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In the Hands of a Populist Authoritarian

The Agony of the Hungarian Asylum System and the Possible Ways of Recovery

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8.1 INTRODUCTION

EU constitutional rules require member states to be constitutional democracies. Yet, a populist authoritarian has, following Carl Schmitt's rulebook, captured the constitutional state in Hungary and turned it into an autocracy. It need not have happened, the 2015 'migration crisis' notwithstanding. The new authoritarian regime and its brutal anti-immigration rules serve the sole purpose: to secure prime minister Viktor Orbán's firm hold on power.

European Union politicians hold the assumption that every EU member state is a functioning democracy. Therefore, member states are permitted to ignore each other's faults, knowing that democracies are self-correcting. While it is true that democracies are capable of self-correction, today, Hungary cannot correct its constitutional problems itself.[1] In the 2010 election, the Fidesz-KDNP party got 52.73% of the list votes, but – due to the individual districts where the winner takes all – in Parliament gained 67.88% of the seats that secured constitutional supermajority, which it has mostly retained to the present day.[2]

Since returning to office (he had led the Hungarian government previously, from 1998 to 2002), Orbán has been working toward creating an authoritarian system.[3] His autocracy is not as dramatic as its predecessors,

[1] We use the term 'constitutional' to include the problems concerning the protection of human rights, democracy, and the rule of law.

[2] Homepage of the National Election Committee https://www.valasztas.hu/web/national-election-office/elections.

[3] J Kis, *Alkotmányos demokrácia* [Constitutional Democracy] (Kalligram 2019) 531; J Kornai, 'The System Paradigm Revisited' (2017) 1–2 Revue D'Études Comparatives Est-Ouest 239; GA Tóth, 'Constitutional Markers of Authoritarianism' (2019) 1 *Hague Journal of Rule Law* 37.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

the twentieth-century style authoritarian systems. Opposition parties and candidates are not yet banned, and the regime does not keep hundreds in prison for political dissent. It is still possible to 'protest by word of mouth . . ., or if all else fails, by the extreme form of exit, leaving the country'.[4] Yet, the election law tricks,[5] the campaign finance laws,[6] and the electoral bodies dominated by persons loyal to the leader may cast doubt on the fairness of the elections.[7] Moreover, there are no functioning checks on the executive. Many observers doubt the ordinary judiciary's independence,[8] and hold that the Constitutional Court is effectively neutralised as a check on governmental power.[9]

The rise of authoritarianism is closely related to Orbán's political calculations, driven by a sole purpose: to retain power and control. The restrictive asylum laws and policies are just one instrument among the many used when convenient to serve this goal. The restrictions are not a result of the domestic law's organic development or impacts of the EU acquis. They need not have happened, all the transit through Hungary of large numbers of irregular

According to Way and Levitsky, Hungary is a prime example of a competitive autocracy. LA Way and S Levitsky, 'How Autocrats Can Rig the Game and Damage Democracy' *Washington Post* 4 January 2019. Other scholars describe and name the brave new Hungarian regime in a different way. Bálint Magyar identifies it as a Mafia state, emphasising the cynicism and pragmatism of the regime. B Magyar, *Post-Communist Mafia State: The Case of Hungary* (CEU Press 2016). Yet another terminology is 'plebiscitary leader democracy' suggested by one-time leading Fidesz ideologue, A Körösényi 'The Theory and Practice of Plebiscitary Leadership: Weber and the Orbán Regime' (2018) 33 *East European Politics and Societies and Cultures* 280.

[4] Kornai, supra note 3, 279.

[5] For instance, the so-called winner compensation, gerrymandering, voting rights of the out-of-country Hungarians. R László, 'The New Hungarian Election System's Beneficiaries' <https://cens.ceu.edu/sites/cens.ceu.edu/files/attachment/article/579/laszlo-thenewhungarianelectionsystemsbeneficiaries.pdf> 1–3.

[6] Ibid., 5–7.

[7] OSCE pronounced both the 2014 and 2018 general elections free but unfair. www.osce.org/odihr/elections/hungary. Besides, electoral clientelism in rural Hungary played a role in the enduring success of Fidesz party in the 2014 elections and the 2018 elections. I Mares and L Young, 'Varieties of Clientelism in Hungarian Elections' (2019) 3 *Comparative Politics* 449.

[8] See, e.g., K Kovács and K L Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland and the European Union' in PH Solomon and K Gadowska (eds), *Legal Change in Post-Communist States: Progress, Reversions, Explanations* (ibidem Press 2019).

[9] Ibid., 60–64. Venice Commission, *Opinion on the New Constitution of Hungary* CDL-AD (2011)016, para 102. Venice Commission, *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary* CDL-AD(2012)009, para 10. K Kovács, 'Constitutional Continuity Disrupted' in B Majtényi and M Feischmidt, *The Rise of Populist Nationalism* (CEU Press 2020) 30.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

migrants in 2015 notwithstanding. Since 2010, Hungary's approach to forced migration has been changed substantially: a genuine international commitment gave way to an exclusionist, ethnicist position.[10] This development has been coupled with the discourse of the 'threatening other'. The 'migrant' in the political discourse is separated from its scholarly or legal meaning and is identified with a potential terrorist or at least a criminal, who at the same time threatens to overwhelm the thousand-year-old national 'Christian' culture and replace it with their own.

This chapter, first, locates this Orbanian discourse and measures it in a Schmittian paradigm. The theory of Carl Schmitt helps us make sense of Hungarian constitutional developments because Orbán has continuously concentrated on the political friend and the foe to maintain a permanent 'crisis' situation. Second, the chapter shows how the authoritarian goals determined the management of regular migration and the control of irregular migration and especially asylum. Most of the rules applicable during the fictitious 'state of crisis caused by mass immigration' contradict the EU measures and breach international asylum law. The changes introduced under the pretext of anti-pandemic measures in July 2020 eliminated access to protection.

One might wonder whether it makes a difference that all this is happening in an EU member state. The chapter argues that this 'external constraining force' is relevant both in the context of migration and the possibilities of democratic resistance.[11] There is a potential for legal resistance on the international and EU level, and domestically, techniques of resistance developed during feudalism (e.g., the tradition of free cities or 'passive resistance') and socialism (e.g., samizdat) are to be mixed with those based on the leftover of the rule of law regime.

[10] Byrne, Noll and Vedsted-Hansen, in a recent article, have an interesting blind spot: whereas they call for a historic turn in explaining the roots of the present crisis of EU law and find some of them in the accession process and how asylum law was forced on the new member states they completely ignore the specific situation of Hungary that has in fact provided protection to tens of thousands of refugees first, coming from Romania and then escaping the war in Yugoslavia, and so the historical conditioning of Hungary was substantially different from the other new member states. R Byrne, G Noll & J Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871.

