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Securitization of Migration in Hungary and the Case of Endless State of Crisis Due to Mass Migration

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Abstract

As a response to the migration crisis, Hungarian Government has chosen to securitize the issue of migration and asylum in Hungary and in the European Union as well.ⁱⁱⁱ

The paper aims to give an overview of the concept of securitization, and the normative critique of it, analyzing not only the securitizing actor and its speech, but its structural power and the dissenting voices as well. It examines, by the analysis of the relevant legal acts and secondary sources, the extraordinary measures introduced by the Hungarian Government paying a special attention to the state of crisis due to mass migration which is basically a type of special legal order, and which raises several questions and concerns at the same time.

The paper comes to the conclusion that the Hungarian Government has been securitizing migration successfully through consequent communication and extraordinary measures. On one hand, it created migration as one of the biggest security threats and on the other hand government's migration policy as one of the most successful policies precepted in Hungary according to the public opinion polls. The other conclusion is that a central role is devoted to the misuse of a sort of special legal order, namely the state of crisis due to mass migration.

Keywords: Migration, Securitization, Hungary, State of exception, State of crisis due to mass migration, Crisis

The Concept of Securitization

Securitization is one of the most significant, innovative and at the same time most contestedⁱⁱⁱ approach in security studies in the last two decades (Williams 2003: 511) which was introduced by the members of the Copenhagen School, namely Barry Buzan, Ole Waever, and Jaap de Wilde in their book entitled 'Security: A new framework for analysis' in 1998.

The authors argue for a constructivist approach of security in which *security is not an objectively given phenomenon*, but a contested concept and *a result of a securitization process* which consists of *securitizing speech-acts* through which a *securitizing actor* identifies issues as an *existential threat* for the *referent object* and proposes *extraordinary measures* to handle the situation. As a consequence security agendas are the result of securitization processes (Buzan – Waever – Wilde 1998: 23-26).

It's important to emphasize that the *process of securitization is an intersubjective one*, consequently securitizing actor cannot decide alone whether an issue is a security issue. Audience (in practice society or significant part of it) has to accept the arguments of the securitizing actor about the threat, has to

consider the referent object as something that should survive, and finally support or at least accept those extraordinary measures introduced by the securitizing actor. With the words of the co-authors:

“A discourse that takes the form of presenting something as an existential threat to a referent object does not by itself create securitization—this is a securitizing move, but the issue is securitized only if and when the audience accepts it as such.”(Buzan – Waever – Wilde 1998:25)

Based on the above-mentioned definition, it is worth to expose the elements of securitization:

Referent object:

“things that are seen to be existentially threatened and that have a legitimate claim to survival”(Buzan – Waever – Wilde 1998: 36). Since securitization itself is an intersubjective process, referent object cannot be identified unilaterally by the securitizing actor, but referent object has to hold a general legitimacy (stems from the audience) as something as should survive (Buzan – Waever – Wilde 1998: 31). The referent object may vary according to the different security sectors, e.g. in the military sector the referent object is the state (mainly its territorial integrity) in the political sector the sovereignty, constitutional order or authority of government are the typical referent objects, while in the environmental sector this can be the survival of certain species or the climate (Buzan – Waever – Wilde 1998: 22-23).

Existential threat:

There is no a universal standard regarding the existential threat, since the essential quality of existence varies greatly across different security sectors therefore, so does the nature of existential threats. (Buzan – Waever – Wilde 1998: 21-22). At the same time, according to some of the critics this is one of the weak points of the securitization theory, since not all of the significant threats will endanger the real existence of the referent object, but still they might have effects which divert the usual function of it (Marton – Balogh – Rada 2015: 29).

Securitizing actor:

Who securitize issues by declaring something existentially threatened (Buzan – Waever – Wilde 1998: 36). In most of the cases, persons, politicians and institutions who represent the state are the securitizing actors, but sometimes others, such as companies, lobbyists, NGOs or activists (latters especially on the area of environment protection) may play this role. At the same time the authors stress: “[...] the possibility for successful securitization will vary dramatically with the position held by the actor.” (Buzan – Waever – Wilde 1998: 31). The reason why in most of the cases politicians and institutions who represent the state prove to be successful actors of securitization is that they have the required resources and influence on the society (Marton – Balogh – Rada 2015: 24).

Speech act:

Is a direct communication towards the audience which aims to draw the attention to the threatening factor and form the security perception of the community (Marton – Balogh – Rada 2015: 31). There are certain conditions (internal and external ones) which facilitate the speech act. As an internal condition it's important to follow the grammar of security constructing a plot that includes existential threat, point of no return, and a possible way out. The external aspect of the facilitating conditions embraces two elements: on the one hand it is important that the securitizing actor has social capital and, not necessary official, authority. On the other hand it is also helpful if the certain threat are generally held to be threatening (Buzan – Waever – Wilde 1998: 32-33.)

