

**THE LAW IS ONLY THE EMPEROR'S
CLOTHES: BUT WHAT SHOULD BE IN
HIS HEART AND MIND?**

**REASONS FOR PROTECTING
REFUGEES**

Presented by Boldizsár Nagy

ASYLRECHT UND ASYLPOLITIK IN DER EUROPÄISCHEN UNION
– UNGARISCH-DEUTSCHE PERSPEKTIVE –
Andrassy Universität,

Budapest, 17 May 2016

A motto in the vein of Greek philosophy

„Europe is not free, because freedom begins with speaking the truth. In Europe today it is forbidden to speak the truth.”

**Speech of Viktor Orbán on 15 March 2016 at the
national holiday,
in Budapest, Hungary, Europe**

<http://www.miniszterelnok.hu/speech-by-prime-minister-viktor-orban-on-15-march/> (20160517)

Andersen's tale

„Then the Emperor himself came with his noblest noblemen, and **the swindlers** each raised an arm **as if they were holding something**. They said, **‚These are the trousers, here's the coat, and this is the mantle,‘** naming each garment. **‚All of them are as light as a spider web**. One would almost think he had nothing on, but that's what makes them so fine.’

‚Exactly,‘ all the noblemen agreed, though they could see nothing, for there was nothing to see.

‚If Your Imperial Majesty will condescend to take your clothes off,‘ said the swindlers, **‚we will help you on with your new ones** here in front of the long mirror’.”

[The Emperor walked the streets of his city]

...

„ **‚But he hasn't got anything on,‘** a little child said.

...

‚But he hasn't got anything on!‘ **the whole town cried out at last.**”

THE CONSTRUCTION OF A PARALLEL REALITY

The process leading to the total denial

- 1) Building up a securitising narrative = **Securitising**
- 2) Representing every migrant, that is asylum seekers and others alike as a threats, even as a potential terrorists = **Misleading**
- 3) Claiming that core values of the society (jobs, culture, integrity, security) are already threatened = **Fear-mongering**
- 4) Denying that most of those who arrived in 2015 to the EU are in need of international protection (with the exception of the Kosovars, the Serbs and a few other nationalities) = **Denying reality**
- 5) Suggesting that decisions are taken elsewhere „in an alien country, in a city, named Brussels”* = **Schizophrenia**
- 6) Pretending that Hungary has applied the EU law, defended its borders, applied the Schengen acquis = **Lie**
- 7) Generating the false expectation that an (unconstitutional) referendum over an ill-defined „settling into Hungary” („betelepítés”, „siedlung”) may alter the course of the EU = **Attack on the rule of law and the EU legal order**

* Phrase use by Viktor Orbán in his weekly radio message, within the program „180 perc”, May 6, 2016

1) THE SECURITISING DISCOURSE

Securitisation – a classical quote

“Migration is identified as being one of the main factors **weakening** national tradition and **societal homogeneity**. It is **reified** as an internal and **external danger** for the national community or western civilization. This discourse **excludes migrants from the normal fabric of society**, not just **as aliens** but as aliens **who are dangerous** to the reproduction of the social fabric. The discourse frames the key question about the future of the political community as one of a choice for or against migration. The discourse **reproduces the political myth that a homogenous national community or western civilization** existed in the past and can be re-established today through the exclusion of migrants who are identified as cultural aliens.”

Huysmans, Jef: The European Union and the Securitization of Migration *Journal of Common Market Studies* Vol. 38 (2000) No. 5, pp 751-777, p .758

Generating xenophobia, establishing the migration - threat - terrorism continuum

1. The „questionnaire” 2015 May

NEMZETI KONZULTÁCIÓ
a bevándorlásról és a terrorizmusról

Töltsön ki a kérdőívet!

2) Szerinted Magyarországon a következő években lehet-e terrorcselekmények célja? (válasszon a leginkább igaznak tartott választást!)

5) „Hallunk különböző véleményeket a bevándorlásról. Van olyan, aki azt gondolja, hogy az illegális bevándorlók veszélyeztetik a munkahelyeket és a megélhetést Magyarországon. Ön egyetért ezzel a nézőponttal?”

