

Thoughts on a Special Criminal Procedure

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Abstract

In 2015, Hungary was affected by the irregular migratory flow, which marked a beginning of a new era in the history of the European migration. Mass migration has created a major challenge for the authorities concerning the legal response. In many countries, including in Hungary, the public opinion relating to the irregular migration has forced the legislators to take the necessary measures against it in order to protect the public safety and the public health. In Hungary, among others the criminal law have been focused by the legislator. The first step was the construction of the physical border fence, and as a second stage the Hungarian Parliament adopted the legal framework on protection of the border fence mentioned.

In accordance with creating the crimes against the border barrier, a new special procedure has been inserted into the Hungarian Act on Criminal Procedure, which entered into force in 15 September 2015. The rules have been in force with few modifications even nowadays, however in the new Hungarian Criminal Procedure Code (hereinafter: Code). The aim of this scientific paper is to try to answer the following questions: (1) Was the amendment mentioned justifiable and reasonable measure?; (2) Is it necessary to keep it in our legal system also nowadays, or should it be repealed from the Code?

Keywords: *Hungarian border fence, irregular migration, border barrier, fight against the irregular migration in Hungary, migratory situation in Hungary, special criminal procedure on crimes against border barrier, Hungarian Act on Criminal Procedure.*

I. Introduction

In 2015, Hungary was affected by the irregular migratory flow, which marked a beginning of a new era in the history of the European migration. As a result of emigration, European countries have been forced to admit irregular migrants from the developing world in increasing numbers². Between 2009 and 2010, about 100,000 illegal immigrants were caught in the act at the borders of the Member States each

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² A. Trriandafyllidou, T. Maroukis, *Migrants mugging: Irregular migration from Asia and Africa to Europe*, Springer, 2012, p. 1.

year³. In 2013, the total number of non-EU nationals intercepted at the border of EU Member States was 92,575⁴. As the migration crisis intensified, in 2014 this number had increased to 276,113 people at the pan-European level. This represented an increase of more than 138% compared to previous years⁵. This trend has not changed significantly in the recent years. In 2015 and 2016, the number of illegal immigrants entering the European Union rose to unprecedented levels. According to FRONTEX data, in 2015 the EU states recorded nearly 1,800,000 illegal border crossings at the height of the migration crisis, while in 2016 still extremely high, 511,047 irregular border crossings were detected⁶.

Mass migration, not only because of its irregular nature, but also because of the unprecedented qualitative and quantitative transformation of the response to be given by some Member States, has created a major challenge not only for border control, but also for the internal law enforcement – and the public health authorities, furthermore, the other internal social organizations. In many Member States, including in Hungary, public opinion relating to the irregular migration has forced the legislators to take quick and effective actions against it. In Hungary – although the irregular migration is a multifaceted phenomenon⁷, therefore the legal responses affect many parts of the internal legal system – among others the criminal law have been focused by the legislator.

However, criminalization is not a widespread response in the European Union. Typically, in Western European states, the illegal border crossing and the illegal residence are not considered as criminal offenses⁸. Although, there is a shift towards criminalization⁹ of certain forms of illegal migration, it is not considered as a criminal offense in the domestic law of the most Member States. It is, of course, another question that according to the so-called „marginalization theory”, illegal immigrants who are marginalized in the country of destination often drive their fate towards committing crimes¹⁰, which should be judged in accordance with the substantive criminal law of that state.

It shall be emphasized that as a primary response to the phenomenon of illegal immigration itself, the criminal law action reacts more likely to that criminal activities based on illegal migration, such as trafficking in human beings, smuggling of human

³ C. Morehouse, M. Blomfield, *Irregular migration in Europe*. Migration Policy Institute, Washington DC, 2011, p. 8.

⁴ L. Basilien, M. Gainche, *Immigration Detention under the Return Directive: The CJEU Shadowed Lights*, in *European Journal of Migration and Law*, Vol. 17, 2015, p. 105.