Extraordinary measures:

The different policy areas function under ordinary rules which are accepted via pre-defined legal processes. At the same time in certain cases the decision-maker may use extraordinary measures to handle the situation. At some level states are prepared for such an extraordinary situation; in

democracies usually, the state of exception is that special legal order which authorizes the decision-maker to use extraordinary measures temporarily (Marton – Balogh – Rada 2015: 31-32).

To sum up, securitization theory “aims to gain an increasingly precise understanding of who securitizes, on what issues (threats), for whom (referent objects), why, with what results, and, not least, under what conditions (i.e., what explains when securitization is successful)” (Buzan – Waever – Wilde 1998: 32).

Critical application of securitization

The discursive conceptualization of security policy meant a really important milestone in security studies confronting with the traditional realist approach of security. At the same time critical voices emerged as well, many of them emphasizing the normative implications of securitization, focusing on the issue of normative dilemma and negative securitization.

Negative securitization are those processes “that are the product of unchallenged structural and symbolic power relations as well as social or political processes of exclusion” (Charrett 2009: 11). The normative dilemma of security analysts is how to write and analyze securitization processes without replicating dominant and exclusionary approaches of security resulting in negative securitization processes. As Huysmans stresses: “speaking and writing about security is never innocent” (Huysmans 2002: 47).

Several attempts were made to fill the normative gap of the securitization theory. Williams and Wyn Jones gave a *discursive ethical response* which links securitization to a discursive ethics means that the securitizing speech act is open to discussion in which the “validity claims” of the securitizing actor can be challenged (Williams 2003: 522). The discussion typically revolves around the truth, the normative rightness of the validity claims and the sincerity of the securitizing actor. As a result, the speech act becomes open to refutation based on ethical considerations (Wyn Jones 1999: 111).

As the representative of the *consequentialist approach* Floyd argues “security is neither always positive nor negative, but rather is issue dependent”. The task of the security analysts is to measure the consequences of, and benefits from the securitization and inform the security actor about the best possible action (Floyd 2007: 338).

At the same time, as Cathrine Charrett points it out, the above-mentioned normative approaches have a significant deficiency, namely that they neglect to deconstruct the structural power relations inherent within the dominant discourses of security (Charrett 2009: 22). As Buzan and his co-authors emphasize “no one is excluded from attempts to articulate alternative interpretations of security”, but as a result of the power structures within the field of security, certain actors, typically state elites, hold an advantaged position over defining security threats (Buzan et al 1998: 31-32). They admit the state-elites dominated nature of security discourses, still representatives of the Copenhagen School focus only on successful cases of securitization which are mostly connected to state-elites.

Agreeing with Charrett’s critical application of securitization approach, we argue that to avoid negative securitization, it is crucial on one hand to open up the structural power relations within the securitizing process and critically evaluate the social and political power of the securitizing actor, and on the other hand to give space to dissenting voices or alternative/marginalized securitization processes (Charrett 2009: 38).

In the empirical part of the study we apply the critical securitization approach proposed by Charrett, examining the Hungarian Government as securitizing actor’s structural power position and introducing the dissent voices as well in the process of securitization of migration in Hungary.

Securitization of the Issue of Migration and Asylum in Hungary

Securitizing actor and its structural power position

Hungarian Government, and as a key figure, prime minister Viktor Orbán, has been playing the securitizing actor's role in the securitization process of migration and asylum unequivocally. After gaining two-third majority in the Hungarian Parliament due to the elections 2010, the Orbán-led Government started to establish the so called "system of national cooperation" (Hungarian Parliament 2010). As a result, during the last 10 years a highly centralized political system has been formed (via the adoption of a new constitution^{iv}, and the modification of several cardinal acts which needs two-third majority in the parliament) where the political power is centralized in the Government and, and personally in the hand of the prime minister, having crucial political influence, among others, on the National Electoral Committee, the Constitutional Court, the Public Prosecution, National Court of Auditors and the media. This centralization of power has led to the Tavaris and Sargentini Reports based on the European Union launched its rule of law procedure against Hungary in 2018 (European Parliament 2018).

Beside the growing political influence over the institutions of checks and balances and the media, we should also pay attention to the social support^v of the governing party, Fidesz. Public opinion polls have been showing a massive support with temporary setbacks of the governing Fidesz since 2010. One of the most remarkable setbacks happened in the end of 2014 after the triple victory of the Fidesz on the national parliamentary, European parliamentary and the local elections. Two research institutions, Medián and Tárki detected significant drop of the Fidesz's support by 12 per cent in December 2014 (Political Capital 2014).

Furthermore, not only the public opinion polls indicated the population's turn away from the Fidesz, but the results of the by-elections as well. Several different types of by-elections (local, national parliamentary, mayor) were lost by the Fidesz^{vi} (Political Capital 2015a; Political Capital 2015b). As a result of the national parliamentary by-election in the end of February, Fidesz two-third majority in the parliament was lost as well.