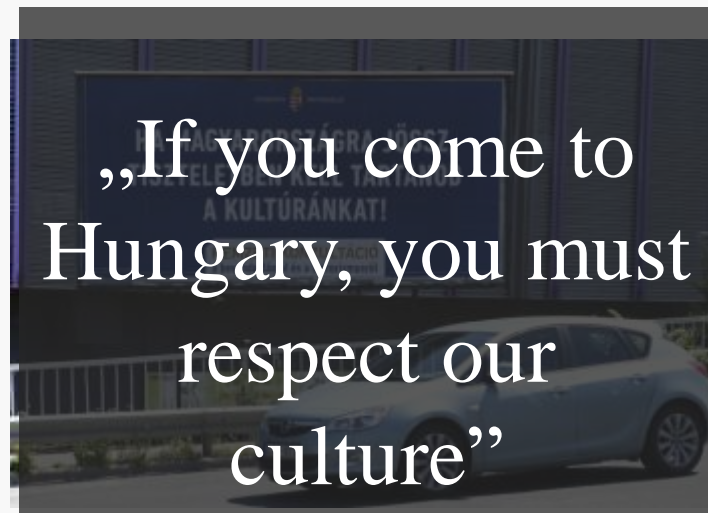
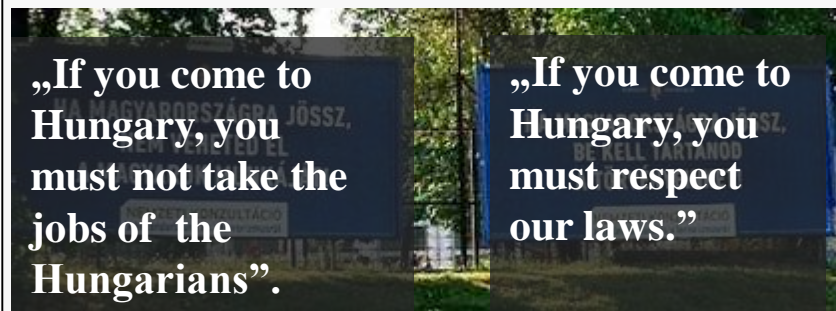
9) „Azt halljuk, hogy az illegálisan Magyarországra bejövő migránsok a legkevesebb idő alatt hazatérhetnek az országukba. Ön egyetért ezzel a nézőponttal?”

No. 2: “Do you think that Hungary could be the target of an act of terror in the next few years?”;

No. 5 “We hear different views on the issue of immigration. There are some who think that economic migrants jeopardise the jobs and livelihoods of Hungarians. Do you agree?”;

9. “Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?”

2. The billboard campaign, starting in 2015 June



2) MIGRANTS AS THREATS

Viktor Orbán's Speech in the Hungarian parliament after the Paris Attacks, 16 November

“We Hungarians have been advocating the closure of our borders to stop the flood of people coming from the Middle East and Africa.[Hungary was criticised for this]... Which approach is more humane: to close the borders in order to stop illegal immigration, or to put at risk the lives of innocent European citizens?”

“We feel that the very existence of Europe is at stake”

„We have warned the leaders of the EU not to invite these people into Europe”

MIGRANTS AS THREATS

“All of them present a security threat because we don’t know who they are. **If you allow thousands or millions of unidentified persons** into your house, the risk of ... **terrorism will significantly increase.**”

Viktor Orbán’s interview, Politico.eu 23 November 2015
<http://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/>

Terrorism charge against a person in Hungary

One Cypriot national, his mother with diabetes and his father in a wheelchair. The son is accused of terrorism the parents in participation in mass disorder

Lack of identification – **not a threat in itself** – most terrorist acts have been committed by previously identified persons.

Mainly returning terrorists

(EU nationals) used the uncontrolled migration routes

Asylum seeking entails detailed checks, including national security checks.

Refugees and asylum seekers are much more frequently targets of violent attacks.

Facts: he talked through a megaphone to the waiting group at the Serbian-Hungarian border (Röszke), called upon the Hungarian police to open the border and threw stones at the police .



<http://www.bild.de/politik/inland/fremdenfeindlichkeit/atlas-der-angst-do-uebergriffe-auf-fluechtlinge-bisher-in-2016-44658446.bild.html> (2016)

THE CRISIS SITUATION CAUSED BY MASS IMMIGRATION – Article 80/A-G of the Asylum Act

§ 80 A (2) „A crisis situation caused by mass immigration can be **declared in a Government Decree** on the proposal by the minister as initiated by the National Commander of the Police and the head of the refugee authority. A crisis situation caused by mass immigration can be declared **for the entire territory or defined areas of Hungary.**”

Alternative **preconditions**

- Arrivals: on average in excess of 500/day for a month, or 750/day for two weeks or 800/day for a week.
- Stock: the number of applicants in the special “transit zone”. If on average the number of persons in the zone exceeds 1000/day, for one month, 1500/day for two weeks, or 1600/day for one week.
- Unrest: „the development of any circumstance related to the migration situation **directly endangering the public security, public order or public health of any settlement**, in particular the **breakout 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.**”

Although **none of the conditions** have been met after mid-October 2015 the crisis situation is still **in force** (on 17 May 2016) and on **9 March 2016** it was **extended to the whole country** without any precondition of the Act existing.

