

RULE BY LAW

MIGRATION AND THE ABUSE OF POWER IN HUNGARY

*Disfiguring the rule of law, the public discourse, the
body politic and the refugee*

Presentation by
Boldizsár Nagy
at the Uppsala University (via Zoom)
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Main themes

- **Disfiguring**
 - the rule of law and the constitution,
 - the body politic,
 - the public discourse and
 - the refugee and asylum
- A **conceivable interpretation** of what is happening
- Possibilities of **resistance**

Aspects of democratic decay in particular in the context of migration

Disfiguring

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graph TD; A[Disfiguring] --- B[The rule of law and the constitution]; A --- C[The body politic]; A --- D[The public discourse]; A --- E[The refugee and asylum];
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The rule of law and the constitution

The body politic

The public discourse

The refugee and asylum

Disfiguring the Rule of law and the Constitution („Fundamental Law“)

Rule of law

Definition proposed by the Commission in 2018:

'the rule of law' refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of

- **legality**, implying a transparent, accountable, **democratic** and pluralistic **process for enacting laws**;
- **legal certainty**;
- **prohibition of arbitrariness** of the executive powers;
- effective **judicial protection** by **independent courts**, including of **fundamental rights**;
- **separation of powers and equality before the law**;

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

COM(2018) 324 final

Catalogue of problems in the Commission's rule of law report of September 2020 (Selected items)

SWD (2020) 316 final, 30 September 2020

Judicial independence

- The President of the National Office of Judges breached the law when annulling the procedures for **selecting court presidents** and discretionarily appointing *ad interim* court presidents without the approval of the National Judicial Council
- Challenging the judge who **asked preliminary question** from CJEU
- Judges and lawyers are subject to **negative narratives in the media**

Note also the forced **early retirement of judges**, that **ended in a compromise** after the CJEU judgment – Naturally not mentioned in this report.
C-286/12 Judgment: 6 November 2012

Catalogue of problems in the Commission's rule of law report of September 2020 (Selected items)

SWD (2020) 316 final, 30 September 2020

Corruption

- Perception of corruption higher than average in the EU
- There has been no prosecution of high-level government officials in recent years.
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- During the period 2015-2019, Hungary had the highest number of OLAF investigations (43) closed with a financial recommendation among Member States

Mediapluralism

- The merger of more than 470 government-friendly media outlets through the creation of the 'KESMA' media conglomerate in November 2018 was exempted from competition control, because the Government declared it, *a merger of strategic national importance*
- Independent media outlets face systemic obstruction and intimidation

Catalogue of problems in the Commission's rule of law report of September 2020

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Democratic checks and balances

- Hungarian legislation provides for the mandatory use of public consultation, as well as *ex ante* and *ex post* impact assessments. In practice, **the consultation and impact assessments are rather formal or symbolic.**
- On 11 March 2020, a **'state of danger'** was declared by the Government **without a stated duration**. Later, Parliament passed a new law that allowed the Government to set aside any law by decree. The emergency powers raised questions as regards their necessity and proportionality and interfered with business activities and the stability of the regulatory environment
- **Civil society remains under pressure**, especially when taking a critical stance towards the Government („Foreign funding”, criminalisation of assistance to forced migrants, immigration tax)

EP starting TEU article 7 procedure, 2018

The concerns of Parliament relate to the following issues:

- the functioning of the **constitutional and electoral system**;
- the **independence of the judiciary** and of other institutions and the rights of judges;
- **corruption** and conflicts of interest;
- **privacy** and data protection;
- **freedom of expression**;
- **academic freedom**;
- **freedom of religion**;
- **freedom of association**;
- the right to **equal treatment**;
- the rights of persons belonging to **minorities, including Roma and Jews**, and protection against **hateful statements** against such minorities;
- the fundamental rights of **migrants, asylum seekers and refugees**;
- **economic and social rights**.

