

WORSE CAN ALWAYS COME.

REFLECTIONS ON THE ELIMINATION
OF THE RULE OF LAW AND
OF ASYLUM LAW IN HUNGARY

Presentation by

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Professor Rebecca Stern's course

„Democracy and Human Rights in a European Perspective”

Delivered (to Uppsala) online
on 23 February 2021

Tuning in

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/>

„We Hungarians have always believed that we were not simply born into this world: if one was born a Hungarian, one also has a mission. One’s mission points beyond oneself: its scope and significance are European” ...

„Facing outward, defending the spirit which binds nations together and Christian European culture against all external attacks on Europe, in the form of a bastion and a shield; facing inward, defending diversity against attempts at imposing hegemony over independent nations.” ...

An **ethnonationalist**, Messianistic claim of having a spiritual mission.

Populist identification of the leader and the nation: „we”

The assumption of a homogenic „Christian European culture” and spirit – an **esoteric ideal** instead of the values of the EU

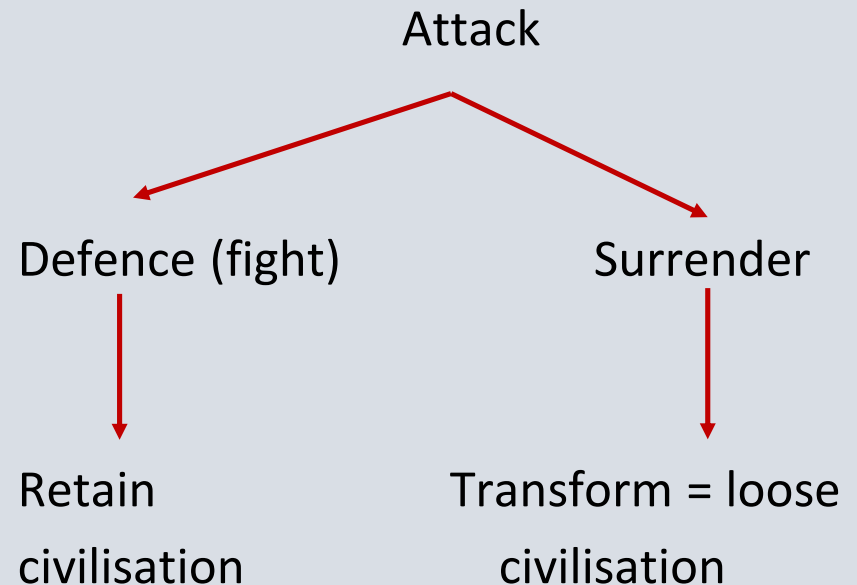
Two dangers - **securitisation**:
„external attacks” = migration
„attempt to achieve hegemony
hegemony” = Brussels, the EU

Setting the scene – The Prime Minister (Orbán) in February 2021

„...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, antagonising (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

2010-2011

20 months – **365 laws adopted** – emptying the substance of parliamentary debate

New Media law setting up control authorities staffed with pro-government persons and strong controls

2011

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

Curtailment of the powers of the Constitutional Court

Removal of the Commissioner on Data Protection and Freedom of Information and of the **President of the Supreme Court** under the pretext of changing the institutions

Gerrymandering the electoral districts – introduction of **one round elections** in individual districts

New Church Law - retroactively depriving churches from that status – arbitrary denial of status from some of them

2012

Reducing the judges' retirement age from 70 to 62 (next year raised to 65 due the ECJ judgment)

Democratic backsliding - dismantling the rule of law

Major stations

2015

See at the asylum legislation

2016

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

2017

Law eventually banning US degree education at the Central European University – 2019: exile in Vienna

Law on Transparency of Organisations Receiving Support from Abroad - stigmatising foreign funding

2018

Criminalising assistance to irregular migrants
Taxing activities presenting migration in positive light

2020

The extensive use of the promulgated „situation of danger” to increase control (e.g. military commanders in hospitals) and legislate by decree even in issues unrelated to Covid-19 (E.g. removing a major foreign investment from the competence of the town where it was located)

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.