„It is forbidden to say that immigration brings crime and terrorism to our countries. It is forbidden to say that the masses of people coming from different civilisations pose a threat to our way of life, our culture, our customs, and our Christian traditions.”

The crimes committed by all foreigners in Hungary make up around 1 % of all crimes committed and show a constantly decreasing trend compared with 2003. (oscillating between 74 – 95 % of the 2003 value)

Hautzinger, p. 65

RECENT SCHOLARSHIP ON THE TERRORISM – MIGRATION NEXUS

Research based on 149 countries and the period 1970 - 2000

„The results suggest that **migrants stemming from terrorist-prone states** moving to another country **are indeed an important vehicle** through which terrorism does diffuse. Having said that, the findings also highlight that **migrant inflows per se actually lead to a lower level of terrorist attacks.**”

Vincenzo Bove and Tobias Böhmelt, "Does Immigration Induce Terrorism?," *The Journal of Politics* 78, no. 2 (April 2016): 572-588. DOI: 10.1086/684679

Abstract

3) CORE VALUES AT STAKE

Core values threatened – welfare

Government's discourse

Facts /counter-arguments

Resolution of the Hungarian parliament entitled “**Message to the leaders of the European Union**”
36/2015. (IX. 22.) OGY

“**Waves of illegal** immigration **threaten** Europe with explosion...The European **Union is responsible** for the emergence of this situation...**Irresponsible are the European politicians**, who with the illusion of a better life **encourage the immigrants** to leave everything behind and by risking their lives set out towards Europe... We have the right to **defend our culture, language, values....**”

António Guterres UN High Commissioner for refugees, on 20 November 2015, **a week after the Paris attacks**:

„But let me make it clear that **refugee flows are the result of war and terror**, not its source. Refugees are fleeing events very **much like those of Paris or Beirut**, happening in their home towns, every month, **every week**, for the past few years. And fear and rejection of refugees – especially Muslim refugees – are precisely the **wrong answer** to extremist threats. This is above all **a battle of values**. If **you lose your values you lose the battle**. A Western world that would reject Muslim refugees would provide extremists the best propaganda tool they could wish for in the recruitment of new supporters, including inside the very countries that might close their borders to refugees.”

The argument against the (communitarian) and other criticism The fate of the culture (of the bounded community)

Communitarian thesis:

“The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people (though some are global pluralists, and other only local loyalists) seem to believe, then closure must be permitted somewhere. At some level of political organisation, something like the sovereign state must take shape and claim the authority to make its own admission policy, to control and sometimes restrain the flow of immigrants.”

Walzer (1983), 39

Three questions on culture

A

Do states have (a single) own culture?

B

Does a culture only survive within a relatively closed (bounded) community?

C

Is the stability (immutability) of a culture a value itself?

The argument against the (communitarian) and other criticism The fate of the culture (of the bounded community)

Ad A) **Culture** (whether understood as behavioural patterns or as normative prescriptions or as self image of the identity of the individual) is normally **not an attribute of a state**. (Even if states occasionally are engaged in creating a „national culture” – or groups are imagining such in the course of state-building)

Most states are home for many cultures, occasionally to hundreds. (E.g. India)

Ad B) **May be that cultures need relative closure, but not legal borders**. (Think of the Amish in the US!) Migration may only threaten their survival if out of proportion and seeking dominance.

Ad C) **The stability of a culture is not a value in itself**. (Think of the open racism of the US or of the Fascism, Stalinism in Europe, let alone the situation of women in preceding centuries).

Cultures of states/societies/cultural groups have immensely changed since 1945 even if they were hermeneutically closed (in migration terms)

Viktor Orbán's Speech in the Hungarian parliament after the Paris Attacks, 16 November

Instead of political correctness defend „our culture and economic interests”

„A new European policy is needed. ... I suggest to push dogmas aside, **let us discard political correctness** and talk straight and openly. I suggest to return from the world of ideologies to natural reason...”