[11] We use quotation mark because Bozóki and Hegedűs argue that Hungary is a regime externally constrained by the EU, but we think that EU principles and laws are an internal and integral part of the Hungarian legal system. A Bozóki and D Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 *Democratization* 1174.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

8.2 FOLLOWING THE SCHMITTIAN RULEBOOK

Today, scholars identify the behaviour of authoritarian nationalists with the term 'populism'. For instance, Lazaridis and Konsta[12] – after noting the divergent interpretations of the term 'populism'[13] – set out three general characteristics of today's populists: they speak on behalf of the national community as if it was a culturally, religiously, and linguistically homogenous genuine community sharing the same values; they accuse the political elite and the intellectuals of being undemocratic, 'incapable, unproductive, and privileged, distant or alienated from the people, or lacking in the plebiscitarian quality of common sense';[14] and identify a threatening other – one or more groups whose members allegedly undermine the community's values or prosperity.

Indeed, today's populist authoritarian nationalists concentrate on the concept of identity as a tool for determining who belongs to the mass that may be defined in ethnic, religious or linguistic terms. They use the language of the malign 'other', in which the other is a group considered not to belong to the mass because it differs in some key characteristics. However, this claim of today's populist authoritarian nationalists is not new. They go back at least to Carl Schmitt's interwar theory of 'democracy',[15] at the heart of which is the idea of a unified will of the homogeneous people, embodied in the unitary sovereign's distinction between the friend and foe.[16] Schmitt held that democracy, properly understood, is an attempt to establish a 'genuine identity' between rulers and the ruled.[17] The ruled are the people who exist in their

[12] G Lazaridis and AM Konsta, 'Identitarian Populism: Securitization of Migration and the Far Right in Times of Economic Crisis in Greece and the UK' in G Lazaridis and W Khursheed (eds), *The Securitisation of Migration in the EU* (Palgrave Macmillan 2015) 185–7.

[13] For a more recent account see B Bugaric, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism' (2019) 20 *German Law Journal* 390.

[14] Lazaridis and Konsta, supra note 12, 186.

[15] M Kumm, 'How Populist Authoritarian Nationalism Threatens Constitutionalism or: Why Constitutional Resilience Is a Key Issue of Our Time' (*VerfassungsBlog*, 6 December 2018) <https://verfassungsblog.de/how-populist-authoritarian-nationalism-threatens-constitutionalism-or-why-constitutional-resilience-is-a-key-issue-of-our-time/. Schmitt does not call his system 'sovereign dictatorship', rather he reinterprets 'democracy', because he accepts the inevitability of democracy. C Schmitt, *The Crisis of Parliamentary Democracy* (E Kennedy tr, Massachusetts Institute of Technology 2000) 22.

[16] C Schmitt, *The Concept of the Political* (Chicago University Press 2007) 26.

[17] B Scheuerman, 'Is Parliamentarism in Crisis? A Response to Carl Schmitt' (1995) 1 *Theory and Society* 138.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

ethnic and cultural 'oneness',[18] which ensures the community's strict internal homogeneity. The ruler may be a directly elected unitary sovereign who acts as an authentic representative of the people by symbolically incarnating the identity of the people and whose primary mission is to guarantee the political entity's self-preservation.

The most appealing part of the Schmittian conception for today's populist authoritarian nationalists is that at the basis of every constitution is an indispensable, unitary sovereign, who, at the moment of an unpredictable crisis, can break free of the rule of law and assert his pre-legal authority. This situation is what Schmitt calls the state of exception (*Ausnahmezustand*), which refers to a completely abnormal situation, where the continued application of the normal legal rules and rights prevents effective action from ending the exception.

Notably, there is a difference between the state of emergency and the state of exception. The notion of the state of emergency refers to public emergencies in democracies, such as national security crises, including, for instance, terrorist attacks, but also economic catastrophes and technological or natural disasters, such as pandemics. During a state of emergency, democratic state institutions function normally, although the distribution of power is modified in favour of the executive to manage the crisis. But a state of emergency provides only the conditions for exercising otherwise legitimate power. It is an underlying principle that 'the executive is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system'.[19] Thus, in a case of emergency, a democratic regime is typically a temporarily modified constitutional democracy. Some constitutional rights are restricted, with the primary purpose of emergency being to restore the democratic legal order and the full enjoyment of human rights.

Ausnahmezustand, however, is a lawless void when there is an order, but the order is not a normative, rather a factual one, where 'the state remains, whereas law recedes'.[20] The application of the normal legal rules and rights is suspended by the unitary sovereign's decision on the ground that the situation is abnormal: 'The exception is that which cannot be subsumed: it defies general codification, but it simultaneously reveals a specifically juristic

[18] U K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution' in M Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy* (Duke University Press 1995) 153–4.

[19] J Ferejohn and P Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, 211.

[20] C Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (Chicago University Press 2005) 12.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

element – the decision in absolute purity'.[21] The unitary 'sovereign is he who decides on the exception'[22] and on 'whether the constitution needs to be suspended in its entirety'.[23] Thus, the state of exception is constituted by the sovereign's personal decision: the sovereign decides both when there is a state of exception and how best to respond to that situation. That decision for Schmitt is one which is based on the political consideration of who is a friend and who is an enemy of the state.[24] Instead of openly discussing competing ideas in public, the uncontrolled sovereign has the exclusive power to make political distinctions between friend and foe constantly. Schmitt asserted that the differentiation of the people from the foe was inevitable because the foe threatened the existence of the political entity. However, the 'existential' enemy need not be an external one; he can very well be a domestic political opponent;[25] furthermore, he 'need not be morally evil or aesthetically ugly, he need not appear as economic competitors, and it may even be advantageous to engage with him in business transactions'.[26]

Hence, the distinction between the political friend and foe is needed to create a 'crisis' situation, where the ordinary norms are suspended. As we will see in the next section, a whole array of processes has been created in Hungary since 2010 in response to some 'crisis' situation.

8.3 IN A PERMANENT STATE OF CRISIS

Already the 2011 constitution of the Orbán regime – officially named 'Fundamental Law' – was adopted with reference to a crisis: the 2008 global financial crisis and its consequences.[27] A couple of years later, citing the 2015 migrant crisis threat, the Hungarian government, alone in the EU, declared a mass migration emergency. Migration was not among the constitutionally listed situations that might justify the introduction of emergency rule. So, the government used article 15(1) of the Fundamental Law – 'The government shall exercise powers which are not expressly conferred by laws on another state body' – to declare a 'state of crisis caused by mass

[21] Ibid., 13.
[22] Ibid., 5.
[23] Ibid., 7.
[24] Schmitt supra note 16, 26.
[25] Ibid.
[26] Ibid., 27.
[27] K Kovács, 'After the Economic Crisis – In a State of Exception?' Venice Commission Report CDL-JU(2014)013.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

immigration',[28] entitling itself to suspend or deny fundamental rights not only to the 'migrants' but to the inhabitants of the country as well. The conditions of introducing the state of crisis have never been met, as neither the numbers required for its introduction materialised nor the threats that would entitle the government to announce it even if the number of arriving irregular migrants was below the threshold.[29] No other EU member state declared a state of crisis to deal with the refugee problem, not even states that were the ultimate destination of asylum-seekers. Although in 2019, the European Commission declared the migrant crisis to be over,[30] the Hungarian state of crisis is still in effect. The government renews it every six months, most recently on 3 September 2021, even though the border with Serbia is hermetically sealed, and in principle not a single irregular migrant can enter Hungary's territory.[31]

In addition to the 'state of crisis caused by mass immigration', a constitutional amendment was adopted to make it possible to declare a 'state of a terrorist threat' to 'manage the adverse results from the migration crisis, including threats of terrorism'. This amendment followed the Schmittian tradition: it allowed the government to declare the 'state of a terrorist threat' on its own, and there was no need to have the Parliament's approval; so the government could decide both that there was a threat and how to respond to it. All this happened in a country that has not seen a severe terror attack within its borders yet. Although the government, in a demagogic way, has connected the issue of migration with the problems of terrorism, militant fundamentalism is absent in the country.[32]

Since 2015, Hungary has been in a permanent 'state of crisis caused by mass immigration'. On top of that, in 2020, the government declared the 'state of danger due to the coronavirus pandemic', and later a third one, a 'state of medical preparedness'.[33] And with a constitutional amendment,[34] a further

[28] Government Decree 41/2016 on declaring a state of crisis caused by mass immigration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis.