So, from the end of 2014 the Fidesz support in the public opinion and on the by-elections had dropped, nevertheless Fidesz was still the most supported political party (no one could take the lead from the Fidesz even at that time in the public opinion). Faced with the declining social support, and the loss of the two-third majority in the parliament, prime minister Viktor Orbán sought for an issue through which Fidesz's support could be stabilized, and this issue was nothing but the securitization of migration and asylum.

Speech acts

Since 2015 Hungarian Government has been securitizing the issue of migration and asylum in Hungary and in the European Union as well as via different forms of communication: declarations, billboard-campaigns, and so-called national consultations.

As a starting point, in the spring 2015, Hungarian Government launched an anti-migrant billboard campaign. Since the messages were written only in Hungarian ("If you come to Hungary, you must respect our culture, "If you come to Hungary, you must abide our laws," "If you come to Hungary, you cannot take our jobs") it's safe to conclude that Hungarian people were the target of the campaign (Juhász 2017: 39-40). Anti-migrant billboard campaign was ongoing in Hungary later as well, but it has got an anti-Brussels and anti-Soros semitone too ("We have sent the message to Brussels: migration has to be stopped!", "We have sent the message to Brussels: 98% to the compulsory relocation. "We shouldn't let Soros to laugh in the end!").

In the autumn 2015, Prime Minister Viktor Orbán drew a direct relation between migration and terrorism after the terror attacks against the Charlie Hebdo and the Bataclan stating: "Economic migration is a bad thing in Europe. We cannot consider it as a useful phenomenon, it causes only trouble and danger for European people, so migration has to be stopped (Népszabadság Online 2015). [...] Nobody admit it, but the truth is that practically every terrorist is migrant. The only question is when did they migrated into Europe." (Index 2015).

In parallel with the billboard campaigns, Hungarian Government started several so called 'national consultations', these are some kind of questionnaires in which the Hungarian Government asked guided questions. The first one in May 2015 was about migration and terrorism with questions like this: "Some say that immigration mishandled by Brussels is in connection with growing terrorism. Do you agree with this opinion?" [61,07 % agreed completely, 27,79 % agreed rather and 11,14 % didn't agree]. "Would you support Hungarian Government she to introduce, against Brussels 'permissive legislation, stricter rules on migration?' [89,65 % fully supported, 7,55 % partially supported and 2,80 % didn't support] (National Consultation 2015).

In September 2017 another national consultation paper was sent to the constituents, in which Hungarian Government took aim at the so called 'Soros Plan'. György Soros the billionaire business man was in the cross-hairs of the Hungarian Government's securitizing speech act in this national consultation. According to the questioner, the substance of the plan is that Soros wants to persuade Brussels to settle one million migrants from Africa and the Middle East into Europe and Hungary as well. Another statement of this national consultation was that, based on the Soros Plan, Brussels should oblige the member states, including Hungary, to relocate migrants in the framework of a compulsory relocation mechanism and to pay 9 million Hungarian Forints state support for every migrant. This questioner wasn't so sophisticated regarding the possible answers since there were only two optional responses (yes or no) to the question 'Do you support this point of the Soros Plan?'(444.hu: 2017).

National Consultation 2018 was basically about the protection of families, but it contained question relating to migration as well: "Do you agree that the decrease of the population has to be handled not by immigration but the enhanced support of families?" [99,18 % of respondents agreed of course] (National Consultation 2018).

Just before the European Parliamentary elections the letter of PM Viktor Orbán arrived to constituents' post box in the spring 2019. The information sheet got the title: "You have the right to know what is Brussels preparing for!" "The Prime Minister informed the citizens about the newest 'worrisome developments of the migrant crisis', stating that the Brussels Bureaucracy didn't learned the lessons from the terror attacks and continued to enhance migration to the EU via migrant visa and bank cards for migrants (Miniszterelnöki Kabinetiroda 2019). At the same time, the Government launched a new wave of billboard campaign which was combining the anti-migrant, anti-Brussels and anti-Soros messages and which on one hand enhanced the tension between the EU and Hungary, and on the other hand between the Fidesz and the European People's Party (EPP), since Jean- Claude Juncker appeared on the billboards beside Soros.

If someone assumed that in the time of COVID-19 pandemic the issue of migration disappeared from the governmental communication, would be wrong. Hungarian Government launched the last national consultation in June 2020. The questioner is devoted formally to the counter- or preventive measures of the CIVID-2019 pandemic, but substantially it's a mixture of the previous national consultations, since it includes questions not only relating to the handling of the pandemic, but relating to Soros's newest plan, Brussels institutions' inability to foresee the pandemic and migration as well (National Consultation 2020).

Extraordinary measures and the dissenting voices

Beside the securitizing speech acts, Hungarian Government has introduced several measures which are out of the normal way of policy-making and aim to handle the "extraordinary situation and threats" allegedly caused by mass migration. Under this subtitle we are surveying these measures, paying a special attention to the state of crisis due to mass migration and its critiques.