He then suggests four priorities:

- 1 „First we have to **defend the external borders** of the EU, as security starts with the defence of borders”
- 2 „We have to **defend our culture** as the essence of Europe is its spiritual and cultural identity.”
- 3 „We have to **defend our economic interests** as we, Europeans must remain in the center of the world-economy”
4. **People** must be given the right „**to influence European decisions**, because the union must be based on a democratic edifice.”

Conclusion on culture

„States effectively lost any legal possibility to imagine themselves as rooted in homogeneous monocultural societies, unable to ask of their own nationals and of the growing numbers of newcomers anything more than mere respect for the liberal ideology...” Kochenov, 2011, p. 10

“Cultural continuity is perfectly compatible with cultural pluralism and cultural stability includes cultural change. The core issue is not the preservation of an existing culture or an existing ‘plurality of nomoi,’ but the rate of cultural change or, more precisely, the avoidance of externally enforced, excessive cultural disruption. Bader, 2005, p. 22

**4) DENYING THAT THE
ARRIVING PEOPLE ARE
IN NEED OF
PROTECTION**

HUNGARY DOES NOT ADMIT THAT MOST OF THOSE WHO ENTERED THE EU TERRITORY WERE (AND ARE) REFUGEES

Government's discourse

Facts /counter-arguments

„Hungary does not need livelihood immigrants” title of the parliamentary debate day on 22 February 2015

„National consultation on terrorism and immigration”

„These people do not come for safety, are not running away in order to save their lives” PM Viktor Orbán on channel TV2, September 2015

MTI the Hungarian News Agency labels any news on refugees as „illegal immigration”

Kosovars who came in that period did not want to immigrate, they transited with or without applying for asylum

Open letter of practically the whole Hungarian migration profession: the questions to be sent out as national consultation are “devoid of any professional or moral basis”.

UNHCR spoke of „people fleeing war and conflict” in its warning against hastened legislation on 3 July 2015

„Illegal immigration” - - „German -Polish program starts to alleviate the refugee crisis” MTI, 2016 February 12 15:31

„Crossing a border in order to seek asylum is not a crime” Antonio Guterres (former) UN High Commissioner for refugees, during his visit in Hungary, September 2015



War in peace
Images of Aris Messinis,
Late October 2015 <http://neoskosmos.com/news/en/aris-messinis-afp-photographer-blog-refugee-crisis-lesvos>



GERMAN RECOGNITION RATES: SYRIANS, IRAQIS: OVER 85 %

Tabelle I - 11:
Entscheidungsquoten nach Herkunftsländern im Jahr 2015

Haupt-herkunftsländer	Entscheidungen über Asylanträge												
	Ins-gesamt	davon Rechtsstellung als Flüchtling (§ 3 Abs. 1 AsylG, Art. 16 a GG)				davon Gewährung von subsidiärem Schutz gem. § 4 Abs. 1 AsylG		davon Feststellung eines Abschiebungs- verbotes gem. § 60 Abs. 5 o. 7 AufenthG		davon Ablehnungen (unbegründet / offensichtlich unbegründet)		davon formelle Entscheidungen	
		%- Anteil		%- Anteil		%- Anteil	%- Anteil	%- Anteil	%- Anteil	%- Anteil		%- Anteil	
1 Syrien, Arab. Rep.	105.620	101.137	95,8%	1.167	1,1%	61	0,1%	221	0,2%	23	0,0%	4.178	4,0%
2 Albanien	35.721	7	0,0%	0	0,0%	33	0,1%	36	0,1%	31.150	87,2%	4.495	12,6%
3 Kosovo	29.801	13	0,0%	0	0,0%	22	0,1%	97	0,3%	26.139	87,7%	3.530	11,8%
4 Afghanistan	5.966	1.708	28,6%	48	0,8%	325	5,4%	809	13,6%	819	13,7%	2.305	38,6%
5 Irak	16.796	14.510	86,4%	157	0,9%	289	1,7%	81	0,5%	128	0,8%	1.788	10,6%

NO TREATMENT AS A REFUGEE

Bill No T9634 submitted to Parliament in March 2016

Abolition of ALL integration measures (including the so-called integration contract) (Now: if needed: 300 euros/month for ½ year, then decreasing sum)

Still **no provision of language course**

Maximum stay at the reception centre, after recognition: **30 days**

Review of refugee and subsidiary protection **status: every 3rd year**

The **withdrawal of the monthly 2850 HUF (9 euros)** cash support of the **asylum seekers**

Expected consequence:

Homelessness

Irregular secondary movement (even of recognised persons)

Justification of the bill: to prevent abuse and not to offer better conditions than what Hungarian citizens enjoy

Absurd – **integration** affected persons **recognised to be in need of international protection**

**5) DECISIONS ARE TAKEN
„ELSEWHERE”, „BY
OTHERS”
BY THE
„EUROPEAN LEADERS”,
AND „BY BRUSSELS”**

Let us defend the country!