[29] The number of irregular migrants required to trigger a state of crisis is described in Section 80/A of the Asylum Act LXXX of 2007.

[30] European Commission, 'Progress Report on the Implementation of the European Agenda on Migration' Brussels, 6 March 2019 COM(2019) 126 final, 14.

[31] Governmental Decree 509/2021; E Inotai, 'Pandemic-Hit Hungary Harps on About "Migrant Crisis"' (2020) Balkaninsight March 19 <https://balkaninsight.com/2020/03/19/pandemic-hit-hungary-harps-on-about-migrant-crisis/>. In reality, however, people manage to cross the fence.

[32] GA Tóth, 'Judging Fears in Refugee Crisis' (*VerfassungsBlog*, 26 September 2015) <http://verfassungsblog.de/judging-fears-in-refugee-crisis/>.

[33] Government decree 40/2020; Government decree 478/2020.

[34] Ninth amendment of the Fundamental Law of 22 December 2020, Hungarian Official Gazette 2020/285, 10128.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

step has been taken on the road to full-out authoritarianism. It broadens the situation in which emergencies can be declared, and government decrees become the default because the amendment erased any meaningful role for the Parliament.

In short, this section demonstrated that the way Hungary has declared a 'state of crisis' displays characteristics of the Schmittian state of exception[35] characterised by a de facto unlimited authority of the executive. Looking at the interrelationship of the democratic decay and the restrictive rules on forced migration facts suggest that the restrictive rules on migration emerged as part of the larger scheme aiming at the concentration of power and generating a loyal constituency, the loyalty of which derives from the vision of a leader who protects it from the 'foe'.

8.4 AUTOCRATISATION IN THE CONTEXT OF MIGRATION

8.4.1 *Constitutional Narratives and Developments*

A discourse that securitises the 'migrant',[36] and represents the arriving irregular migrants as the threatening 'other' has dominated the Hungarian political scene since the 2015 arrival of asylum seekers.[37] The government has treated asylum seekers as foes labelling them as 'migrants',[38] and launched national consultations on 'illegal migration' and terrorism.[39] However, the threatening other is not just the 'migrant', but the 'forces' behind the migrant: the 'financiers', especially George Soros, the 'pro-refugee' NGOs in alliance with

[35] Schmitt supra note 16.

[36] B Nagy, 'Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Cooperation' (2016) 17 *German Law Journal* 1053; B Nagy, 'From Reluctance to Total Denial. Asylum Policy in Hungary 2015–2018' in V Stoyanova and E Karageorgiou (eds) *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 23–31.

[37] See, e.g., B Simonovits, 'The Public Perception of the Migration Crisis from the Hungarian Point of View: Evidence from the Field' in B Glorius and J Doomernik (eds) *Geographies of Asylum in Europe and the Role of European Localities* (Springer 2020); B Mendelski, 'The Rhetoric of Hungarian Premier Victor Orban: Inside X Outside in the Context of Immigration Crisis' in S Ratuva (eds) *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan 2019).

[38] In some instances, the term 'migrant' retained its original meaning encompassing regular migration for work and other legitimate purposes.

[39] The so-called national consultation serves as a substitute for the democratic institution of the referendum. Unaudited questionnaires are sent out to the electorate with several questions put by the government. There is no independent verification of either the number of surveys returned to the government or the answers, and the government refuses to allow outside verification of its claims regarding the results.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

the political left.[40] The EU ('Brussels') is also the threatening other in the field of immigration, against which a firm immigration policy must be upheld.[41] Besides, those who insist on the idea of an open society and promote the ever closer union of the people of the EU are also collaborators against whom the 'real' patriots must ally.[42]

This discourse enables the oppression of various democratic actors, including human rights defenders and NGOs helping refugees and creates synergies with other legal measures destroying constitutional democracy.[43] The protagonist of this discourse, Orbán's government, claims to be the only force capable of containing the threat, with the help of the exceptional powers they vindicate.

A quick look at the constitutional developments related to migration and asylum reveals how the approach to migration has changed over time, how a genuine international commitment gave way to an exclusionist, ethnicist position. Until the 1989 democratic transition, the Hungarian constitution promised to 'grant' asylum to those who are persecuted for their activities promoting 'democratic behaviour, social progress, the liberation of people and the defence of peace'.[44] The 1989 democratic constitution led to the gradual incorporation of the essential elements of the Geneva Convention relating to the Status of Refugees, albeit until 1997 it also recognised persecution based on 'language'.[45] Asylum became a right, not an optionally 'granted' privilege. In 1997, a limitation on the right to asylum was introduced in the constitution based on the twin concepts of a safe country of origin and a safe third country. Asylum was to be granted only to those to whom these did not apply.[46] This restriction was in line with the emerging rules within the European Community as it was.[47]

[40] Mendelski came to the same conclusion. Mendelski supra note 37, 1.

[41] Viktor Orbán's 'State of the Nation' address <www.miniszterelnok.hu/prime-minister-viktor-orbans-state-of-the-nation-address-3/>; Viktor Orbán's speech at the launch event for the Fidesz–KDNP European Parliament election programme <www.miniszterelnok.hu/speech-by-viktor-orban-at-the-launch-event-for-the-fidesz-kdnp-european-parliament-election-programme/>.

[42] Viktor Orbán's speech on the 63rd anniversary of the 1956 Revolution and Freedom Fight <https://miniszterelnok.hu/prime-minister-viktor-orbans-commemoration-speech-on-the-63rd-anniversary-of-the-1956-revolution-and-freedom-fight/>.

[43] For a review of the measures see 8.4.3.4.

[44] Article 67 of the Constitution in its post-1972 version.

[45] Act XXXI of 1989 effectively re-wrote the whole constitution, but technically the old number was retained.

[46] Section 13 of Act LIX of 1997.