The birbed-wire border fence

One of the most controversial measures^{vii} of the Hungarian Government was that in the evening of 14 September 2015 it ordered to close the Hunagrian-Serbian state border at Röszke. By that time

the 175 km long barbed-wire border fence was built up entirely between the two countries. Later on border closure was set up on the Hungarian-Croatian and Hungarian-Romanian border as well.

Amendments to the Asylum Act and other relating rules

Hungarian Parliament made several amendments to the Asylum Act and to other relating rules in the last few years which introduced provisions that undermine the availability of international protection in Hungary.

In July 2015 Government Decree 191/2015 (VII. 21) identified Serbia as a safe third country for asylum-seekers which was contrary both to the opinion of the Hungarian Supreme Court (Opinion No. 2/2012 (XII.1) and the recommendation of the UN High Commissioner for Refugees (UNHCR 2012). Since the amendment to the Asylum Act obliges the National Directorate-General for Aliens Policing to reject as inadmissible all asylum claims lodged by applicants who came through a safe third country and more than 99 % of the asylum-seekers enters Hungary from Serbia, the new regulation meant a quasi-automatic rejection of almost all of the asylum claims (Hungarian Helsinki Committee 2015: 1-2).

Additionally, accelerated procedure was introduced for asylum-seekers coming from a safe third country in which the National Directorate-General for Aliens Policing is expected to pass a decision within 15 days (Article 47 section (1),(2) and Article 51 section (2) point e) of the Asylum Act).

In September 2015 after the closure of the Hungarian border with Serbia, so-called 'border procedure' (Article 71/A of the Asylum Act) and the rules of 'state of crisis due to mass migration' (Article 80/A of the Asylum Act) was introduced by the amendments to the Asylum Act.

Not only the Asylum Act, but the Act on State Borders was also amended in September 2015. According to the amendments, transit zones might have been established at any of Hungary's land borders that was an external Schengen border. These transit zones should have functioned as temporarily accommodate of individuals seeking refugee status or subsidiary protection, a place to conduct asylum and immigration procedures, and to accommodate the facilities required for this (Article 15/A section (1) of the Act on State Border).

Due to the amendments of 2016 to the Asylum Act and the Act on State Border, since 5 July 2016 Hungarian Police can escort back anyone to the external side of the border fence on the Hungarian-Serbian or Hungarian-Croatian border, who entered the green border illegally and was caught within eight kilometres from the state border without letting them to submit asylum claim. (Hungarian Helsinki Committee 2016).

According to the amendments 2017, since 28 March 2017 during the state of crisis due to mass migration, asylum claims could be only submitted in closed transit zones, nowhere else (Article 80/J section (1) of the Act on Asylum.) At the same time, according to the observations of UNHCR, Ministry of Interior permitted maximum of 100 asylum-seekers per a day to be processed by the National Directorate-General for Aliens Policing after the transit zones became operational on 15 September 2015 (UNHCR 2016: 10-11). Furthermore, Hungarian Helsinki Committee stressed that the admittance capacity of the transit zones had been continuously reduced ever since their establishment, from a daily 100-100 to only 1-1 on working days by January 2018 (Hungarian Helsinki Committee 2018: 1-2).

On 1 July 2018 new case of inadmissibility was introduced by the amendment to the Asylum Act, an asylum application shall be considered inadmissible if the applicant arrived through a country where he/she was not exposed to persecution or to serious harm, or if an adequate level of protection was available in the country through which the applicant had arrived to Hungary (Article 51 section (2) point f) of the Asylum Act). Both human right organizations and the European Commission criticized this mixed basis of inadmissibility, stating that it is violating the EU law, namely the EU Asylum Procedures Directive which provides an exhaustive list of inadmissibility grounds, which does not include such a hybrid form. As a result on 19 July 2018 European Commission launched an infringement procedure against Hungary regarding this amendment (European Commission 2018).

Amendments to the Criminal Code and the Criminal Procedure Act

In 2015 amendments to the Criminal Code introduced three new border closure-related crimes:

- prohibited crossing of the border closure (Article 352/A of the Criminal Code);
- damaging of the border closure (Article 352/B of the Criminal Code)
- obstructing the construction of the border fence (Article 352/C of the Criminal Code).

Furthermore, amendments tightened the penalties relating to smuggling of human beings in the basic and the aggravate forms too.

According to the amendments to the Criminal Procedure Act fast track criminal procedure was introduced for the above-mentioned border closure related crimes and in the case of mass migration crises situations, criminal procedures related to border closure have priority over all other crime proceedings.

In 2018 amendment to the Criminal Code introduced a new migration related crime: contribution to illegal migration (Article 353/A of the Criminal Code). The so-called 'STOP Soros' legislation criminalized any assistance offered by any person on behalf of national, international and non-governmental organizations to people wishing to apply for asylum or for a residence permit in Hungary. In the view of the European Commission, the new rules are in violation of the Asylum Procedure Directive and the Reception Conditions Directive, since the criminalization of the support for asylum and residence applications and the related restraining measures curtail asylum applicants' right to communicate with and be assisted by relevant national, international and non-governmental organizations (European Commission 2018).