⁵ Europol, *European Union Terrorism Situation and Trend Report 2016*, 2016, p. 7.

⁶ Frontex, *Risk Analysis for 2018*, 2018, p. 8.

⁷ M. Hegyaljai, *Migráció, bűnügy, nemzetközi kitekintés*, in Hautzinger Zoltán (szerk.): *A migráció bűnügyi hatásai*, Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016, p. 12.

⁸ E. Guild, et. al., *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*. CEPS Paperback, 2016, p. 24.

⁹ M. Levay, „Crimmigration” avagy kriminológiai kutatások a bevándorlás kriminalizálásáról, in *A tudós ügyész. Tanulmányok Bócz Endre 80. Születésnapjára*, Szerk., Finszter Géza-Korinek László-Végh Zsuzsanna. HVG-ORAC, Budapest, 2017, pp. 153-162.

¹⁰ A. Leekers, et. al., *Crime among irregular immigrants and the influence of internal border control*. *Crime Law SocChange* 2012. Vol. 58. 2012, p. 17.

beings and related organized crime¹¹. The illegal immigration has been used by the mentioned crimes in order to reinforce its status in the European Union, taking advantage of Europe's openness and its declared fundamental freedoms¹².

In accordance with the above-mentioned fact, in the political dialogue, illegal immigration is often regarded as a threat to state sovereignty as well as to public security, whereby the states have the right to protect their borders. The emphasis of the mentioned aspects is justified by the need on the one hand to respond to the conduct – videlicet the illegally enters the territory of a foreign state – itself, and on the other hand to the security challenges concerning the illegal stay¹³.

Since the beginning of 2015, when the migratory pressure has intensified at the Hungarian-Serbian border, the idea of creating more effective legal measures against it, has become part of the political dialogue in Hungary. When the Act on amendment of Hungarian Criminal Code and the Criminal Procedure Code were adopted by the Parliament in connection with irregular migration in 2015 and when the constructions work of the border barrier finished, the legislator pointed out, that only by the installation of ever more serious facilities can be the external borders protected. The function of these items is not only to complete the state's self-defense but also to signal that the state has right to self-defense, and this right must be respected by everyone.

For the criminal-political reasons mentioned above new crimes¹⁴ and a new special procedure has been inserted into the Hungarian Criminal Code and into the Hungarian Criminal Procedure Code, which entered into force in 15 September 2015. The rules have been in force with few modifications even nowadays, however in our new Procedure Code (hereinafter: Code).

In my scientific paper I am going to find the relevant answers to the questions mentioned earlier in the abstract, and for that I am going to use several statistical data made available by the Ministry of Interior and by the Office of Prosecutor General¹⁵. In order to facilitate the understanding I am going to use special theoretical aspects, that I can present my thesis more easily.

These aspects will be the following:

1. The data of crimes against border barrier committed since the rules came into force;
2. The connection between the procedural rules to be analyzed and the other special criminal procedural rules;
3. The data concerning the nationality of defendants;

¹¹ V. Mitsilegas, *The Criminalization of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Springer, 2015, p. 48.

¹² O. Galateanu, *Illegal Migration and the Migration Phenomenon at the Frontiers of Romania*. Contemporary Readings in Law and Social Justice. Vol 9 (2), 2017, p. 601.

¹³ A. Spena, *A Just Criminalization of Irregular Immigration: Is it possible?* Criminal Law and Philos, Vol. 11, 2017, p. 354.

¹⁴ These crimes are called crimes against the border barrier (unlawful crossing the border barrier, damaging the border barrier, obstruction on construction work of the border barrier).

¹⁵ Nr. LFIIGA/506-7/2018, and Nr. LFIIGA/365-2/2020.