[47] R Byrne, G Noll and J Vedsted-Hansen (eds) *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer 2002) 17–27.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

For years, the Fundamental Law contained the definition of the Geneva Convention entitling to asylum (with the above two exceptions) and the prohibition of mass expulsion and *refoulement*.[48] The text had not changed until 2018, when the Fundamental Law's seventh amendment entered into force, introducing new rules on regular migration and asylum.[49] They stipulate in Article XIV (1), 'No foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities.' The first sentence does not make sense since 'foreign population' is not an expression defined anywhere in Hungarian law, and 'settling in' does not have a meaning under migration law.[50] Thus, the whole sentence is a populist slogan with the undertone of protesting against possible relocation or resettlement due to an EU decision.[51]

Paragraph (4) of the same article re-wrote asylum law and deviated from the Geneva Convention by adding the qualifier 'direct' to persecution. So 'well-founded fear of direct persecution' is required to qualify as a refugee. The rule contains another serious deviation from international law, as it excludes from refugee status and asylum any person who 'arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution'. That is much less than a safe third country concept, especially as codified in the EU's Procedure Directive (PD).[52] Subsidiary protection did not find its way into the Fundamental law; only minimalist non-refoulement rule is found in Article XIV (3).

8.4.2 *Regular Migration*

In the context of regular migration, the Hungarian immigration policy is ethnicist and economically utilitarian. In principle, the government has a

[48] Fundamental Law, Article XIV as in 2012.

[49] Seventh amendment of the Fundamental law of 28 June 2018, Hungarian Official Gazette 2018/97, 4714.

[50] J Tóth, 'Mi fán terem a (kényszer)betelepítés? [Where on Earth Does Forced Settling in Come from?]' (2017) 1 *Magyar Jogi Nyelv* 17.

[51] The official justification sharing the rationale behind the seventh amendment was clear on this: 'The mass immigration hitting Europe and the activities of pro-immigration forces threaten the national sovereignty of Hungary. Brussels plans to introduce a compulsory fixed-quota scheme for the relocation of migrants residing or arriving in Europe, which presents a danger to the security of our country and would change the population and culture of Hungary forever.' The justification of Bill T/332 <www.parlament.hu/irom41/00332/00332.pdf>.

[52] Article 38 of the PD. The ECJ found the rule infringing EU law: Judgment of the Court (First Chamber) of 19 March 2020 Case C-564/18 *LH* v. *Bevándorlási és Menekültügyi Hivatal Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság*, ECLI:EU:C:2020:218.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

migration policy[53] – at least with regards to inward migration – but the government never invokes that document, and the public discourse eliminates it as well.[54] Consequently, the Hungarian migration policy can only be deducted from the rules and the legal practices that, notably, entirely contradict the government rhetoric that condemns 'migration' in all of its forms.[55] In practice, Hungary encourages certain types of regular migration and actively seeks certain migrants from third countries. The ethnonationalist element is evident in the encouragement of the migration of those who were 'formerly a Hungarian citizen and whose citizenship was terminated, or whose ascendant is or was a Hungarian citizen'.

The indirect inducement to immigration is also evident in the enhanced naturalisation of those 'whose ascendant was a Hungarian citizen or who is able to substantiate of being of Hungarian origin ... if he/she proves that he/she is sufficiently proficient in the Hungarian language'.[56] The rule's focus is not on descendants of those former Hungarian citizens who became citizens of another country because of political changes they could not control but generally on transborder minorities. Since no time frame would restrict the tracing of Hungarian ancestry, the rule led to the naturalisation of more than one million foreigners, who are entitled to settle in Hungary.[57] They may also vote in the national elections without moving to Hungary.[58]

Other examples of how Hungary encourages immigration include the 'Stipendum Hungaricum' program that aims at third-country nationals of less

[53] The Migration Strategy and the seven-year strategic document related to Asylum and Migration Fund established by the EU for the years 2014–20 mentioned, but not reproduced in Government resolution 1698/2013 <belugyialapok.hu/alapok/sites/default/files/Migration%20Strategy%20Hungary.pdf>.

[54] Krisztina Juhász recalls that in June 2015, the government spokesperson Zoltán Kovács stated that the Migration Strategy was out-of-date and needed to be amended. Nothing has happened ever since. K Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) *Politics in Central Europe* 52.

[55] 'Hungarian Prime Minister Says Migrants Are "Poison" and "Not Needed"' *Guardian* (London, 27 July 2016) <www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump>.

[56] Act LV of 1993 on Hungarian Citizenship Section 4(3).

[57] Precise data are hard to find, as there is no official site publishing them, nor does the National Statistical Office produce them. In response to an MP, the competent state secretary responded that 877,653 persons underwent the beneficial naturalization process between 1 January 2011 and 31 January 2018, and another 135,000 persons living abroad got a certificate of existing Hungarian nationality or were re-nationalised. Response to parliament question K/19616 <www.parlament.hu/irom40/19615/19615-0001.pdf>.

[58] For details, see B Nagy, 'Nationality as a Stigma. The Drawbacks of Nationality (What Do I Have to Do with the Book-Burners?)' (2014) *Corvinus Journal of Sociology and Social Policy* 5 (2) 31–64.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

developed countries;[59] active programs to recruit foreign workers from third countries, like Serbia and Ukraine;[60] and the Hungarian Residency Bond Program that existed between 2013 and 2017.[61]

8.4.3 *Asylum*

Whereas regular migration is governed with ethnicist or utilitarian economic preferences, without being admitted in government communication, the measures affecting asylum seekers and their helpers perfectly reflect the government's intentions. It turns merciless when it comes to the so-called 'irregular' migrants.[62] The process may be dissected into four branches, each one of which will be addressed below.

8.4.3.1 The Ordinary Asylum System

The Asylum Act has been amended twenty-one times between January 2013 and August 2020, its implementing regulation twenty-three times.[63] The last amendment of the Act genuinely seeking harmony with the EU acquis was adopted in 2015 and improved asylum seekers' access to the labour market, eliminated the concept of manifestly unfounded applications and replaced it with different accelerated procedures,[64] reflecting those in the PD.[65] Unaccompanied minors got better protection. The chance to re-open an abandoned procedure was also granted. All amendments after the Summer of 2015 were either technical (reflecting changes in the rules of administrative

[59] <http://studyinhungary.hu/study-in-hungary/menu/stipendium-hungaricum-scholarship-programme>.

[60] OECD, *International Migration Outlook* (OECD Publishing 2018) 246.

[61] R Field, 'Settlement Bond Program Gives 20,000 Foreigners Right to Settle in Hungary, Schengen Region' *The Budapest Beacon* (Budapest, 14 December 2017) <https://budapestbeacon.com/settlement-bond-program-gives-20000-foreigners-right-to-settle-in-hungary-schengen-region/>.

[62] On the total destruction of the Hungarian asylum system see B Nagy 2019, supra note 36.; Sz Borbély, 'Integration of Refugees in Greece, Hungary and Italy Annex 2: Country Case Study Hungary' (2017) European Parliament Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, IP/A/EMPL/2016–18 PE 614.196.

[63] Act LXXX of 2007 on Asylum (Asylum Act), Government decree 301/2007 on its implementation. Figures from J Tóth, Preface of the editor to the special issue of Állam- és Jogtudomány on Asylum (2019) 4, are adjusted for 2020.

[64] Act CXXVII of 2015.

[65] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, 60–95).

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

procedure and organisation) or were steps in destroying a fair and dignity-respecting asylum system.