Collection of signatures, starting early November 2015, precursor to the planned referendum

The text of the signature collecting sheet:

*„Let us defend the country!
Petition against the compulsory settlement quota.
An immigration wave of never seen magnitude has been launched towards Europe!*

Based on the national consultation Hungary stood up for itself and defended its borders. However, Brussels is now preparing to settle [in Hungary] tens of thousand of immigrants. Say no to the senseless and illegal quota and join our petition!”

VÉDJÜK MEG AZ ORSZÁGOT!

Petíció a kötelező betelepítési kvóta ellen

Ajánlom Megosztás

Soha nem látott bevándorlási hullámot indítottak Európa irányába. A nemzeti konzultáció eredményei alapján Magyarország kiállt magáért, és megvédte határait. Brüsszel azonban most arra készül, hogy kötelező kvótákkal akár bevándorlók tízezreit telepítse le.

Mondjon nemet az értelmetlen és jogtalan kvótákra, csatlakozzon petíciónkhoz!

FIDESZ Tovább a fidesz.hu-ra

Név:*
E-mail:*
Életkor:* Mobil telefon:
Vezetékes telefon:

Kérjük, töltsse ki a *

Adatvédelm

„Pressure is mounting on Hungary”

Minister János Lázár’s press conference, 11 February 2016

„The Hungarian government expects that it has **to fight with Brussels** in order **to defend the country** and in order to **avoid the coerced settlement**” (of refugees resettled from Turkey – but never named as refugees in the press conference –BN)

„Even the **pressure from Brussels will not lead to concessions** with regard to our legal system which enables that the personal security closure /sic – (meaning the fence) BN/ and the legal guarantees /meaning the threats against refugees –BN/ **keep illegal immigrants away from Hungary**”

„**Germany** has not committed a larger mistake during the past ten years, than **having pressed for letting 170 thousand persons across Europe without registration and control**. He stated that this is was the largest security mistake having been committed in Central Europe the last ten years.”

Sources: <http://www.kormany.hu/hu/miniszterelnokseg/hirek/fokozodik-a-nyomas-magyarorszagon> , <http://www.fidesz.hu/hirek/2016-02-11/fokozodik-a-nyomas-magyarorszagon/> and <http://www.mti.hu/Pages/News.aspx?newsid=575465&lang=hun&contnews=0&append=1&print=1> (20160212)

THE SCHYSOPHRENIC RELATION TO THE EU

Government's discourse

Facts /counter-arguments

„It is forbidden to say that in Brussels they are constructing schemes to transport foreigners here as quickly as possible and to settle them here among us. It is forbidden to say that the purpose of settling these people here is to redraw the religious and cultural map of Europe and to reconfigure its ethnic foundations, thereby eliminating nation states, which are the last obstacle to the international movement. It is forbidden to say that Brussels is stealthily devouring ever more slices of our national sovereignty, and that in Brussels today many are working on a plan for a United States of Europe, for which no one has ever given authorisation.”

Viktor Orbán, March 15 speech, 2016
(Government's translation)

Both the 2015 September 22 decision of the Council on the relocation of 120 000 persons from Greece and Italy (in the Commission's proposal also benefitting Hungary) and the planned corrective mechanism in the Dublin recast are expressions of intra-EU solidarity, increasing the fair sharing of responsibility.

The 2015 resettlement decision and the Statement with Turkey envisaging the resettlement of a maximum of 72 000 Syrians in need of international protection are expressions of solidarity with the states hosting four times more refugees than the whole EU

THE SCHYSOPHRENIC RELATION TO THE EU

Government's discourse

Facts /counter-arguments

Orbán about the Commission proposal to recast the Dublin regulation (COM (2016) 270 final)

„The stakes are high: this is about a plan to deprive the Hungarian people of the right to decide whom we wish to live together with and whom we do not wish to live together with; others want to transfer this right somewhere to a foreign land + somewhere called... same time this is a... must not look at this... party politics. I am open to everyone who is able to... in the resistance to forced resettlement.”

The recast is **not about** (long term) **immigration** /"live together"/). It is about conducting refugee determination. If de...