4. The relationship between the asylum and the criminal procedure;
5. The special rules relating to coercive measures.

II. The theoretical aspects

1. The data of crimes against border barrier committed since the rules came to force

Generally, it can be emphasized that the reason for creating a new special criminal procedure can be also confirmed by the criminal-statistical data. If a special crime – like crimes against border barrier – often appears in the criminal statistics – in order to ensure the principle of efficiency – giving special procedural items for the authorities can be considered as a reasonable measure. Therefore, examination of criminal-statistical data concerning the crimes mentioned (such as: unlawful crossing the border barrier, obstruction on constructions work of the border barrier and damaging the border barrier) is very important.

It shall be underlined that according to the statistics, – since the rules mentioned entered into force – now criminal procedure has been conducted by the Hungarian authorities due to obstruction on constructions work of the border barrier. According to my opinion the reason for criminalizing can be already questioned by the fact mentioned. In lack of perpetration of this crime in no circumstances does it have any reason to insert special procedural rules into the Code. If we have a look at the data relating to the other crimes against border barrier, the number of the crimes committed was decreased significantly in the past few years. The following table shows this well:

Year	Unlawful crossing the border barrier (Btk. 352/A.§)	Damaging the border barrier (Btk. 352/B.§)
2015	914	22
2016	2843	1543
2017	22	863
2018	16	115
2019 – October 2020	22	68

However, it must be underlined that the number of crimes committed does not coincide with the number of the criminal procedures. The number of the procedures conducted in 2015 accounted for 754, in 2016 made up 646, in 2017 decreased to 10. Furthermore, it is an interesting data, that the number of procedures did not increase in 2018 either. According to the information of the Office of Prosecutor General in 2018 accounted only for 5 cases which reached the judicial proceedings¹⁶.

¹⁶ According to the statistical data sent by the Office of Prosecutor General.

If we analyze the data summarized above by the table, we can agree with Zoltan Hautzinger's standpoint: „there is no reason for creating such elements of crime which have not practical applicability due to the possibility of uselessness”¹⁷.

2. The connection between the procedural rules to be analyzed and the other special criminal procedural rules

Based on the statistical data sent by the Office of Prosecutor General, there were two other special procedure which were applied by the authorities in order to conduct the criminal procedures against defendants who committed crimes against border barrier. These were the arraignment (based on this special procedure the prosecutor can arraign the defendant to court within a short time from the perpetration of the crime), and the omission of the trial (in this criminal procedure the judge can make the sentence only on the file of the criminal case without holding a trial).

The relevant data is summarized by the following table:

Year	Number of cases/number of defendants	Number of defendants arraigned to court	Number of the other procedures conducted based on the special rules on omission of the trial
2015	754/780	766	2
2016	646/2134	2096	4
2017	10/20	5	0
2018	concerning the unlawful crossing the border barrier 5/11 ¹⁸	7	0

The data mentioned shows that the authorities – generally – conducted the criminal procedures against defendants, who committed a crime against border barrier, based on the rules of arraignment. Consequently, the rules of the special procedure mentioned before were more dominant in these criminal cases than the special rules analyzed in my paper. The significantly decreasing number of the criminal cases due to the crimes analyzed and the similarity between the special rules of the arraignment and of procedure due to a crime against the border barrier do not confirm the justification of the new special procedure created in 2015 as an legal

¹⁷ Z. Hautzinger, *A migráció és a külföldiek büntetőjogi megjelenése*. AndAnn Kft, Pécs, 2018, p. 157.

¹⁸ It shall be emphasized that the statistical data sent by the Office of Prosecutor General did not content any comparative data concerning the damaging the border barrier. The reason of this was that all of criminal procedures conducted by the authorities due to the crime mentioned did not reach the judicial stage, because these procedures were suspended by the prosecutors due to the unknown identity of the perpetrators.

answer to the migratory challenges. It shall be emphasized that in lack of the new rules inserted into the Act on Criminal Procedure in 2015, the procedural rules on arraignment would ensure the principle of efficiency in these criminal procedures.