Backsliding in figures

	Freedom House		Bertelsman Transformation Index/Democracy		World Justice Project Rule of law	
	2015	2000	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.

Rule of law index (World Justice Project)



Source: <https://worldjusticeproject.org/rule-of-law-index/global> (20201024)

Disfiguring the Fundamental Law - Adding a purely xenophobic, senseless clause into the Fundamental Law in 2018 Article XIV (1)

„[n]o foreign population shall be settled in into Hungary....”

„Foreign population” is not an expression defined anywhere in Hungarian law.

„Settling in” (in Hungarian: „betelepítés”) is only used in the Hungarian law in the context of plants and animals.

(Then) Minister of Justice László Trócsányi explained: [The rule is capable of] „blocking the implementation of an imposed decision on coercively settling in foreign population in disregard of the will of the Hungarian constitutional organs and the Hungarian people”

General debate in Parliament on the bill T/332 on the seventh amendment of the Fundamental Law. Reproduced at:

<https://uj.jogtar.hu/#doc/db/33/id/A1800628.TV2/ts/10000101/> (20200122)

Disfiguring the Fundamental Law - Curtailing the right to asylum

Article XIV.

(4) Hungary shall... grant asylum to non-Hungarian nationals who .. do not receive protection from their country of origin, nor from any other country. [The applicant is **not**] **entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted** or directly threatened with persecution.”

Disfiguring the body politic

A confused identity in the constitution

Fundamental law – **confusion about the subject** of the constitution – whose identity?

Whose „values“

„Hungarian nation“ – „Hungarian people“ – „the political community“ – „the people“ – „Hungarians“

A large pool of potential immigrants with voting rights living in another country

- **Endless jus sanguinis** – nobody know the number of Hungarian nationals living abroad (and having voting rights, after getting a certificate on their Hungarian nationality)
- Act XLIV of 2010 **naturalization offered on preferential terms and without moving to Hungary** to persons if „at least one of his relatives in ascendant line was a Hungarian citizen or he shows the likelihood of having descended from Hungary and certifies his knowledge of the Hungarian language.”
- Since 2011 their number is above **940 thousands**
- Citizens who do not have an address in Hungary may vote by mail. Those who have address in Hungary but live abroad may only vote at the foreign representations of Hungary.

Active and passive voting rights at national elections

People, „**whose ascendant is or was a Hungarian citizen**” become **long term residents without any initial period** if the move to Hungary

Active and passive voting rights at local elections

Disfiguring the public discourse

A securitizing, majority identitarian populist discourse

Lazaridis and Konsta: Majority identitarian populism

In the Orbanite discourse the Other is



the „migrant” and
the forces behind the migrant,

„Brussels”
the political left and

„Migration boosts crime – in particular, crimes against women – and spreads the disease of terrorism among us.” Orbán, 2019 State of Nations speech

in the

„We must reject the financiers who see themselves as demigods; reject the Brussels bureaucrats representing their interests; and reject the fake civil society activists – fattened on their money – who want to tell us how to live and with whom” Orbán, 2019, ibid

from its scholarly or legal meaning.

Fluid use: may denote forced migrant, irregular migrant, regular migrant

Immigration condemned by words, endorsed in action

Hungary **voted against the UN Global Compact** on Safe and Orderly regular Migration

In 2020 the Minister for foreign affairs claimed that **migration and job market challenges have „nothing to do with each other”** and the solution is „low taxes, the education of the Hungarian people and family policy”.

In reality: **measures enhancing regular immigration**

- Formal, **government-supported guest worker recruiting** programs. Approximately 60000 valid work permits in 2019 (for third country nationals)
- Large scale **scholarship programs for students** from developing countries
- Hungarian **Residency Bond Program** that existed between 2013 and 2017. Approximately 20 000 persons entitled to long term residence

Eliminating consultation on bills (and on effects of adopted laws)

Act CXXXI of 2010 on Public Participation in Developing Legislation prescribes compulsory consultation with the public and the stakeholders

Evasion techniques

Before adoption of the law

- Publication of the bill and **giving hours or 2-3 days** to comment
- Submitting draft laws as **individual proposal of an MP** when no consultation is needed.