State of crisis due to mass migration

The general concept of state of exception

States based on rule of law have a special legal instrument to protect themselves in situations which endanger their territorial integrity, citizens' life, security or constitutional order and when they aren't able to handle these situations in the framework of ordinary legal order. This special legal instrument is the state of exception.

State of exception is a constitutional umbrella term which embraces several types and depth of extraordinary protective measures of the state (Lakatos 2014: 2). According to the general definition, state of exception is applicable in the case of endangering social or natural phenomena which cannot be handled in the framework of ordinary legal system. In state of exception citizens' fundamental rights can be suspended or restricted and the principles of division of power as well as checks and balances don't prevail in the usual way.

According to Lóránt Csink, there are few important elements of the definition which have to be emphasized and respected to avoid the misuse of the state of exception. First of all, *the natural or social phenomenon has to endanger some of the objects to be protected*, so the intervention of the state is needed. The fact that some phenomenon is special or unusual shouldn't generate the use of state of exception, the core basis of the application is the endangering nature of the concerning phenomenon. Second condition is that the phenomenon cannot be handled by the ordinary legal framework and measures of the state. This condition provides to use state of exception as an ultima ratio measure. Thirdly, it's also important that one of the main aims of the application of the state of exception is to return to the normal constitutional legal order and means as soon as possible. On one hand if the state of exception is overused in time, the legal instrument loses its special exceptional feature, and on the other hand with the long-lasting suspension or restriction of the fundamental rights may break the balance between freedom and security in an irreversible way and pave the way for the abuse of state power or even for dictatorship (Csink 2017: 9-10).

State of exception in the Fundamental Law of Hungary

Articles 48-54 of the Fundamental Law of Hungary contain common provisions of the different types of special legal order. In the Fundamental Law six types of state of exception are differentiated, such as:

- state of national crisis:

declared by the National Assembly in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war)[Article 48 Paragraph (1) a)];

- state of emergency:

declared by the National Assembly in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death. [Article 48 Paragraph (1) b)];

- state of preventive defense:

in the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the National Assembly shall declare a state of preventive defense for a fixed period of time, and shall simultaneously authorize the Government to introduce extraordinary measures laid down in a cardinal act. The period of the state of preventive defense may be extended. [Article 51 Paragraph (1)];

- state of terrorist threat:

In the event of a significant and direct threat of a terrorist attack or in the event of a terrorist attack, the National Assembly shall, at the initiative of the Government, declare a state of terrorist threat for a fixed period of time, and shall simultaneously authorize the Government to introduce extraordinary measures laid down in a cardinal act. The period of the state of terrorist threat may be extended. [Article 51/A Paragraph (1)]; This form of special legal order was introduced by the sixth amendment of the Fundamental Law in 2016.

- unexpected attack:

in the event of an unexpected incursion of external armed groups into the territory of Hungary, until the decision on the declaration of a state of emergency or state of national crisis, the Government shall be obliged – if necessary, in accordance with the armed defense plan approved by the President of the Republic – to take immediate action using force proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied readiness forces of the air defense and air forces, in order to protect lawful order, life and property, public order and public safety. [Article 52 Paragraph (1)];

- state of danger:

In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal act. [Article 53 Paragraph (1)].

Article 54 Paragraph (1) stresses that under special legal order, the exercise of fundamental rights may be suspended or restricted. At the same time according to Article I Paragraph (3): a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right. Nevertheless, Article 54 Paragraph (1) set out that there are certain fundamental rights which cannot be suspended or restricted, such as right to life and human dignity, prohibition of torture, inhuman or degrading treatment or punishment, trafficking in human being, perform medical or scientific

experiment on human beings, practices aimed at eugenics and the use of the human body or its parts for financial gain, as well as human cloning, presumption of innocence, right for defense.

As another limitation of the application of special legal order, the Article 54 Paragraph (2) of the Fundamental Law declares: the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

Regarding the limitation in time of the state of exception, Article 54 Paragraph (3) lays down that the special legal order shall be terminated by the organ entitled to introduce the special legal order if the conditions for its declaration no longer exist.

Not all of the details are regulated by the Fundamental Law, since it says the detailed rules to be applied under a special legal order shall be laid down in a cardinal act.^{viii}

State of crisis due to mass migration

As we mentioned above, the state of crisis due to mass migration as a special type of state of exception was introduced by the amendment to the Asylum Act in September 2015. Hungarian Government applied it first time in September 2015 in two southern counties of Hungary (Csongrád and Bács-Kiskun County) by Government Decree 269/2015 (IX.15.). In 2016 it was extended to the whole country by Government Decree 41/2016 (III.9.), and since then lengthened several times, last time in March 2020 by Government Decree 32/2020 (III.5.).

