

THE ENFORCEMENT OF PRINCIPLE ON LEGALITY IN THE HUNGARIAN FIGHT AGAINST THE IRREGULAR MIGRATION

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ABSTRACT

From 2015 Hungary has been permanently affected by the irregular migratory flow, which – already in 2015 - marked a beginning of a new era in the history of European migration. In many European countries, including in Hungary, the public opinion related to irregular migration has forced the legislators to take the necessary and effective measures against it. In Hungary, among others, criminal law has been also in focus. The first step was the construction of the physical border fence, and as a second stage, the Hungarian Parliament adopted the legal framework on its protection. In accordance with this step, new crimes were inserted into the Hungarian Criminal Code, which entered into force in 15 September 2015. These crimes - are called in the Hungarian literature as „crimes against the border barrier” – were the following: unlawful crossing the border barrier, damaging the border barrier and the obstruction on construction work of the border barrier. According to the relevant official statistical data, the number of crimes against the border barrier decreased significantly for the past few years. In contrast to it, the number of the irregular entries or attempts across the border barrier detected by the Hungarian authorities – at least according to the statistical data published by the Hungarian Police Force – are higher than the number of the criminal procedures conducted due to the crimes mentioned. Therefore, the aim of the paper is to present how the principle of „legality” is enforced by the Hungarian authorities concerning the irregular entries and what kind of conclusions can we make according to the criminal-statistical data and to the detected irregular entries. The paper – after presenting the legal background – will analyze the data mentioned above and will try to make legal conclusions and proposals in connection with the fundamental procedural principle mentioned above.

***Keywords:** Hungarian border fence, irregular migration, principle of legality, fight against the irregular migration in Hungary, migratory situation in Hungary, Hungarian Criminal Code, crimes against the border barrier*

INTRODUCTION

Mass migration has put high pressure not only on Hungary, but also on the European Member States since 2015, and this effect is caused by not only its

irregular nature but also the unprecedented qualitative and quantitative transformation of the responses to be given by the affected states. This phenomenon has created a major challenge not only for border control but also for the internal law enforcement -, and public health authorities, furthermore, the other internal social organizations. In the many Member States, including in Hungary, public opinion related to irregular migration has forced the legislators to take quick and effective actions against it. In this context in Hungary mass migration – with regard to its multifaceted phenomenon [5] – caused that the legal responses concerned many parts of the internal legal system - among others also the criminal law. In connection with this statement, it shall be emphasized that criminalization is not a widespread response in the European Union. Typically, in Western European states, the illegal border crossing and illegal residence are not considered as criminal offenses [3]. Although there is a shift towards criminalization [7] of certain forms of irregular migration, it is not considered as a criminal offense in the domestic law of most Member States. That is 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 crimes [6], which should be punished in accordance with the internal criminal law of the state.

It shall be emphasized that as a primary response to the phenomenon of illegal immigration itself, the European criminal law actions reacted more likely to those criminal activities based on illegal migration [1], such as trafficking in human beings, smuggling of human beings and related organized crime [9]. 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 freedoms [2]. 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, and they have the right to self-defense which must be respected by everyone.

For the above-mentioned reasons, the Hungarian legislator decided on criminal legal and criminal procedural amendments in 2015. The modification of the Hungarian Criminal Code and the Hungarian Criminal Procedure Code entered into force on 15 September 2015. With this amendment mentioned new elements of the crime were inserted into the Hungarian Criminal Code, which are called by the Hungarian legal literature „crimes against the border barrier”. At first, the paper will present these crimes – but very shortly - and the content of the principle of legality as legal background, and then, using the analytical method, will show how these regulations are enforced by the Hungarian authorities, mainly in connection with the unlawful crossing of the border fence.

THE LEGAL BACKGROUND

About the crimes against the border barrier

As we mentioned above, three new elements of the crime have been inserted by the Act CXL of 2015 into the Hungarian Criminal Code (Act C of 2012) – due to the aim of stopping the irregular migratory flow - on 15 September 2015: unlawful crossing of the border barrier (Sec. 352/A.), damaging the border barrier (Sec. 352/B.), and the obstruction on construction work on the border barrier (Sec. 352/C.).

