IT IS IN DENIAL

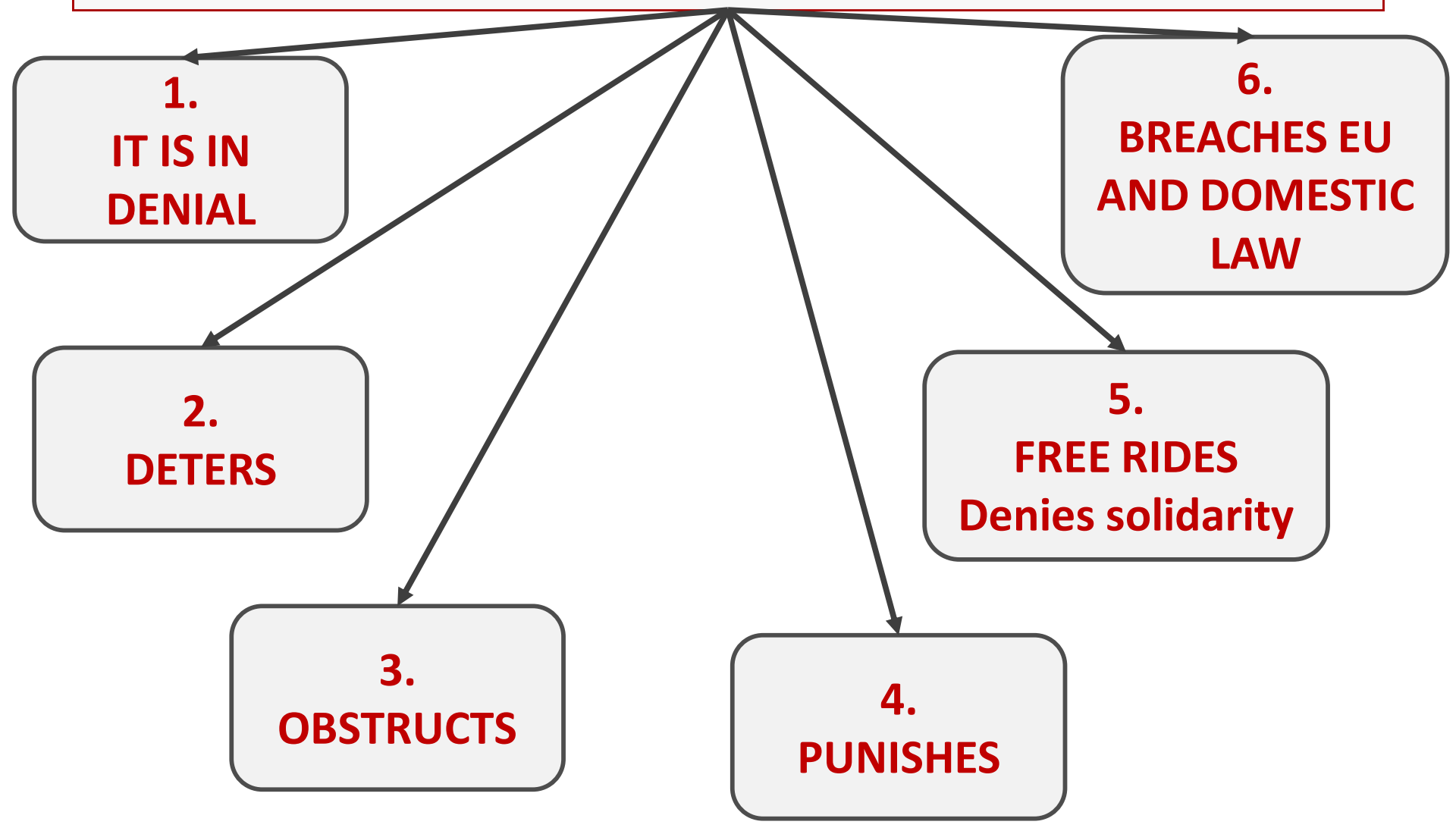
2.
DETERS

3.
OBSTRUCTS

4.
PUNISHES

5.
FREE RIDES
Denies solidarity

6.
BREACHES EU AND DOMESTIC LAW



EXPLANATION?

Structural problems beyond the control of Hungary

- CEAS in force did not deliver appropriate answers
- EU member states (starting with Greece) and other (Western Balkan) states renounced their duties to act as states controlling movement across their territories

Idiosyncratic Hungarian causes

- The **modus operandi** of FIDESZ as the ruling party
Create an „enemy of the nation” and then defeat it
(Banks, utility companies, large food supermarkets, migrants, NGOs with a political agenda)

EXPLANATION?

- **The personality of the Prime Minister** from arch liberal (early nineties) to centrist conservative (late nineties) to ethno-nationalist radical and illiberal right wing politician (since 2010s).
- The political program of **building an illiberal state** (diminished respect for human rights, distorted ethno-nationalist communitarian ideology)
- **The ambition to develop a feudal-socialist system** built on personal allegiance (feudal element), concentration of state power and decision-making at the peak and redistribution of resources through the central administration, depriving municipalities from self governing powers (socialist element)

REMEDY?

REMEDIAL ACTIONS

INTERNATIONAL

- ECtHR judgments;
- UNHCR pressure – lower standing in the UN (E.g. no re-election to Human Rights Council)
- Allies distancing themselves

EU

- Article 7 EU
- Rule of Law Procedure
- LIBE hearing
- Infringement procedures
- Conditionality (Renzi)

DOMESTIC

- Intensive NGO criticism
- Some of the major churches being critical
- EU-oriented politicians in FIDESZ dissatisfied

Danger: the whole EU moving to similar direction – Valetta declaration, efforts to externalise protection

Thanks!

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