After entry into force

- **Denying info on implementation** (ECtHR: *Szurovecz v. Hungary*, Application no. 15428/16, 8 October 2019)

Disfiguring the refugee and asylum

Disfiguring the refugee

Eliminating the use of the terms „asylum seeker” or „refugee” and replacing it with „illegal migrant” or „immigrant” - denial of the plight, the life experience and the agency of the person

„The Hungarian government has, effectively, constructed a full parallel reality. ... it replaced the figure of the refugee in need of protection with the (imagined) illegal migrant, who arrives in an unlawful manner and only has sinister intentions, against whom Hungary has to be defended.. ... in part by criminalizing the actions of that undesired Other.” (Nagy, 2016, 1057))

Persons irregularly crossing the fence with Serbia and Croatia commit a crime

People, denied protection (on procedural grounds) were starved in the tranzit zone

Asylum destroyed

When the exceptional is the normal: **Crisis situation caused by mass immigration** (Articles 80/A-80/K of the Asylum Act)

Its **preconditions** were **NEVER present** (number of arrivals, violent events)

- (First) push-back through the fence, anyone found in an irregular position „escorted” through the fence (by force) to the Serbian side – collective expulsion **without any procedure** (Refugee status determination or Ireturn procedure) – violence reported.
- **No access to the transit zone** (1 person/day)
- **Detention** of all applicants **for the whole procedure** including appeal.
Ilias and Ahmed Grand Chamber judgment inapplicable, as that judgment
 - addressed border (eligibility) procedure
 - Four weeks time limit applied
 - Acts of the authorities related to decision on entry
 - Absurd argument concerning the freedom to leave towards Serbia

Asylum destroyed

- **Inappropriate treatment** of the asylum seekers .

UN Special Rapporteur on the human rights of migrants, Felipe González : “[w]omen and children with serious chronic diseases and cancer remain untreated for months”

- (Second) **push back** as a consequence of the denial of investigating the merits based on an eligibility ground not codified in the Procedures Directive – **inducing illegal re-entry into Serbia**

Entirely eradicating asylum under Covid-19

- Access to the territory flatly denied from March 2020 (No entry into the tranzit zone)
- From June 18 2020 **asylum may not be requested in Hungary** (Few specific exemptions exist –Upgrading from subsidiary protection – being a family member of a protected persons –being deprived of liberty)
- **Persons without the right to stay or arriving at the border** are instructed to approach either the **Belgrade** or the **Kyiv** embassy of Hungary
- There **a letter of intent** (to apply for protection if allowed into Hungary) must be submitted
- In 60 days it is **decided if the person gets a travel certificate** to enter Hungary
- Only **in Hungary** can she submit an application
- Rule is **silent on regularly staying persons** – presumably they also are expected to leave

Harassment of the actors supporting asylum

1) Criminalising „aiding and abetting illegal immigration” meaning:

„organisational activity” pursued in order to

“enable the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, is not exposed to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of direct persecution is not well-founded”.

(Human smuggling and facilitation of illegal residence are separate crimes)

2) Act No LXXVI of 2017 on the transparency of organisations which receive support from abroad.

Civil society organisations must register and reveal the person of their supporters. They are also obliged to indicate on all publications and web appearances that they are supported from abroad.