3. The data concerning the nationality of defendants.

It shall be underlined that in the most of criminal cases conducted due to a crime against border barrier defendants weren't European citizens. They arrived mostly from Algeria, Morocco, Somalia, Afghanistan, Iraq, Iran, Pakistan and Syria. Therefore, the right to use of native language is a very important principle in these cases. Namely, the number of the criminal cases decreased significantly for the past few years, there is no reason for limiting this right according to the special rules. It shall be underlined that according to the general rules of the Code translation of decisions and other official documents to be served is obligatory excepting the right to waiver the written translation. However, this exception is not applicable on accusation and on conclusive decisions. Nevertheless, according to the special rules analyzed in my paper, the defendant has right to waiver the translation of the accusation and the judgment as well, however, the translation in writing of the other conclusive decision is still obligatory.

So low is the number of this criminal cases due to a crime against border barrier, that enforcing the right to use the native language according to the general rules would not cause too many costs to the state. With regard of the number of the criminal cases conducted due to the crimes analyzed, there is no reason creating further special procedural rules concerning the crimes against the border barrier¹⁹.

4. The relationship between the asylum – and the criminal procedure.

The former Act on Criminal Procedure (Act XIX of 1998, hereinafter: Act)) was in center of several criticisms based on that fact that the Act mentioned did not ensure the consistency between the criminal procedure and the asylum rules. This Act did not content any special rules for the case if the defendant seek for asylum. The Article 832. Par. (1) of the new Code intends to correct this anomaly with that regulation which makes it possible to suspend the criminal procedure – but only after the accusation – in the case if defendant seeks for asylum. However, this legal solution cannot be considered an appropriate legislative answer. If the validity of the whole special procedure is questioned, the rule mentioned is unjustifiable as a special rule. Namely – according to the general rules –, it would be possible to suspend the procedure because of an asylum application already during the investigation too for that reason, that the result of the asylum procedure would have effect on criminal procedure as well.

¹⁹ In this topic mentioned see for further information: R. Bartko, *Az anyanyelv használatához való jog erőzítője az illegális migráció elleni küzdelemben*, Eljárásjogi Szemle 4. sz., 2017, pp. 24-28; Balasz et al., *Büntetőeljárás alá vont fiatalok eljárás jogainak érvényesülése az Európai Unióban*, Ügyészek Lapja 3-4. sz., 2017, pp. 87-141; E. Cape, *Effective criminal defence in Europe. Executive Summary and Recommendations*. Antwerp-Oxford-Portland, 2010, p. 8.

Therefore, it has no reason for creating special rule, on the one hand if it can be applied only during the judicial proceedings and on the other hand if this special rule narrows unreasonably the application of a legal institution.

5. The special rules relating to coercive measures.

It shall be emphasized that special rule concerning the coercive measures due to the crimes against border barrier is not regulated by the new Code, the rules concern only several questions relating to their execution. However, the questions mentioned shall be regulated in the penal law, and not in the criminal procedure law. The regulation of different rules would be reasonable in the case when the legislator regulates different forms of the coercive measures in this chapter, or different conditions to be applied by application of this measures. Therefore, we can conclude that – because of these rules – it is not justified to maintain a special procedure in the Code.

III. Conclusions

With reference to the change of migratory routes, the number of the crimes against border barrier has decreased for the past few years in Hungary. Only a few criminal procedures due to the crime mentioned have been conducted since 2017. Furthermore, it is fact, that never was a procedure conducted by the authorities due to the obstruction the constructions work of border barrier. Therefore, not only does the opportunity of decriminalization arise, but also the claim for repealing of the special rules. The general procedural legal frame ensures for the authority to conduct criminal procedures efficiently against defendants who committed a crime against border barrier. Therefore, according to my opinion the special procedural rules relating to crimes against border barrier should be repealed by the legislator. In order to prove this statement, hereby I am going to show some examples as a conclusion of my scientific paper.