According to the reasoning of the amendments to the acts relating to the introduction of the state of crisis due to mass migration,^{ix} the main cause of the new legal instrument is that governmental answers to the mass inflow of foreigners can not be given or only with considerable delaying in the framework of the already existing regulations, so there is a need for creating the state of crisis due to mass migration (Legislative Proposal T/5983 2015: 23-28).

Chapter IX/A of the Asylum Act contains the regulation of the state of crisis due to mass migration.

According to Article 80/A, state of crisis due to mass migration shall be introduced in the following cases:

- 1.If the number of asylum seekers arriving to Hungary reaches a certain level:
 - (a) more than 500 persons per a day on average within a month,
 - (b) more than 750 persons per a day on average of two following weeks,
 - (c) 800 persons on average within a week.
- 2.If the number of asylum seekers in the transit zones reaches a certain level:
 - (a) more than 1000 persons per a day on average within a month,
 - (b) more than 1500 persons per a day on average of two following weeks,
 - (c) more than 1600 persons on average within a week.
3. In the case of circumstances which endanger directly the Schengen external borders.
4. In the case of circumstances which endanger directly the territory of Hungary 60 meters from the external border line or the security, public order or public health of any places of Hungary, especially if riots or other violent actions break out in the transit zones or other facilities for immigrants at that place.

Crisis situation due to mass migration is introduced by the Government, based on the initiative of the Police Superintendent and the Director of the Asylum Office, for maximum 6 months, which can be lengthened if the conditions of application still exist.

According to the provisions of 80/J section 1 of the Asylum Act, asylum claim can be submitted only personally and in the so called transit zones which cannot be left towards other parts of Hungary.

Critiques of the state of crisis due to mass migration

Both the regulation and application of the state of crisis due to mass migration raise several questions. The first one is the legal nature of it. State of crisis due to mass migration is basically a sort of special legal order, types of which are regulated in the Fundamental Law. Since state of exception means

the suspension of certain rights and application of extraordinary measures, constitutional regulation of all types of it would be expected according to the rule of law (Országgyűlés Hivatala 2016: 5-13). At the same time neither the Fundamental Law, nor the Act on the Hungarian Army and the measures introduced during state of exception mention the state of crisis due to mass migration. That's why we can consider this legal institution as a quasi-state of exception, a grey zone between special legal order and ordinary legal order (Mészáros 2015: 111).

We have to notice here, that not all of the EU countries' constitutions contain regulations on the state of exception, for example the Finnish or the Belgian Constitution doesn't have at all or have only minimalistic rules relating the special legal order, but since the Fundamental Law of Hungary regulates all the other forms of the special legal order as we clarified above, it would be desirable that state of crisis due to mass migration would be also regulated on constitutional level.

The explanation why the state of crisis due to mass migration is not regulated on constitutional level is political one. Since Fidesz lost its two-third majority in the parliament on the by-elections in February 2015, the Hungarian Government has chosen the easier and political way: instead of introducing the state of crisis due to mass migration by amendment of the Fundamental Law which would have required two-third majority support in the Hungarian Parliament, the Government regulated it by the amendment of an ordinary law with simple majority.

Another concern is if the regulation, regardless the fact that it has happened out of the framework of the Fundamental Law of Hungary, is appropriate in that sense that the first two cases or conditions of the state of crisis due to mass migration don't refer to any threat, they just refer to special situations, namely when the number of asylum seekers arriving to Hungary or the number of asylum seekers in the transit zones reaches a certain level. As we mentioned above, special situations on their own without threatening nature can not be the basis of the introduction any type of special legal order.

It is questionable as well if the preconditions of the state of crisis due to mass migration are existing at all. If we take a look at the numbers of those who crossed or attempted to cross the Hungarian border illegally (Chart 1) or who entered the transit zones per a day, we can easily come to the conclusion that the first two cases of the state of emergency caused by mass migration is non-existing since the closure of the border in 2015.

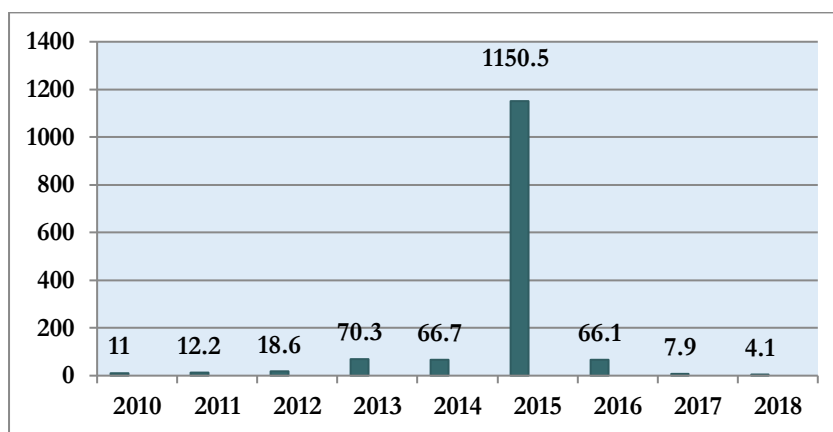


Chart 1 Illegal border crossings or attempts to Hungary per a day between 2010 and 2018

Source: Hungarian Police 2018: 20

As we mentioned above, the National Directorate-General for Aliens Policing maximized in 1 persons per a day the number of asylum seekers entering to the transit zones by 2019, which is far from the amount mentioned in the act.