The regular refugee status determination procedure still exists even if it has been rarely applied since 2015. It incorporates critical points that are relevant to the discussion of restrictive practices. Undocumented asylum-seekers who invoke persecution by a non-state actor may be obliged to contact their home country to prove their own identity.[66] Asylum detention was applied too widely.[67] Certain deadlines are very short. Appeals have no suspensive effect except in safe third-country cases and late-submission cases. Inadmissible are not only applications where the safe third-country clause could be invoked, but also in case the applicant arrived 'through a country where he/she is not exposed to persecution ... or to serious harm ... or in the country through which the applicant arrived in Hungary adequate level of protection is available'.[68] A major concern was that courts had no right to overturn the administrative decision and recognise the applicant as a person in need of protection in an appeal against refusal at the administrative level. They could only return the case to the authority and order a new administrative procedure.[69] The ECJ in the *Torubarov and PG cases* found this in breach of the right to an effective remedy.[70] The ECJ declared that national courts must overturn the denials of protection if the case returns to them for a second time, after the administrative authority again rejects the application, in disregard of the first decision of the court overturning the original administrative decision. It can also be mentioned that in 2016, practically all integration assistance to persons recognised in need of protection was taken away.[71] Beneficiaries of international protection are allowed to stay in a reception centre for one month and receive fundamental health care for half a year. That is all.

The above concerns tend to be abstract in 2021 as the applicability of the rules to which they relate is essentially denied by the rules adopted in July

[66] Asylum Act, Section 5(3).

[67] AIDA, 'Country report Hungary 2018' (2019) 83, 85; *OM* v. *Hungary* App no 9912/15 (ECHR, 5 October 2016).

[68] Asylum Act, Section 51(2)f. This clause is beyond those recognised in the EU acquis and – as mentioned above – was found to infringe EU law Judgment of the Court /First Chamber of 19 March 2020 Case C-564/18 *LH* v. *Bevándorlási és Menekültügyi Hivatal* Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság ECLI:EU:C:2020:218.

[69] Asylum Act, Section 68(5).

[70] Case C-556/17, *Alekszij Torubarov* v. *Bevándorlási és Menekültügyi Hivatal*, Grand Chamber Judgment of 29 July 2019 confirmed by C-406/18 *PG* v. *Bevándorlási és Menekültügyi Hivatal*, Judgment of 19 March 2020.

[71] Act XXXIX of 2016 on amending the Asylum Act.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

2020 to be discussed in the next Section. But even before 2021, they were hardly applied as most people were subject to the exceptional regime in place at times of 'the state of crisis caused by mass immigration'.

8.4.3.2 The System Applicable during a 'State of Crisis Caused by Mass Immigration'

The system established by Sections 80/A–80/K of the Asylum Act includes rules and measures that are incompatible with human rights principles and the international and EU asylum laws that bind Hungary.[72]

The fence at the Hungarian-Serbian and the Hungarian-Croatian border was completed in 2015. They prevent access to the territory. Even if contacted by persons on the other side of the fences, the authorities ignore any expression of the wish to seek international protection in Hungary. According to Article 80/J, anyone found in an irregular situation within Hungary is to be 'led through' a gate in the fence, without the start of an asylum procedure or an aliens' law procedure.[73] The removal measures are taken in the absence of any prior administrative or judicial decision. In essence, that is an extra-legal collective expulsion without any rule of law guarantee and any official record. Hence, asylum seekers are prevented from entering or are forcibly and informally removed.

After the Grand Chamber judgment in *ND and NT* v. *Spain* that unequivocally established Spanish jurisdiction in respect of those storming the Melila fence, there remains no doubt that persons on either side of the fence are under Hungarian jurisdiction (especially as they are on Hungarian territory on the Serbian side of the fence as well).[74] Therefore, being sent back to Serbia against their will – while being under the exclusive and continuous control of the Hungarian authorities – amounts to 'expulsion' for Article 4 of Protocol No 4. Moreover, this is corroborated by the judgement in the *MK and others* v. *Poland* case,[75] which leaves no doubt that returning asylum seekers from the border amounts to collective expulsion even in the case where a brief

[72] This section is written with the view that the application of the rules at the moment of submission of the manuscript is suspended. Therefore, it speaks of the rules, which are still part of the law in the present tense. However, when we analyse the practice, we use the past tense as that practice is momentarily stopped.

[73] FRA, 'Periodic data collection on the migration situation in the EU February Highlights (1 December 2017 to 31 January 2018)' <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-february-periodic-migration-report-highlights_en.pdf> 15.

[74] *N.D. and N.T.* v. *Spain* App no 8675/15 and 8697/15 (ECHR, 13 February 2020) para 109.

[75] *M.K. and Others* v. *Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020).

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

interview is conducted with them and the fact notwithstanding that the expulsion on each occasion may only affect a few persons.[76]

The Grand Chamber's reasoning in *ND and NT* that led to the finding that Spain has not violated the prohibition on collective expulsion does *not* apply to the Hungarian situation. In contrast to the Spanish situation (as interpreted by the Grand Chamber) in Hungary, there are no genuine and effective legal ways open to submit an asylum application when arriving at the border, and the individuals escorted to the border from inland had not been involved in a violent storming of the fence. At no point are apprehended persons subjected to any procedure, other than the 'escort' back to the door in the fence.[77]

Moreover, it was recognised in the Grand Chamber judgment in the *Ilias and Ahmed* case that the return of asylum seekers from Hungary to Serbia entailed a threat of breach of Article 3 ECHR, and therefore could amount to refoulement, which was not the case in ND and NT in respect of Morocco.[78]

Pushbacks have been accompanied by violent acts against irregular migrants.[79] Non-access to territory is accompanied by non-access to the procedure. Only one person per working day was admitted to each transit zone, limiting the applications to ten per week.[80] That practice certainly did not meet the requirement set out in the *ND and NT* judgment: the Schengen external border states must

> make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention.[81]

The practice was that people forced back to Serbia have to wait months, if not years, to be allowed to enter the transit zone.[82]

Even those who finally managed to enter the transit zone and submit an application faced further grave breaches of their human rights and EU

[76] Ibid., para 210.
[77] Terminology of Section 5 of the Act LXXXIX of 2007 on State Border.
[78] *Ilias and Ahmed* v. *Hungary* App no 47287/15 (ECHR, 21 November 2019) para 260.
[79] FRA, 'Migration, key fundamental rights concerns' Quarterly Bulletin 1 July 2019–30 September 2019, 11. Report of the fact-finding mission by Ambassador Tomás Boček, 'Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary' 12–16 June 2017, point III/ 2.
[80] Ibid., 2 and 17.
[81] *N.D. and N.T.* v. *Spain*, para 209.
[82] AIDA supra note 67, 17–18.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

entitlements. First, they were subjected to a procedure that is incompatible with the border procedure as enshrined in Article 43 of the PD, as the Hungarian 'crisis procedure' does not limit the detention to four weeks.[83] Second, the national procedure is incompatible with the rules on the detention of asylum seekers, as enshrined in Articles 8–11 of the RCD since it is extended to persons who do not fall into the taxatively listed six groups.[84] Moreover, the automatic detention of all asylum seekers entering from the Serbian side breached the obligation to consider alternatives to detention and to consider the option of detention only after an individual assessment.[85] Minors aged between fourteen and eighteen were also detained, which is not compatible with rules on persons with special reception needs.