According to the Section 352/A of the Hungarian Criminal Code: „*any person who enters unlawfully the territory of Hungary across the border barrier commits the crime titled the unlawful crossing of the border barrier*”. The mentioned crime can be considered as a „*delictum commune*”, therefore its perpetrator can be anyone. However, if we look at the reason of creation this statutory definition, it is quite clear that the Hungarian legislator drafted it specifically in order to curb the irregular migration. This fact is also confirmed by the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution. Namely, according to relevant data the most of the perpetrators of the crime mentioned had the following nationality: Afghan, Iraqi, Syrian, Pakistani, Iranian and Kosovo.

This crime is – in practice typically - committed either by breaking the physical border fence - rarely by crossing it without using violence against it - or by entering unlawfully the border fence damaged earlier by someone. Therefore, it shall be emphasized that who is caught in the act by the authorities in the territory of Hungary near to the border fence, or not so far from it, there is a reasonable cause to believe that this person entered irregularly Hungary – in violation of the border fence – and therefore committed the crime mentioned. However, to speed up the back-redirects to the gates built upon the Hungarian border fence, the Act on State Border was amended by the Hungarian legislator in 2016. According to this modification, if an irregular migrant is held up by a police officer within 8 kilometers from the Hungarian-Serbian and the Hungarian-Croatian border (the EU external borders), the authority shall redirects this migrant to the border barrier – except if it is reasonable to cause to believe that the migrant committed a crime - to ensure that the migrant retires back where he or she came unlawfully from. If we look at the statistical data, we can see how the migratory routes have changed as a result of creating the border barrier and how the number of criminal procedures has changed for the past few years in the context of the legal amendment mentioned above. The decreasing number of procedures clearly shows how the measures applied by the authorities have been modified due to the amendment of the Act on State Border. The data also shows how the authorities moved from the strict application of the principle of legality towards the law enforcement methods avoiding the criminal procedure.

In the following table we summarize the registered unlawful crossings of the border barrier based on the Unified Hungarian Criminal Statistic mentioned above:

Table 1. *The detected unlawful crossings of border barrier in Hungary between 2015 and February 2021*

Years	Unlawful crossing of the border barrier (Sec. 352/A)
2015	914
2016	2843
2017	22
2018	16
2019 – April 2021	33

Source: the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution

According to the Sec. 352/B. of the Hungarian Criminal Code *any person who damages or destroys the border barrier and its devices commit the damaging of the border barrier, insofar as the act did not result in a more serious criminal offence.* Following the definition mentioned, it shall be underlined that this crime can be considered as *a subsidiary statutory definition.* The legal object protected by the legislator is not only the territorial integrity of Hungary but also the protection of the border barrier. The reason for creating the mentioned crime is that it is required to punish that perpetrator who endangers with his conduct the protection function of the border barrier built by the state [4].

Nevertheless, it shall be emphasized that the border barrier built-in 2015 at the Serbian-Hungarian and the Croatian-Hungarian border is protected not only by the statutory definition mentioned above but also by the crime regulated under the Sec. 352/C of the Hungarian Criminal Code. According to the mentioned Section *any person who obstructs the construction or the maintaining work of the border barrier commits a crime titled obstruction on construction work on the border barrier.* This crime is also a *subsidiary statutory definition* because the perpetrator can be punished for this crime only in that case if the act committed by the perpetrator did not result in another criminal offence. Any conduct by which the perpetrator can obstruct the works on the border closure may constitute according to the mentioned Section [8]. For the past few years, the crime titled damaging of border barrier occurred in the judicial practice, however, the obstruction on construction work on border barrier is not at all.

In the following table we summarize the relevant data of the Hungarian criminal statistic according to the mentioned two criminal offences:

Table 2. Registered crimes concerning the damaging of border barrier and obstruction on construction work on border barrier in Hungary between 2015 and 2017

Years	Damaging of the border barrier (Sec. 352/B.)	Obstruction on construction work of the border barrier (Sec. 352/C.)
2015	22	0
2016	1543	0
2017	863	0
2018	115	0
2019 – April 2021	192	0

Source: the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution

Common characteristics of these crimes are mentioned in Table 1-2 that each crime can be committed only by intent. Furthermore, several qualified cases were linked by the legislator to the statutory definition of damaging of border barrier and to the unlawful crossing of the border barrier. These are the following: perpetration by displaying a deadly weapon, or by carrying a deadly weapon, and perpetration as a member of a mass riot. The most serious qualified case by both above-mentioned crimes is if the perpetration results in death. If the defendant is sentenced for a crime against the border barrier for fixed-term imprisonment, according to the Sec. 60. Par. (2a) of the Hungarian Criminal Code, the defendant shall be expelled from the territory of Hungary. Namely, in the mentioned cases the application of expulsion is compulsory – except for that person who has been granted asylum in Hungary.