At the same time we cannot mention any circumstances or conditions which would underpin the other two cases of the crisis situation due to mass migration neither. Therefore the central question is: based on what the Hungarian Government lengthens the state of crisis due to mass migration for 5 years by now? The question was asked from the Hungarian Government by journalists, scientists, lawyers, representatives of international organizations or human rights organizations many times. After the first lengthening of the crisis situation (9th March 2016),

Hungarian Helsinki Committee presented a data postulation for public interest at the National Directorate-General for Aliens Policing and the Central Police Headquarters. Both authorities refused the claim stating: it was classified for 10 years what were the bases of the lengthening (Helsinki Figyelő 2016).

The fourth concern, which is closely related to the previous one, is about the length of the state of crises due to mass migration. As we mentioned above, one of the core confines of the special legal order and at the same time one of the most important guarantee to be able to go back to the ordinary legal system is its limitation in time. As István Sabjanics stresses „Neither fever is the normal state of the body, nor the special legal order of the state based on rule of law.”(Sabjanics 2014: 227.)

Last but not least, we have to mention those critiques and concerns which were raised by lawyers, human rights organizations, churches or international organizations in connection with the transit zones. As Dunja Mijatovic, Commissioner for Human Rights of the Council of Europe stresses in her report, which was published after her visit to Hungary in February 2019, the systematic confinement of asylum seekers in the transit zones without a time limit and effective access to remedy qualifies as detention, and Hungary lacks an adequate legal basis for the deprivation of liberty of asylum seekers under the “crisis situation”. (Commissioner for Human Rights of the Council of Europe 2019: 10-11).

In its concluding observations of 9 May 2018, the UN Human Rights Committee came to the same conclusion, expressing concern that the automatic removal of asylum applicants to transit zones for the duration of their asylum procedure did not meet international legal standards, because of the lengthy and indefinite period of confinement allowed, and the lack of procedural safeguards to meaningfully challenge removal to the transit zones. The Committee was particularly concerned about claims that restrictions on personal liberty had been used as a general deterrent against unlawful entry rather than in response to an individualized determination of risk (UN Human Rights Committee 2018).

European Court of Human Rights had controversial decisions about the legality of transit zones. In the case of Ilias and Ahmed v. Hungary, the Chamber’s unanimous ruling of 14 March 2017 concerned the detention of two Bangladeshi asylum seekers in the transit zones for 23 days in 2015, and their removal from Hungary to Serbia, stating that the de facto detention of the two asylum seekers in the transit zone had been unlawful (violation of Article 5 Paragraph 1 and 4 of the European Convention on Human Rights). The decision stated as well, that there had been no effective remedies available for the asylum seekers to complain about their detention, and that the applicants would not have been able to leave the transit zone without forfeiting their asylum claims and running the risk of refoulement (Commissioner for Human Rights of the Council of Europe 2019: 11).

Since the Hungarian Government lodged an appeal against the Chamber’s decision on 18 April 2018, the Grand Chamber of the European Court of Human Rights held an open hearing and made its final decision on 21 November 2019, in which it found that the applicants had not been de facto deprived of their liberty since they had decided to enter Hungary from Serbia on their own initiative and it had been realistically possible for them to return to Serbia, without a direct threat to their life or health known by or brought to the attention of the Hungarian authorities (European Court of Human Rights 2019: 1-2). Basically in its final decision the Grand Chamber accepted the arguments of the Hungarian Government that being in transit zones is not a form of detention, since asylum seekers can freely leave transit zones towards Serbia.

Court of Justice of the European Union was involved to the legal debate over the nature of the transit zones as well, and it made a contradictory decision to the Grand Chamber of the European Court of Human Rights on 14 May 2020 (C-924/19 PPU). The judgment in the joint cases concerning two asylum-seeking families held in the transit zone in Röszke originated in preliminary ruling requests lodged by Hungarian judges in December 2019. As a consequence, Hungarian Government closed the transit zones at the Hungarian-Serbian border in Röszke and Tompa and removed nearly 300 asylum seekers to asylum facilities inside Hungary.

After the initial enthusiasm of asylum seekers, human rights organizations and activists related to the European Union Court of Justice decision, worried voices can be heard again because of the regulatory answer of the Hungarian Government. At the same time with the termination of the state of danger (as it is known Authorization Act) introduced because of the Covid-19 pandemic, Hungarian Parliament adopted the Act on Transitional Provisions related to the Termination of the State of Danger. Provisions of this act, basically as an answer to the European Union Court of Justice decision, made it more cumbersome the access to lodge an asylum claim in Hungary since under the Article 267 and Section (1) and (2) of Article 268, until 31 December 2020, asylum claims can be submitted personally only at the embassies of Hungary. Experts warn that this interim regulation is in violation again with the international and European law (Zubor 2020).