Notably, the finding that the detention under the 'crisis procedure' is illegal does not contradict the ECtHR Grand Chamber judgment in the *Ilias and Ahmed* v. *Hungary* case.[86] That case dealt with detention in the border procedure and was related to a twenty-three-day-long holding of the two applicants in the transit zone. The court's finding of no breach of Article 5 of the ECHR was based on a set of conditions, which are not present in the 'crisis procedure'. This was clearly stated in *FMS and others*, the case in which the ECJ differentiated between the border procedure assessed in *Ilias and Ahmed* and the system applied during a 'state of crisis caused by mass immigration.'[87] The ECJ found that the detention until the end of the procedure in merit following the admissibility phase is incompatible with both the PD and the RCD, as it is neither a border procedure nor does it meet the requirements of necessity and proportionality.[88]

Another breach, going beyond illegal detention within the transit zone, was related to the treatment of the asylum seekers. Not only was the whole militarised set-up re-traumatising, especially to minors, but inhuman treatment was recurrent.[89] Asylum seekers whose application was declared

[83] Section 71/A of the Asylum Act extends the border procedure to those intercepted within 8 km from the Schengen external border, but still contains the four weeks limitation.
[84] Article 8(3) of the RCD.
[85] Article 8(3) of the RCD.
[86] Supra note 78.
[87] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others* v. *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020.
[88] For a more detailed review of the judgment, see B Nagy, 'A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FMZ and the Legislation Adopted by Hungary in Its Wake' (*Eumigrationlawblog*, 15 June 2020).
[89] OHCHR, 'End of Visit Statement of the UN Special Rapporteur on the Human Rights of Migrants, Felipe Gonzáles Morales' 17 July 2019, 2 <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

inadmissible based on the presumption that Serbia had the responsibility to conduct their asylum procedure were repeatedly starved.[90] Initially, even those whose judicial appeal was still pending were deprived of food. Later the deprivation was limited to those whose application was finally rejected, and awaited removal.[91]

Finally, the procedure followed during the 'state of crisis caused by mass immigration' as described here is incompatible with the PD and the more general human right to the fair procedure and the right to be heard. The Commission brought a case to the ECJ in 2018[92] in an infringement procedure that started in 2015.[93] In its 2020 judgment, the ECJ found that the extremely limited access to the transit zones and the impossibility to submit an application elsewhere, the detention in the transit zone and the pushback to Serbia were contrary to Articles 6, 24(3), 43 and 46(5) of the PD, Articles 8, 9 and 11 of the RD and Articles 5, 6(1), 12(1) and 13(1) of the Return Directive.[94]

8.4.3.3 The Total Exclusion of Access to the Procedure and the Abolition of the Transit Zone System

The pandemic led to the total abolition of the access to procedure within the country, excluding even the transit zone, at first temporarily, till 31 December 2020 and later extended till 30 June 2021.[95] Accordingly, both the regular procedure and the crisis procedure remained part of the law; just their application is suspended in favour of a system, now incorporated into the Act LVIII on the Epidemiological Preparedness.[96] According to the Act, asylum applications cannot be submitted within Hungary unless someone is

[90] Hungarian Helsinki Committee, 'Hungary Continues to Starve Detainees in the Transit Zones' 23 April 2019 <www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf>.

[91] Bear in mind that these rejections do not relate to the substance of the claim. The starved rejected asylum seeker may well be a refugee since his/her case was found inadmissible only with a view of Serbia being competent to conduct the refugee status determination.

[92] C-808/18 *European Commission* v. *Hungary*.

[93] Infringement no. 20152201, reported in IP/15/6228 on 10 December 2015.

[94] C-808/18 *European Commission* v. Hungary, Judgment of 17 December 2020.

[95] The 'Provisional rules on the asylum procedures' were introduced by Articles 267–275 of Act LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness (2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről), 18 June 2020. They were extended until 31 December 2022 by Act CXX of 2021.

[96] Act LVIII of 2020 as mentioned above. Its implementing rules are: Government Decree 292/2020 on the designation of embassies in connection with the statement of intent to lodge an application for asylum and Minister of Interior Decree 16/2020 on the procedure related to the statement of intent to lodge an application for asylum.

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already enjoying subsidiary protection in Hungary, is a family member of a person enjoying international protection in Hungary, or is subjected to a law enforcement measure affecting her liberty. Every asylum seeker not belonging to these groups announcing her intention to seek protection is removed from Hungary in a summary procedure without any formality. The law is conspicuously silent about those legally present in Hungary and intending to submit an application. According to the rules, the only legal way to trigger an asylum procedure is by submitting a 'declaration of intent' at the Hungarian embassy in Kyiv or Belgrade. That embassy decides within sixty days whether to have a travel document issued to the future applicant, who then may travel to Hungary and express her intention to submit an actual asylum application.[97] The person may be detained for four weeks without any individual deliberation of the necessity and proportionality of detention. The fact that she arrived legally with the travel document issued by the Hungarian embassy is irrelevant.[98] Both the UNHCR and the Hungarian Helsinki Committee were quick to condemn the new system and demand its withdrawal.[99]

8.4.3.4 Criminalisation of Migrants and NGOs and Other Threats

Hungary is not the only state that adopts ever more measures to exclude asylum seekers and shift responsibility to third countries. What is relatively specific in its process of autocratisation is that Hungary also attacks NGOs and other actors that may help secure the exercise of human rights and refugee rights.[100]

Securitisation comes hand in hand with crimmigration,[101] the introduction of criminal law tools to govern migration and deter stakeholders who oppose

[97] On 19 February 2021, the Commission sent a reasoned opinion to Hungary on this new asylum procedure. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441.

[98] The procedure is regulated in Sections 267–275 of Act LVIII of 2020, that is, these rules do not appear in the Asylum Act.

[99] See the UNHCR's position on the new Act at <www.refworld.org/docid/5ef5c0614.html>; Hungarian Helsinki Committee, 'Hungary de facto removes itself from the common European asylum system (CEAS)' 12 August 2020 <www.helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf>.

[100] Other states also started to attack humanitarians. See EU Fundamental Rights Agency: *December 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them* <https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal#TabPubOverview0> and S Carrera, V Mitsilegas, J Allsopp, & L Vosyliute, *Policing Humanitarianism: EU Policies Against Human Smuggling and Their Impact on Civil Society* (Hart Publishing 2020) especially 57–103.

[101] For a Hungary-relevant interpretation, see Nagy (2016) supra note 36, 1044 and 1065–67.

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government policies. Migration control is an administrative (public law) matter as is amply corroborated by the ECtHR practice in its refusal to apply Article 6 of the ECHR to it. Nevertheless, in 2015, Hungary reverted to the criminalisation of irregular border crossing at sections where there was a fence. A maximum of three years imprisonment threatens all who cross the fence illegally. Not only are the asylum seekers criminalised, which is contrary to Article 31 of the Geneva Convention, but NGOs assisting asylum seekers also face criminal threats. On top of human smuggling and facilitation of illegal residence, 'aiding and abetting illegal immigration' also became a crime,[102] the core of which is 'organisational activity' that is perpetrated in order to

> (a) 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,
>
> (b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit.