Rule of law index (World Justice Project)



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

Economist, Democracy Index, 2020

Table 7.
Eastern Europe 2020

	Overall score	Global Rank	Regional rank	I Electoral process and pluralism	II Functioning of government	III Political participation	IV Political culture	V Civil liberties	Regime type
Estonia	7.84	27=	1	9.58	7.86	6.67	6.88	8.24	Flawed democracy
Czech Republic	7.67	31	2	9.58	6.07	6.67	7.50	8.53	Flawed democracy
Slovenia	7.54	35	3	9.58	6.43	7.22	6.25	8.24	Flawed democracy
Latvia	7.24	38	4	9.58	6.07	6.67	5.63	8.24	Flawed democracy
Lithuania	7.13	42=	5	9.58	6.07	5.56	5.63	8.82	Flawed democracy
Slovakia	6.97	47	6	9.58	6.43	5.56	5.63	7.65	Flawed democracy
Poland	6.85	50	7	9.17	5.71	6.67	5.63	7.06	Flawed democracy
Bulgaria	6.71	52	8	9.17	5.71	7.22	4.38	7.06	Flawed democracy
Hungary	6.56	55=	9	8.33	6.43	5.00	6.25	6.76	Flawed democracy

Source: <https://www.eiu.com/n/campaigns/democracy-index-2020/>, at p. 33

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**

DENIAL

- **Never calling** persons arriving irregularly **as asylum seekers/ refugees** - only using „illegal immigrants”
- **Denying the refugeehood** (asylum seeker quality) = denial of the personality and fate – denying **the agency of the migrants** - denying the duty to assist
- **Denying** that **NGO-s** assisting migrants **are performing a socially useful function** – calling them „fake civil organisations” and agents of George Soros
- In general, **denying the benefits of (regular) migration** and denying that Hungarians living abroad are in fact migrants (Withdrawal from the Global Compact on Migration - 2018 June)
- **Denying the autonomy** of the **European Parliament, the Venice Commission, the European Court of Human Rights even the UN** - claiming they are all influenced by George Soros (EP, Sargentini Report, vote, 2018 September 12)

In essence: creating a **parallel reality**, in which the **asylum seekers are potential terrorists** and **cultural threats** against whom the country must be defended.

Any actor speaking or acting on their behalf is an agent of the **evil** George Soros and so the **enemy of the nation**

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**.

OBSTRUCTION

2015 Applying **safe third country** rules to **Serbia** (since 2015)

- Declaring „**crisis situation caused by mass immigration**” – applying exceptional rules and powers – practically no regular RSD procedure is conducted. **Asylum procedures are only conducted in the transit zones at the border** (for the whole country since 2017) Extending the crisis situation without its conditions being met since 2015
- **Accelerated and inadmissible procedures** – short deadlines – removal decision before appeal phase ends
- **Limited access to the transit zone** - the only entry point (1 person/day in Röszke and Tompa respectively)
- **Closure** of the major open **refugee reception centers** (in 2015-2016)

2016 **Denial** of all **integration** assistance - 1 month in reception center after recognition

2017 - **Removal from the whole territory** of the country if found in an irregular situation and applying for international protection „escort through the fence”

2018 - **new inadmissibility ground**: the person came through a county where the person had not been subject to persecution or the risk of serious harm, or „**adequate protection**” is available

2020- Closing of the transit zone. Preliminary extraterritorial procedure – **declaration of intent** to apply for protection at the **Belgrade or Kyiv** embassy – **no access to procedure from within Hungary**

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)

NO SOLIDARITY WITH THE EU – FREE RIDING

2015 • „Waves through” approximately 240 000 persons without registering, fingerprinting (2015)

- Encourages registered asylum seekers to move on to Austria/Germany (170 000)
- Diverts the Western Balkan route to Croatia and Slovenia with the fence (2015)