3) A special „tax on immigration”, to be levied on „immigration supporting activities”

as „carrying out media campaigns and media seminars and participating in such activities; organising education; building and operating networks or propaganda activities that portray immigration in a positive light” that is directly or indirectly aimed at promoting immigration defined in the Act as „the permanent relocation of people from their country of residence to another country”

Rejection of the Hungarian measures by European Courts Selected cases

European Court of Human Rights

Ilias and Ahmed v. Hungary - Grand Chamber, 2019 - (Application no. 47287/15)
Return to Serbia = breach of Art 3; „short” holding in transit zone in border procedure – not a breach of Art 5 as they could leave towards Serbia (Chamber in 2017 thought that the 2015 procedure entailed illegal detention)

Court of Justice of the European Union

Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal 2019,
Violation: Courts must have power to vary (change) the decision of the administrative authority if it ignored previous judgment in the same case if national law only allows annulment

LH v Bevándorlási és Menekültügyi Hivatal 2020 C-564/18) Violation:
„Safe transit country” – illegal eligibility ground

Rejection by European Courts

Selected cases

Court of Justice of the European Union (Cont'd)

FMS, and others 2020 (C-924/19 PPU and C-925/19 PPU) Grand Chamber Violations: detention in transit zone, new inadmissibility ground (safe transit country), breach of border procedure rules

Commission v Hungary (C-17/18) Violation: The Act on Transparency of Organisations which receive Support from Abroad breaches Article 63 TFEU and Articles 7, 8 and 12 of the Charter

Commission v Poland, Hungary and the Czech Republic 2020 Joined Cases C-715/17, C-718/17 and C-719/17 Violation. Not performing the quota decision was illegal

Rejection by European Courts

Selected cases

Commission v Hungary (C-808/18) pending in October 2020. AG opinion June 2020: suggests to find breach on all counts (detention, border procedure, effective remedy)

European Commission v Hungary (Case C-821/19) 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

Pre-Court phase

Starving: **25 July 2019 Commission sent letter of 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”

**A conceivable interpretation of what
is happening**

Hungary under Orbán: a feudalistic - late socialist regime

Hungary is a



Feudalistic

- Personal dependence
- = vertical hierarchy
- Loyalty to and faith in the leader
- Vassals are replaceable at will

-
state

Late Socialist

- Centralisation and
- Redistribution
- Catering for the „needs” instead of respecting choice
- Shrinking spheres of autonomy
- Parliament = rubber stamping machine
- Institutions of checks and balances transformed into political tools

Why all this? Orbán's personal traits

The destruction of the asylum system is neither a consequence of EU legal developments nor does it result from a national trend of asylum law.

The majority identitarian discourse and the securitizing moves were needed to mobilize the voters, who guaranteed Orbán's continuous power

András Körösenyi: „plebiscitary leader democracy”

„As the narrative that can be traced through his speeches shows, Orbán has regarded elections as granting him authorization, a so-called *personal mandate* to govern according to 'the people's will.' This is obtained when *electors proclaim their faith* in a leader's ability to act for the national interest, *rather than mandating him to carry out a concrete program.*”

Joseph Weiler: Orbán and the self-asphyxiation of democracy

I.CON vol 18 (2020) No. 2. 315

„...by saying again and again Orbán, Orbán, Orbán (and make no mistake, he is vile), we fall into the trap ... of “deresponsibilizing” the People, the nation, the electorate.” (And Orbán enjoys „majoritarian legitimacy”)

- 1) Democracy in itself need not be good. A democracy of socially unjust and uncaring people is an unjust and uncaring democracy
- 2) **Separate individual guilt and collective responsibility!** A people in a democracy may be collectively responsible if they expressed their will freely
- 3) „Orbánizing” the phenomenon **and infantilizing the people who vote for him in droves serves as an exculpating device for us.** It obviates the **need to do some serious soul searching regarding the failures of our liberal democracy...**”

Joining Weiler

Weiler: „And **this is not rule by terror**. This is **an act of collective democratic self-asphyxiation**, of willed action, which could have been stopped at the ballot box. Let us call it as it is, and this call makes the Hungarian situation ever more disconcerting:

a vile leader supported by ~~a significant majority of his subjects~~”

who **rules by law**, I may add...