In case of 1 million asylum seekers, Hungary would have to decide 13 500 cases, according to the Commission's criteria (50 % GDP – 50 % population)
This is the number already registered between January and May 2016 – all the remaining cases could be handed over to other EU MS.

... 78 (2) e: clear EU competence
But: even for long term immigration the EU has (shared) competence. See TFEU § 79 (2) a

**6) PRETENDING THAT
HUNGARY HAS APPLIED THE
EU LAW, DEFENDED ITS
BORDERS, APPLIED THE
SCHENGEN ACQUIS**

Solidarity or not?

“Is it in fact **Hungary that is showing the most solidarity with German and Austria** because we are the only ones who can state: **we have stopped the flow of illegal immigration crossing our borders.** There is no more illegal immigration flowing towards Austria and Germany via the territory of Hungary”, Mr. Szijjártó declared. “...there are countries who place the burden onto the shoulders of Austria, Germany and SwedenBut this is not what Hungary is doing; ... We are part of the Schengen System, according to which **we are bound to protect the external borders** of the European Union, and **this is exactly what we are doing**”

Péter Szijjártó, Minister of Foreign Affairs and Trade in an interview with CNN as reported by the government's website <http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/we-must-support-countries-who-care-for-refugees> (20150516)

Hungary never stopped the flow of irregular migrants. **In 2015 at least 410 thousand crossed into Hungary, of which more than 230 thousands were no registered at all.** There were 177 135 asylum requests were registered, but **only 3 425 decisions on the merit** adopted (with 152 260 terminated for absconding and the rest pending) **Protection** given to **508** persons

The number of irregular crossers in 2016 is of the same order of magnitude as before the fence was erected.



Breach of Law – International and European

- The **systematic detention** of every asylum seeker who applies at the border is contrary to international law and presumably infringes Article 31 of the Geneva Convention
- Pushing back from the transit zone to Serbia under the heading of safe third country, **forcing to re-enter Serbia without a legal permit violates** good neighbourliness, the 2007 **Serbia – EU return agreement** and the **Return directive**. Not providing the applicant with a document in Serbian language informing the Serbian authorities of the ground for return (stc.) breaches the Procedures directive
- **Returning persons to Croatia** could only happen under the Dublin III regulation not by direct refoulement

Breach of Law – International and European

10 December: **letter of formal notice** = start of **the first set** of infringement procedures http://europa.eu/rapid/press-release_IP-15-6228_en.htm

- No possibility to refer to **new facts** and circumstances in the context of appeals and
- **No automatic suspension of decisions** in case of appeals - effectively forcing applicants to leave the territory before the time limit for lodging an appeal expires, or before an appeal has been heard.
- Decisions on the appeal against finding an application inadmissible are taken by **court secretaries (a sub-judicial level)** lacking judicial independence
- The rules on **interpretation and translation** in the criminal law procedure violate the relevant directive.

**7) GENERATING THE FALSE
EXPECTATION THAT AN
(UNCONSTITUTIONAL)
REFERENDUM OVER AN ILL-
DEFINED „SETTLING INTO
HUNGARY” („BETELEPÍTÉS”,
ANSIEDLUNG”) MAY ALTER THE
COURSE OF THE EU**

AN EARLY CAMPAIGN

REFERENDUM
against the coerced settlement

**We send the message to
Brussels,
so that they also understand**

OBSCURITY OF THE REFERENDUM QUESTION

Do you agree that the European Union should have the power to impose the compulsory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly of Hungary?

Möchten Sie, dass die Europäische Union auch ohne die Zustimmung des Ungarischen Parlaments die verpflichtende Ansiedlung nichtungarischer Staatsbürger in Ungarn vorschreiben darf?

Translations provided by the prime Minister's homepage

<http://www.miniszterelnok.hu/viktor-orbans-interview-in-der-sendung-180-minuten-180-perc-von-radio-kossuth-2/> (20160517)

„Akarja-e, hogy az Európai Unió az Országgyűlés hozzájárulása nélkül is előírhasa nem magyar állampolgárok Magyarországra történő kötelező betelepítését?”

A FEW STRICTLY LEGAL QUESTIONS

The Hungarian **Fundamental Law** prohibits referenda on „**obligations arising from international treaties;**” (Art 8 (3))

Are obligations incorporated in the **secondary law** of the EU obligations **arising from** (not entailed in!) international **treaties** – this time the arising from the TFEU and the TEU?