Another serious problem was the condition in the transit zones. The Commissioner for Human Rights of the Council of Europe was alarmed that many asylum seekers, including repeat asylum applicants, detained in the transit zones under an alien policing procedure have been deprived of food during their detention. In August 2018, five applications were made to the European Court of Human Rights requesting urgent interim measures to stop the deprivation of food. The requests were granted by the Court and the provision of food was resumed by the authorities. Eight similar requests for urgent interim measures were made and granted again in February, March and April in 2019 (Commissioner for Human Rights of the Council of Europe 2019: 11).

Conclusions

In connection with securitization it's important to examine if it is successful, so if the targeted audience, the society or a considerable part of it has accepted the idea that a certain phenomenon is threatening or not. In the first case, we can talk about a successful securitization, while in the second case it is only a securitization attempt or securitization move which didn't achieved its aims (Buzan – Waever – Wilde 1998: 25).

Consequently, to be able to evaluate the success of the securitization of migration in Hungary, we have to examine how Hungarian society reacted to the securitization move of the government. *If we take a look at the public opinion polls on the security perception of the Hungarian people, we can come to the conclusion, that the securitization of the issue of migration by the Hungarian Government was successful.* According to the Pew Research Center, in 2017 66 % of the Hungarian respondents thought that the large number of refugees is a major threat for the state. The second biggest threat was the ISIS with 64 % (Poushter – Manevich 2017). Not only engaged voters of the Fidesz (56%), but significant proportion of engaged voters of the opposition parties (Hungarian Socialist Party 51%; Jobbik 43%, Politics can be Different 38%, Momentum 36%) consider that one of the biggest achievements of the Orban government is the containment of migration. Even 31 % of the mostly harshest opposition party, Democratic Coalition's voter think so (Bíró-Nagy – Laki 2020: 10).

Nevertheless, in the course of securitization the migration and asylum issue, Hungarian Government has introduced several highly restrictive and contested measures, one of them is the crisis situation due to mass migration. *This particular type of special legal order is a glaring example of how a government can misuse the special legal order to stabilize its political power.* After its defeats on the by-elections in 2014 and 2015 and the decreasing social support, as a result of the securitization of migration^x Fidesz could obtain two-third majority of the seats in the parliament in 2018 again. In spite of the critical voices and the legal consequences (infringements procedures, condemnatory judgment of the European Union Court of Justice), Hungarian Government keeps the issue of migration on the political agenda even in the time of the COVID-19 pandemic, hoping that if something was working once, it can work again.

End Notes

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ⁱⁱ Securitization of the issue of migration is a current topic nowadays, especially in connection with Hungary, but the discourse over it goes back to the time even before the migrant crisis hit Europe and the EU in 2015 (Ceyhan 2002, Huysmans 2000, Ibrahim 2005, Karyotis 2007).

ⁱⁱⁱ Especially representatives of the so-called critical security studies argue that securitization theory makes security issues anti-politics, namely taking it out of the scope of 'normal politics' and transfer it to the 'black box' at the dark heart of the state. (Neal 2019: 7)

^{iv} Fundamental Law of Hungary

^v Massive support means that since June 2006 Fidesz has been leading the public opinion polls.

^{vi} National parliamentary: Újpest (23.11.2014) and Veszprém (23.02.2015); local: Pilis (25.01.2015) and Mezőtúr (08-02.2015) Mayor: Mezőnyárád (25.01.2015).

^{vii} The barbed wire border fence triggered heated reactions both from within Hungary and in the international community. Aside from the governing parties (Fidesz Hungarian Civic Alliance–the Christian Democratic People's Party, Fidesz–KDNP), only the far right radical party, Jobbik supported this plan. In contrast, the so-called democratic opposition parties – the Hungarian Socialist Party (MSZP), Democratic Coalition (DK), Politics Can Be Different (LMP), Together (Együtt) and Dialogue for Hungary (PM) – all condemned the border closure. Turning to international reactions, the day after the Hungarian announcement of the border wall, on 18 June 2015, the Serbian Prime Minister Alexander Vucic expressed his shock and surprise. Building walls, he said, was not the solution and Serbians did not want to live in Auschwitz (Juhász 2017:41).

^{viii} Cardinal acts are adopted by the qualified majority, usually by two third of the representatives of the Hungarian Parliament. The Law 2011: CXIII. on the Hungarian Army and the measures introduced during state of exception contains the detailed rules of the types of the special legal order.

^{ix} As we have mentioned above several other acts already in force had to be amended because of the introduction of the state of emergency caused by mass migration such as criminal code, criminal procedure act, act on the state border, civilian procedure act, act on the general rules of environment protection, act on the formation and protection of the built environment.

^x It doesn't mean that securitization of migration was the only reason behind the Fidesz overwhelming victory on the national parliamentary elections 2018, but it was among those reason definitely.

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