Organisational activity is not defined exhaustively, but includes border surveillance, producing or commissioning information material or the dissemination thereof, and 'building or operating a network'.[103]

This crime has a clear goal: general deterrence, not aimed at criminals but at NGOs providing information and assistance to irregular migrants of whom they cannot yet know if they will apply for international protection in Hungary, and if they do apply, whether they will be recognised. The new crime contains terms that can hardly be operationalised to establish beyond a reasonable doubt that the crime had been committed; therefore, it may deter from a wide range of actions that should normally be perfectly legal, like informing asylum seekers about their rights or feeding them. The Commission has started an infringement procedure that was referred to the ECJ on 29 July 2019.[104] The Hungarian Constitutional Court, however, maintained the semantic fog when it did not quash down the crime as unconstitutional but exempted from the crime the conduct that amounts to

[102] Codified at Section 353/A of the Act C of 2012 on the Criminal Code.

[103] Text summarising or quoting Section 353/A.

[104] Case C-821/19 *European Commission* v. *Hungary*. Judgment of 16 November 2021. The ECJ ruled that Hungary had violated EU law by restricting access to asylum and criminalising assistance to asylum seekers https://curia.europa.eu/juris/liste.jsf?num=C-821/19.

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'carrying out the altruistic obligation of helping the vulnerable and the poor'.[105]

There are two more measures against civil society indicative of an autocratisation. Act LXXVI of 2017 on the 'transparency' of organisations that receive support from abroad in the value of 27,000 euros or more per year requires civil society organisations – except for sports, religious and minority associations and foundations – to register and reveal their supporters. They are also obliged to indicate on all publications and web appearances that they are supported from abroad. A month after adopting the Act, the Commission started an infringement procedure that led the ECJ to conclude that it 'has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations'.[106]

In addition to the criminalisation of assistance, a 'special tax on immigration' was introduced. It is 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' except in case of persons enjoying EU free movement rights.[107] This tax is a means to deter as its formal applicability is minimal. In principle, the twenty-five per cent tax was only to be levied on activities supporting the permanent immigration of third-country nationals in Hungary; however, the meaning of 'permanent relocation' is unclear and fluid.

The criminalisation of civil society organisations is yet another link between democratic decay and restrictive migration policy. The government did not need it to limit the number of arriving asylum seekers – that could be achieved by the fence, the criminalisation of their irregular entry through it and the systemic detention and return to Serbia. Threatening the civil society organisations with criminal sanctions and punitive taxes is part of the Schmittian political project of creating foes, identifying the 'mercenaries of [George] Soros' against whom the leader protects his nation.[108]

[105] Decision 3/2019.

[106] Case C-78/18, *European Commission* v. *Hungary* Judgment of 18 June 2020, para 145. Since Hungary has not repealed the Act, on 18 February 2021, the Commission sent a letter of formal notice for Hungary to implement the judgment.

[107] Act XLI of 2018, Section 253.

[108] Beáta Bakó also assumes that the targeted legislation against NGOs constituted 'lex enemies' and came as a reaction of them criticising the curtailing of the rule of law. B Bakó, 'Hungary's Latest Experiences with Article 2 TEU: The Need for "Informed" EU Sanctions' in A von Bogdandy, P Bogdanowicz , I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States Taking Stock of Europe's Actions* (Springer 2021) 40.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

8.5 POSSIBILITIES FOR DEMOCRATIC AND LEGAL RESISTANCE

The democratic decay and the dismantling of the rule of law leaves little room for legal resistance and resilience. It promotes (so far peaceful) forms of democratic resistance. Let us briefly mention the latter before turning to the possibilities of the legal action.

According to medieval traditions, free cities may function as islands of freedom and may even exercise self-governance.[109] The cities under opposition rule may stop the harassment of visible minorities, press the law enforcement agencies to take measures against xenophobic insults or crimes and offer NGO's various forms of material support such as office space and access to local media. Symbolic measures of the mayor and the cities' counsellors may refute and delegitimise the government's ethnicist, populist propaganda. An example of such a measure is raising the EU flag again on local government buildings that had disappeared from the Parliament and the central government's buildings long ago. Cities may shelter those few refugees who were recognised but had to leave the reception centre after thirty days without any integration assistance. Human dignity, freedom, democracy, equality, the rule of (local) law and respect for human rights, including the rights of persons belonging to minorities, may be respected and exercised locally.

Yet another form of resistance (widespread during Socialism) is maintaining an 'alternative' sphere of public information. Social media partly naturally provides it, but a 'samizdat' is again in circulation, and Radio Free Europe is back on the scene.[110] Besides, German state broadcaster Deutsche Welle announced the launch of Hungarian-language news programmes.[111] Solidarity, among NGOs under pressure has gained importance, as seen, for example, in the concerted refusal to register as foreign-funded organisations.

Turning to the classical legal tactics, one may note that on the ruins of the rule of law, a few remaining independent regular courts may still protect the integrity of EU law and the interest of asylum seekers to find protection, for example, by finding that Serbia is not a safe third country, contrary to the claims of the government. Similarly, not ordering detention is within the

[109] On 16 December 2019, the so-called Free Cities Pact was signed by the mayors of Bratislava, Budapest, Prague and Warsaw to demonstrate their commitment to democratic values and increase their leverage against national governments <www.themayor.eu/en/mayors-of-bratislava-budapest-prague-and-warsaw-sign-free-cities-pact>.

[110] 'RFE/RL Relaunches Operations in Hungary Amid Drop in Media Freedom' 8 September 2020 <www.rferl.org/a/rfe-rl-relaunches-operations-in-hungary-amid-drop-in-media-freedom/30826537.html>.

[111] <www.ardaudiothek.de/medienmagazin/klubr-di/86534998>.

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power of an independent judge. After the *Torubarov* judgment, courts once again may overturn the administrative decision if the authority does not change it to recognition after the first sending back.

It is clear, though, that domestic democratic resistance would not be viable without external support. For instance, EU institutions might take a more decisive role in supporting Hungary's re-democratisation. The reality of the ongoing Article 7(1) procedure against Hungary to date is anything but 'nuclear'.[112] It so far somewhat resembles a blunt arrow. Yet, replacing Article 7 with newer mechanisms like the 'peer review procedure' entailing a regular review of each member state's rule of law performance is not a solution. Instead, European politicians should use the existing tools and improve Article 7 procedure by working transparently and using internal expertise of the European Parliament and external expertise of Council of Europe bodies. All the three major institutions of the EU (Commission, Council and the Parliament) are currently subject to serious criticism concerning their inefficient actions to stop autocratisation. It is not the task here to engage the literature on strengthening the EU to reinstate the rule of law and respect of the European values.[113] Nevertheless, four short remarks may be appropriate.

First, if the *effet utile* principle was to be applied, Hungary cannot veto the application of Article 7(2) TEU. According to this provision, the European Council may determine the existence of a serious and persistent breach by a member state of the values referred to in Article 2 TEU. After that, the Council could adopt effective sanctions.