Is a referendum on a **past and binding Council Decision compatible with** the principle of **sincere cooperation** (Article 4 para 3 of the TEU)

Is „**compulsory settlement**” **unequivocal** for the public and for the legislator if it is not part of Hungarian law nor of the EU acquis? (See § 9 of Act CCXXXVIII. from 2013 on referenda)

Does the subsidiarity procedure involving national parliaments according to Protocol 2 (to the Treaties) **amount to „consent”, „Zustimmung”?**

Isn't the **ordinary legislative process** entailing the consent of the **European Parliament** a satisfactory **expression of the democratic will** of the nations (perceived as the EU population)?

THE ULTIMATE QUESTION: WHAT IS THE OBJECT OF THE REFERENDUM?

Hungarian **Supreme Court**
(Kúria):

It is the 2015 September 22
Council Decision on the
relocation of 120 000 asylum
seekers.

See points 30, 35, 37, etc.

„The Curia notes...that **the question** sanctioned by the National Election Committee **relates to measures entailed in a Council decision belonging to the secondary law of the union**”

Resolution Knk.IV.37.222/2016/9. of 3 May 2016

Viktor Orbán, interview on 6
May

Q.: *Will the result of the referendum apply to everyone? Will it apply to the migrants who are already here, or to the newcomers, or to the new distribution mechanism?*

A.: **It will be binding for the future.** As regards the past, **a decision** has been taken by the EU which **we are contesting in court.** [the CJEU – BN] **So we are not now trying to change the past – we want to settle that in the court. With the referendum we are seeking to shape the future.**

THE UNION AND THE MEMBER STATES – THE DUTY OF SINCERE COOPERATION (ARTICLE 4 PARA 3 OF THE TEU)

„3. Pursuant to the principle of **sincere cooperation**, the Union and the Member States shall, **in full mutual respect**, assist each other **in carrying out tasks which flow from the Treaties**.

The Member States **shall take** any appropriate **measure**, general or particular, **to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union**.

The Member States **shall** facilitate the achievement of the Union's tasks and **refrain from any measure which could jeopardise the attainment of the Union's objectives.**”

Are Member States, and in particular Hungary meeting this requirement (e.g. by initiating a referendum against an already adopted Council Decision reacting to an emergency situation)?

**INTERIM CONCLUSION:
HUNGARY IS IN THE STATE OF
TOTAL DENIAL, THE
GOVERNMENT CONSTRUCTED A
PARALLEL REALITY, IT IS
WEARING ITS NEW CLOTHES
PROUDLY**

CONCLUSION ON THE ACTIONS OF PARLIAMENT AND GOVERNMENT

Parliament and Government intentionally replaced the figure of the refugee with the (imagined) illegal migrant, who is arriving in an unlawful manner and only has sinister intentions, against whom “Hungary has to be defended”.

The ‘logical’ response: the fence, criminalisation, ignorance, exposure to the harshest conditions, and a total lack of support, except for the support provided by civil society.

That civil society is now under attack, accused of being a vehicle for unfettered “immigration” threatening the destruction of Europe.

So the parallel reality is now complete: there were “illegal migrants”, who only came to destroy Hungary and Europe, but against whom Hungary (and Europe) has been defended.

In the reality on the ground, the violation of many refugee related obligations is coupled with the most myopic political move of diverting the arriving people to neighbouring countries and pretending that the “refugee problem” has been “solved”.

The ambitions of the Hungarian Government and of the EU are widely divergent, they do not run in parallel as they should.

The words uttered are about “defending Europe”, but the deeds actually destroy it.

**WHAT SHOULD BE DONE
INSTEAD?**

**PROTECTING THE
REFUGEES!**

10

POSSIBLE ARGUMENTS

**SUPPORTING THE VIEW THAT REFUGEES ARE (SHOULD
BE) ENTITLED TO PROTECTION EVEN IN TIMES OF
IMMIGRATION CONTROL**

Why not everyone who is in need?

- Migration without borders – would allow
- Arguments for the exceptional treatment
 - Refugee law: part of the political struggle – yes
 - alleviating poverty etc. – not (Price)
 - Centrality of the human right violated (J. Hathaway)
 - Communitarianism – migration would put qualitatively larger pressure on the community than refugee admission (M. Walzer)
- In fact:
 - root causes,
 - human security,
 - moral duty of development assistancelines of thinking all wish to address this, assuming the existence of the moral duty
- Special case: environment induced migration: refugee law? – climate change adaptation issue? - law of development?