2015-2016

Denies participation in

- Relocation of asylum seekers from Greece and Italy
- Resettlement from outside of the EU
- Practically does not receive Dublin transfers from other EU countries
- Vehemently objects any proposal (including „Dublin IV”) of a compulsory solidarity mechanism within the EU

2018 Rejects the Global Compact for Refugees (alone within the EU)

2020-21 Rejects the New Migration and Asylum Pact

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

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, breach of **environmental rules** when building the fence, curtailing **procedural rights and rights of the child**

Against the asylum seekers and migrants in general:

- **Three „national consultations”** (letters to every adult = 8 million persons)
 - 2015 Combining migration and terrorism
 - 2017 „Let us stop Brussels” – against the „EU” „forcing in illegal immigrants”
 - 2017 „Stop Soros” again against the planned compulsory allocation system (Dublin IV)
- **Referendum, 6 October 2016:** Should the EU be „entitled to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of the national Assembly” – outcome invalid due to the relatively small participation rate
- **Amendment of the Fundamental Law** (failed in 2016, succeeded in 2018 due to the regained 2/3 majority)
„Foreign population may not be settled into Hungary”



Against the civil and academic sector

involved in asylum and migration matters
Constant – frequently in personam –
attacks in pro-government media.

„Sargentini prepares for the next week meeting of the EP with the people of Soros in Budapest and Brussels” - Article in the pro-government daily, Magyar Hirlap online , 5 September 2018



Reflections, seeking interpretations

A heuristic tool to interpret the events: Hungary is a feudalistic - late socialist state

Hungary is a

Feudalistic

-
state

Late Socialist

- Personal dependence, vertical hierarchy
- Loyalty to and faith in the leader
- Replaceability of vassals at will

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

A scholarly interpretation

András Körösényi: the Orbán regime is a **plebiscitary leader democracy**

Basis - Max Weber

*“Plebiscitary democracy —the most important type of Führerdemokratie—is a variant of **charismatic authority**, which **hides behind a legitimacy** that is **formally** derived from the **will of the governed**. The leader (demagogue) **rules by virtue of the devotion and trust** which his political followers have in **him personally**.”*

M. Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 268.

The Orbán regime as a leader democracy – Körösényi's key categories

1) **Charismatic Leader** and Legitimacy

2) **Demagogy, Populism**, the Relationship between the Leader and the People

3) The **plebiscitary** character of representation

4) Crisis Situations and **Crisis Discourse**

1) **Heroism** (fight with the „enemy” like banks, utility providers, forces of globalisation), **vision**, (decline of the West) and (to a lesser extent) personal responsibility

2) **Populism as style** – demagogic rhetoric – speaking the language of the ordinary people

3) Orbán perceives **electoral victory as a personal entitlement to implement** the will of the people as defined by him. Elections – subsequent approval of earlier measures. No Fidesz program in 2014 or 2018.

4) He **frames the situation as crisis**, as the end of the era of the West. The European Union's institutions are incapable of giving answers to historical challenges. As a populist he **creates a crisis narrative then to appear as the one who resolves it**

The Orbán regime as a leader democracy – Körösényi's key categories

5) **Radicalism** in Politics and Public Policy

6) **Prebendal** mode of wielding power

5) **Radical innovations in public policies** (taxation, public work, taxing certain branches with crisis tax, **extreme centralisation**) and **primacy of politics** that penetrates all spheres, above all public administration.

6) **Collusion of public and private interest**, „crony capitalism”. Filling up higher positions with loyal persons in the administration (**patronage**), **elite change** in art and science, and the creation of a **national, loyal bourgeoisie**. Dominance in the media world, way beyond the public broadcasters.

Why the support – even if not of the majority?

The paradoxes of the Fidesz voter:

Deeply **anti-Communist**, 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.



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**

Joseph Weiler: Orbán and the self-asphyxiation of democracy

„...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...

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 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.

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

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Scheppele, 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
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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 Timmermans) https://javorbenedek.hu/wp-content/uploads/2017/05/letter_to_vice-president_timmermans_04052017_annex.pdf

THANKS!

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