Second, as guardian of the Treaty, the Commission has a duty to ensure the uniform enforcement of EU law, including the rule of law. The best tool the Commission has at its disposal to enforce it is the infringement action, which may be made more powerful to be 'systemic'.[114] While infringement actions have not so far been used effectively to challenge the autocratic consolidation of a member state, the ECJ has strongly hinted that it would be open to such a challenge.[115]

Third, the intensified use of interstate disputes under Article 259 TFEU might also be used more frequently. The article allows the EU member

[112] KL Scheppele and L Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (*VerfassungsBlog*, 6 March 2018).

[113] For an authoritative restatement of the issues see: KL Scheppele, DV Kochenov and B Grabowska-Moroz, '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' (2021) *Yearbook of European Law* 1.

[114] Ibid.

[115] For instance, in the case *Associaçao Sindical dos Juízes Portugueses* v. *Tribunal de Contas* (C-64/16, 27 February 2018), the ECJ threw out a lifeline to the other European institutions seeking to fight the destruction of judicial independence in a member state.

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states to take action even when the EU Commission does not support the claim.[116]

Fourth, budget conditionality rules linked to the rule of law are now one of the EU toolbox items. Disbursement of EU funds from the budget and Next Generation EU is tied to respect for the rule of law standards. However, its application is suspended until the ECJ has greenlighted it,[117] which is legally questionable and in violation of the EU's system of checks and balances.[118]

Significantly, however, external support in re-democratisation is not limited to the EU. European and global institutions are instrumental, although their role cannot be examined here in detail.

The ECtHR is certainly a candidate to act as a force resisting democratic decay and restrictive migration policy. Until the Grand Chamber decision in *Ilias and Ahmed*, it did well in condemning the protean forms of detention of asylum seekers and migrants without the right to stay in Hungary, but on the more general front of resisting democratic backsliding, its record is less impressive.[119] The ECtHR has never addressed the structural constitutional changes that happened during the last decade in Hungary. A few ECtHR judgements affected various aspects of the Hungarian autocratisation process, but either they failed to require the government to make structural changes,[120] or the government refused the legal change required by the ECtHR.[121]

Another short remark relates to the relative passivity of UNHCR that runs an office in Budapest and is, therefore, a close witness of the agony of the Hungarian asylum system. True, at crucial points, UNHCR has raised its voice. However, UNHCR has not been part of the visible public discourse regarding the situation; its representatives do not sit on public panels; neither

[116] L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' June 2019 <https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> 6.

[117] The CJEU dismissed the actions brought by Hungary and Poland against the conditionality mechanism which makes the receipt of financing from the Union budget subject to the respect by the Member States for the principles of the rule of law. C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*, Judgment of 16 February 2022.

[118] A Alemanno and M Charmon, 'To Save the Rule of Law You Must Apparently Break It' *Verfassungsblog* 2020/12/11.

[119] B Nagy, 'Hungary, in Front of Her Judges' in P Minderhoud, S Mantu and K Zwaan (eds) *Caught in Between Borders: Citizens, Migrants, Humans. Liber Amicorum in Honour of Prof. Dr. Elspeth Guild Tilburg* (Wolf Publishers 2019) 251–257 discussing the ECtHR practice.

[120] In the *Baka* v. *Hungary* App no 20231/12 (ECHR, 23 June 2016), the government paid the compensation to Chief Justice Baka that the ECtHR ordered but did not ensure that in the future, judicial speech is not used for disciplining judges.

[121] In the *Szabó and Vissy* v. *Hungary* App no 37138/14 (ECHR, 12 January 2016), the ECtHR found that the unlimited surveillance powers of the government's anti-terrorism police violated the Convention. Still, the government refused to change the law.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

do they give interviews. The reason is that UNHCR fears that it would lose access to the transit zones if it had a less low-key policy. UNHCR also believes that no rational debate with government propaganda is possible at the moment. That may be true, but one still wonders if a more direct challenge of the government could not improve the public image of asylum seekers and refugees and undermine the stream of fake news and the xenophobic framing that is part of the government indoctrination.

8.6 CONCLUSION

The rise of ethnonational populism and the phenomenon of autocratisation are subject to an ocean of literature. Most of it describes and analyses the Hungarian constitutional and legal changes, and some search for their causes. This chapter does not focus on these matters; instead, it gives an overview of the constitutional changes regarding migration, the abolition of the functioning asylum system and the framing of migration as a threat against which Hungary must 'protect' itself.

The chapter argues that the constitutional changes introduced by Orbán's authoritarian regime can be interpreted in a Schmittian paradigm. An ever-increasing number of enemies had to be found against which the government (relying on its overweight in Parliament) equipped itself with practically unlimited powers, by way of introducing special legal orders (more specifically, by declaring a state of crisis), either by amending the Fundamental Law, or merely de facto, by ordinary Acts or even government decrees. The government has used the 'crisis' that has never existed to 'justify' the exceptional and inhuman practice developed in the transit zone, which has recently been replaced by a total ban on applying for asylum in Hungary or at its borders.

The chapter suggests that the abolition of the asylum system did not follow either from the development of the EU acquis or the large-scale arrivals in 2015, which only led to around 5000 substantive refugee status determination procedures that year and much less in the following years.[122] Other states where large numbers of asylum applications were submitted may have tried to avoid the increase in numbers. However, contrary to Hungary, they have not given up on the idea of a fully-fledged refugee status determination procedure. The elimination of a regular procedure guaranteeing the required reception did not follow from an internal 'organic' development of the Hungarian

[122] Nagy 2019 supra note 36, 20.

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press

refugee law either. Hungarian asylum law was generous in some periods, especially in the early nineties and then again after the first formal Asylum Act. It only gradually became tighter, but still within the bounds of the EU acquis, perhaps except the extensive use of detention.[123]

Finally, the chapter addresses the strategies the civil society and the remaining independent institutions may consider when resisting autocratisation. As it is clear by now, Orbán has sacrificed the rule of law and the functioning democracy with a decent asylum system and presented migration as a threat to perpetuate a crisis that calls for the leader with extra-ordinary capabilities to protect his people. In exchange, blind trust and exceptional powers were to be offered, replacing rational discourse and a state operating within the bounds of fundamental rights, democracy, and the rule of law. The minority of the voters wanted that, but due to the electoral system, most parliamentarians are willing to maintain it in exchange for the goodwill (and rewards) offered by their (party) leader. Under these circumstances, democratic resistance and legal action may be needed. Both have limited and ever-narrowing space. As doubts arose concerning the meaningful support from the international and EU institutions, no guarantee is within sight against the continuing autocratisation that only used restrictive migration and asylum law and policy as a vehicle to promote its purely political, Schmittian goals, essentially determined by the person of Viktor Orbán.

[123] B Nagy, A *magyar menekültjog és menekültügy a rendszerváltozástól az Európai Unióba lépésig. Erkölcsi, politikai-filozófiai és jogi vizsgálódások* [Hungarian refugee law and refugee affairs from the system change in the late eighties until accession to the European Union. Moral, political-philosophical and legal investigations] (Gondolat 2012).

https://doi.org/10.1017/9781009040396.013 Published online by Cambridge University Press