1. There is no reason regulating by special rules the consolidation and severance of criminal cases relating to crimes against border barrier, because it is also possible according to the general rules, and these rules make the procedural opportunities more flexible for the authorities. For example, in that case if more than one defendant is involved in the same criminal case, or the defendants have joint examination and the consolidation is deemed justified due to subject or the participants of the proceedings or for other reason.
2. According to the new Code the crimes analyzed shall fall under the jurisdiction of the court located at the seat of the county court. With reference to the statistics concerning the procedural data due to the crimes against the border barrier, this regulation has also no reason. The procedure against the crime mentioned were generally conducted before that court whose seat is located at that area where the crime against the border barrier has been committed. Furthermore, because the prosecutors started the judicial proceedings mostly

- based on the rules of arraignment, in practice the applied rule related to the jurisdiction of the court was same as the general one. The general rules related to not only the competence, but also the jurisdiction of the court ensure the appropriate procedure due to the crime mentioned.
3. According to the Article 829 of the Code the participation of the defense counsel is obligatory in the criminal procedure concluded due to a crime against border barrier. If we have a look at the statistical data, we can see, that generally the defendants committed a crime mentioned above were not European citizens, therefore, they do not speak Hungarian. According to the general rule (Art. 44, lett. d), the participation of the defense counsel is obligatory in case, when the defendant does not speak Hungarian. Therefore, there is no reason for repeating the general rule under the section of this special procedure.
 4. Finally, there is no reason for regulating further special rules related to the other special criminal procedure (for example, the arrangement, the omission of the trial, criminal proceedings against juvenile defendant) when the object of a criminal procedure is a crime against border barrier. In case of repealing special rules related to the crimes against border barrier, the other above-mentioned special procedure could ensure the efficiency and the rapidity of criminal procedure.

References

1. Balasz et al., *Büntetőeljárás alá vont fiatalkorúak eljárási jogainak érvényesülése az Európai Unióban*, Ügyészek Lapja 3-4. Sz, 2017.
2. Bartko, R., *Az anyanyelv használatához való jog eróziója az illegális migráció elleni küzdelemben*, Eljárásjogi Szemle 4, 2017.
3. Basilien, L., Gainche, M. Immigration Detention under the Return Directive: The CJEU Shadowed Lights. *European Journal of Migration and Law*, Vol. 17, 2015, p. 105.
4. Cape, E., *Effective criminal defence in Europe. Executive Summary and Recommendations*. Antwerp-Oxford-Portland, 2010.
5. Europol, *European Union Terrorism Situation and Trend Report 2016*, 2016.
6. Frontex, *Risk Analysis for 2018*, 2018.
7. Galateanu, O., *Illegal Migration and the Migration Phenomenon at the Frontiers of Romania*. Contemporary Readings in Law and Social Justice. Vol 9 (2), 2017.
8. Guild, E. et. al., *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*. CEPS Paperback, 2016.
9. Hautzinger, Z., *A migráció és a külföldiek büntetőjogi megjelenése*. AndAnn Kft, Pécs, 2018.
10. Hegyaljai, M., *Migráció, bűnügy, nemzetközi kitekintés*, in Hautzinger Zoltán (szerk.), *A migráció bűnügyi hatásai*, Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016.

11. Leekers, A. et. al., *Crime among irregular immigrants and the influence of internal border control*. Crime Law SocChange 2012. Vol. 58, 2012.
12. Levay, M., „Crimmigration” avagy kriminológiai kutatások a bevándorlás kriminalizálásáról, in *A tudós ügyész. Tanulmányok Bócz Endre 80. Születésnapjára*, Szerk., Finszter Géza-Korinek László-Végh Zsuzsanna. HVG-ORAC, Budapest, 2017.
13. Mitsilegas, V., *The Criminalization of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Springer, 2015.
14. Morehouse, C., Blomfield, M., *Irregular migration in Europe*. Migration Policy Institute, Washington DC, 2011.
15. Spena, A., *A Just Criminalization of Irregular Immigration: Is it possible?* Criminal Law and Philos, Vol. 11, 2017.
16. Trriandafyllidou, A., Maroukis, T., *Migrants mugging: Irregular migration from Asia and Africa to Europe*, Springer, 2012.