Why the support – even if not of the majority?

The paradox of the Fidesz voter:

Deeply **anticommunist**, frequently with family grievances caused during socialist time **but** at the same time **expecting the state to be** as paternalising („caring”) as the Socialist state was.

In the **national elections of 2018** the coalition got **49,27 %** of the list-votes, but controls **66.83%** of the Parliament's **199 seats** as a consequence of the electoral system developed by Fidesz adopting a „first pass the post” rule for the individual electoral districts and having gerrymandered the layout of the districts.

Enthusiastically identifying herself with the **repeated symbolic „victories”** over banks, Soros, Brussels and the migrants/refugees as this helps forget that she, actually **is constantly losing out against her peers in the other postsocialist countries** and is **heavily exploited** by the new national bourgeoisie.

Why the support – even if not of the majority?

Further characteristics of the Fidesz voter:

Resonates to the nationalist demagogy because the loss of 2/3 rd. of the territory and of the population of Hungary after the First World War („**Trianon**”) was largely excluded from the public discourse after 1945.

Approves the practical revocation of secularization

Benefits from **popular (and populist) measures** in the field of **family support**, access to **real-estate ownership**, utilities **price-control**

Possibilities of resistance

Possibilities of resistance

A) „Medieval” methods

- **Free cities**

 - Terminating harassment

 - Supporting NGOs

 - Symbolic measures (flag!)

 - Respecting rights of the free citizens and of the refugees (shelter!)

- **Oligarch remove the ruler** – in constitutional ways - if playing by the EU rulebook more profitable than paying the vassal's dues

B) „Socialist” resistance

- **Alternative sphere of public information** – social media, samizdat, Radio Free Europe
- **Solidarity** among the NGOs under pressure
- **Churches** returning to their Christian mandate

Possibilities of resistance

C) Using remnants of the **rule of law**

- Courts finding against the „safety” of third countries
- After *Torubarov* overruling the administrative decision even if Hungarian law prohibits that

D) **EU** tools

- Article 7 procedure (blunt arrow, not a nuclear option). But if *effet utile* applied, no veto by Hungary or Poland!
- a more intensive involvement of the CJEU
- intensified use of interstate disputes under Article 259 TFEU
- a new mechanisms entailing a regular review of the rule of law performance of all Member States
- A regime on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

Summary

A functioning **asylum system** had to be sacrificed and **migration** had to be presented as threat, in order to perpetuate a crisis situation that calls for the leader with extraordinary capabilities to protect his people.

In exchange for the protection **blind trust and exceptional powers** were to be offered by the people, replacing rational discourse and a state operating within the bounds of democracy, the **rule of law** and fundamental rights.

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.

Sources referred to in the slides

- Commission (2020) 2020 Rule of Law Report Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final 30 Sept 2020
- European Parliament (2018) The situation in Hungary. Resolution of 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)) P8_TA(2018)0340
- Lazaridis, G. & Konsta, A. M. , (2015) *Identitarian Populism: Securitization of Migration and the Far Right in Times of Economic Crisis in Greece and the UK*, in Lazaridis, Gabriella; Wadia, Khursheed : *The Securitisation of Migration in the EU*. London: Palgrave Macmillan
- Nagy, B. Hungarian Asylum Law and Policy in 2015-2016. Securitization Instead of Loyal Cooperation *German Law Journal* Vol. 17, (2016) No. 6, 1034-1081
- Orbán, (2019): *Prime Minister Viktor Orbán's "State of the Nation" address, 10 February 2019, Budapest* <http://www.miniszterelnok.hu/prime-minister-viktor-orbans-state-of-the-nation-address-3/> (Accessed 20201024)

THANKS!

BOLDIZSÁR NAGY
Central European University
Budapest / Vienna
www.nagyboldizsar.hu

E-mail: [nagyboldi100 at gmail.com](mailto:nagyboldi100@gmail.com)