About the principle of legality

According to the principle of legality, the criminal procedure shall be initiated and conducted, and the defendant shall be punished by the authorities, if the act committed by the defendant can be qualified as a crime and if the defendant is punishable. Namely, if there is a reasonable cause to believe that the act committed by the perpetrator could be qualified as a crime according to the Hungarian Criminal Code, the authorities must conduct the procedure and must examine the elements of the crime committed. It means that the investigating authorities must investigate the circumstances of the crime, the prosecutor must arraign against the perpetrator – if there is no other opportunity to finish the criminal procedure -, and the judge must sentence the perpetrator if the perpetration is proved and the defendant is punishable.

As it can be understood on base of the content of the criminal procedural principle mentioned, in case of caught in the act or of detecting a crime, the authorities are not in that position to decide on starting a criminal procedure. The procedure must be started.

THE LEGAL PROBLEM

The Hungarian Police Force weekly publishes the actual data related to the irregular migration in Hungary. The data published concerns the number of irregular crossings hindered, the number of held-up irregular migrants who were redirected to the gates built up on the border fence, and the number of arrested migrants against whom procedures were started by the authorities. If we check up the data, it isn't in the same street in comparison with the data of criminal procedure mentioned above in Table 1, and Table 2, and it is not in accordance with the real content of the principle of legality. Namely, that person, who is held up or arrested, or hindered during or after the irregular crossing the border fence, or this person is caught in the act during the attempt of crossing, commits at least the unlawful crossing of the border barrier and the criminal procedure must be started against her or him. Otherwise, how could the migrants get to the Hungarian territory within 8 kilometers from the mentioned borders, if not by committing the mentioned crime or crimes? According to our opinion, it is impossible in most of these cases without committing the mentioned crime.

In the following table we will summarize the data published, however, for the sake of simplicity, only with reference to the last three years.

Table 3. *The number of irregular, held up and captured or arrested migrants in the period 2019 – 2021. Force*

Years	Number of irregular crossings hindered by the authorities	Number of held up migrants who were redirected to the gates	Number of captured and arrested irregular migrants
2019	3008	12973	943
2020	14160	30097	2078
2021 (till 4 of April)	9766	8311	518

Source: the official website of the Hungarian Police

As we see earlier according to the statutory definition of the unlawful crossing of the border barrier, anyone who tries to enter the territory of Hungary unlawfully - across the installed border fence avoiding the appointed gates -, commits the crime mentioned. On the basis of data summarized by Table 3 we could also see that the data concerns that cases, when the irregular migrants entered or tried to, entered unlawfully the territory of Hungary. All of the migrants who were hindered or held up and redirected, or captured and arrested by the Hungarian police, committed this crime mentioned above, because they could enter Hungary only through the border barrier, namely, they were caught in the act either by the fence or not so far from it. Therefore, in every or in most of the cases mentioned above by Table 3, the authorities should have had to apply the Hungarian Criminal Code, and according to the principle of legality, they should have had to start the criminal procedure.

However, if we compare the data summarized by the tables we can emphasize that from 2019 the authorities preferred mostly the law enforcement methods than the criminal procedural ones to ensure the rapidity, efficiency, and cost-effectiveness of the procedure. The criminal procedural principle on legality has become a contentless principle in these procedures, therefore, the following question occurs justifiably: Is there any reason to regulate the unlawful crossing of the border barrier as a crime in the Hungarian Criminal Code? Or if the answer is yes, is there any reasonable cause to carry on managing the problem caused by the irregular migration such a method like the mentioned one? We are going to try to find out the correct answer in our conclusion.

CONCLUSION

According to our opinion, there are two different ways to give the appropriate answer to these questions. The first way connects to the field of criminal law and needs to deal with the real criminal-political aim declared by the legislator in 2015. The second way is the law enforcement one. However, it shall be underlined that there is no reason to apply the mixed methods mentioned above in the practice. Namely, if someone committed the crime titled unlawful crossing the border barrier, or another crime against the border barrier the criminal law must be applied against this perpetrator and not the measures, not of a criminal legal nature mentioned in this paper.