The scholarly context of the arguments for refugee protection

Essentially

liberal universalism (cosmopolitan, or impartialist approach)

v.

communitarian (/ethno/nationalist, partialist) approach

The two most engaged authors (C. Boswell and M Gibney) find the liberal universalist approach practically untenable

Christina Boswell's answer: overcome the dichotomy of liberal and nationalist ethical claims, by „abandoning the universalist foundations of liberalism” and basing the mobilisation on the Western liberal states' own tradition, on the „group's pride in affirming shared liberal values” (Boswell, 2006, p. 676)

The scholarly context of the arguments for refugee protection

Matthew J. Gibney's answer is „humanitarianism” or „humanitarian principle”

„Humanitarianism can be simply stated: the principle holds that states have an obligation to assist refugees when the costs of doing so are low. This responsibility recognises, like impartial theories, the existence of duties that stem from membership in a single human community, However, it is less comprehensive in scope than most impartial theories – specifying obligations only to those in great need” (Gibney, 2004, p. 231)

Identity

Brubaker and Cooper: Identity: overburdened – three clusters of meaning

A) *Identification and categorization (pp.14-16)*

External categorisation (e.g. by the state) or self identification

Relational (e.g. kinship) categorical (e.g. profession)

B) *Self-understanding and social location*

„It is a dispositional term...one's sense of who one is, of one's social location, and of how (given the first two) one is prepared to act.” (p. 17)

C) *Commonality, connectedness, groupness (part of self understanding)*

„'Commonality' denotes the sharing of some common attribute, "connectedness" the relational ties that link people. Neither commonality nor connectedness alone engenders "groupness" – the sense of belonging to a distinctive, bounded group involving both a felt solidarity or oneness with fellow group members and a felt difference from or even antipathy to specified outsiders.” (p. 20.)

Identity based I. Shared identity (imagined community)

1. global: altruism – member of human race (liberal egalitarian arguments)
2. ethnically/culturally determined „one of us” (communitarian, ethno-nationalist)
3. „ The bank of history” repaying historic debt accumulated by own community (remembering predecessor refugees who found asylum)

Identity based II.

Construction of the self (identity) by seeing the refugee or her persecutor as „the other”

Constructing the self

- by helping the refugee (the other)
- or protecting the refugee as one of us escaping the persecutor, which is then „the other”

Identity based II.

Construction of the self (identity) by seeing the refugee or her persecutor as „the other”

4. Indigenous – foreigner (hospitality)

5. Rich – poor

6. Democratic, law respecting –
persecutory, totalitarian

Reciprocity – Utilitarian

7. Reciprocity („insurance policy”) Today’s refugee may become tomorrow’s asylum provider and vice versa

This is a utilitarian, rational choice approach.

- Europe, last 80 years:

Spanish, French, Germans, Austrians, Baltic people, Italians, Polish, Greek, Hungarians, Czechs and Slovaks, Romanians, Russians, Moldavians, Armenians, Azerbaijanis, Georgians, Croats, Bosnians, Serbs, Albanians, Ukrainians (and other nationalities) had to flee

Political calculation – Utilitarian, political choice

8/a conflict prevention / domestic political pressure

8/b window dressing

(utilitarian, state level)

Historical – national responsibility

9. If persons were persecuted by a given state or because of the acts of a given state, then the state who is responsible for the persecution ought to offer protection

(Germany before and after WWII; US, Australia - South Vietnamese)

Semi legal - non-refoulement

10. A wider conception of non-refoulement based on the prohibition to expose to ill treatment by way of return (Article 3 of the ECHR as interpreted by the EctHR and beyond.)

PURELY LEGAL APPROACH

Duty only to the extent of

- undertaken treaty obligations
- binding customary law
- European law
- national rules

Exclusion of refugees

In order to argue in favour of limiting the arrivals/excluding refugees the actor must:

- be consequently **egoist** (welfare chauvinist)
- have **no historic memory**
- blindly **trust stability**
- be a **realist** in IR sense (willing to violate law if it is in the perceived national interest and no sanctions threaten or interests outweigh harm caused by sanctions)

Reminder: Council of Europe (All EU members are members of it)

Statute, 1950, preamble:

Convinced that the pursuit of **peace based upon justice** and international co-operation is vital for the **preservation of** human society and **civilisation**;

Reaffirming their **devotion to the spiritual and moral values which are the common heritage of their peoples** and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;

Believing that, **for the maintenance and further realisation of these ideals** and in the interests of economic and social progress, **there is a need of a closer unity between all like-minded countries of Europe**;

Hints for further reading

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Thanks!

Boldizsár Nagy
Central European University
Budapest

nagyb@ceu.edu

www.nagyboldizsar.hu