If we want to analyze the first way – the criminal legal one -, the first question to be answered is whether maintaining the criminal legal regulation concerning unlawful border crossing would be justifiable in the future or not? In order to give an answer to our question, we have to examine the legislator's aim related to the crime mentioned. In 2015, when this crime was inserted into the Hungarian Criminal Code, the legislator appointed that – among others – Hungary can fight efficiently against the irregular migration with the construction of the physical border, therefore, in order to improve the defence of the Hungarian borderline, there is necessary to make such a crime which can support this political aim. Therefore, it is a relevant question whether repealing the crimes against the border barrier can be expected in the near future or not. However, it should be considered with reference to the criminal statistical data and the established practice. Thus, if the legal situation will not get be changed, and if a crime against the border barrier will be committed by someone, the authorities must conduct the criminal procedure against the perpetrator. And this expectation coincides with the main content of the criminal procedural principle on legality. If Hungary wants to follow the way assigned by the legislator in 2015 changing of the viewpoint of the authorities is to be needed.

Enforcement of the traditional legal principles can be considered as an advantage of this way, however, there are a lot of disadvantages to being seen. First, it can increase the number of the criminal procedures which can enhance the administrative burden of the authorities working on every stage of the criminal

procedure, and it will also increase the costs of the procedures which won't probably pay off for the state. If we have a look at data, it can be clear that the authorities – even for the aim of avoiding the burdens mentioned – do not follow the traditional practice, and mainly choose the other method mentioned above to ensure the rapidity and efficiency of the procedures. However, this law enforcement method is not in accordance with the criminal legal regulations, and this is why it can be criticized. Furthermore, according to our opinion, the border barrier has a deterrent effect as for the migrants. Not the fact of criminalization, but the border barrier and the effective police measures alone can deter and hinder the irregular migrants from unlawfully entering Hungary.

However, if Hungary wants to follow the current method, the law enforcement one, the first and the most important condition to be changed is the viewpoint of the legislator. What does it mean exactly? The justification of the criminal legal steps should be thought over by the legislator. Namely, the rules of criminal law should enforce only in the field of criminal law and criminal procedure law. Therefore, the opportunity of decriminalization arises, which would have to affect all of the crimes against the border barrier. It would be a reasonable step, because it would be based on not only the criminal statistical data mentioned in the Table 1-2., but also on the handling method worked out by the police force to stop the irregular migratory flow. It would ensure the rapidity and efficiency of the procedures against the detected irregular migrants and would not cause a huge economic and administrative burden (can we think here about the cost of the practical application of the right on the use of native language – the cost of translations, and the cost of the officially appointed defence counsel) for the authorities conduct the criminal procedures. For the reasons mentioned above, creating the accordance between the practice and the legal rules is to be considered in the near future in Hungary.

REFERENCES

[1] Bartkó, Róbert – Borbély Veronika: *Az irreguláris migrációt kísérő kriminalitások az Európai Unióban*. Pécsi Határőr Tudományos Közlemények XXII. sz. 2020., p. 293-298.

[2] GALATEANU, Oana: *Illegal Migration and the Migration Phenomenon at the Frontiers of Romania*. Contemporary Readings in Law and Social Justice. Vol 9 (2), 2017. p. 601.

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

[4] Hautzinger, Zoltán: *Büntetőjogi tényállások a külföldiség és a migráció vonzásában*. In. Hautzinger, Zoltán (edit.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, pp. 191-192.

[5] HEGYALJAI, Mátyás: *Migráció, bűnügy, nemzetközi kitekintés*. In: Hautzinger Zoltán (edit.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016. p. 12.

[6] LEEKERS, Arjen et. al.: *Crime among irregular immigrants and the influence of internal border control*. Crime Law SocChange 2012. Vol. 58., 2012. p. 17.

[7] Lévay, Miklós: „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.

[8] Madai, Sándor: „A tömeges bevándorlás okozta válsághelyzet” kezelésének büntető anyagi jogi eszközei hazánkban. In: Hautzinger, Zoltán (edit.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, p. 253.

[9] MITSILEGAS, Valsamis: *The Criminalization of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Springer, 2015. p. 48.