

BARTKÓ RÓBERT - SÁNTHA FERENC

Crimes against the border barrier in Hungary – Effective tools in the fight against irregular migration?

ABSTRACT

Migration, or irregular migration is not a recent phenomenon. It has been present in our world for a long time and has historically posed challenges for countries affected by immigration. Keeping immigration under control has also been an important issue for the European Union since its beginnings. However, the situation has changed significantly in 2014 and 2015. The wave of migration that hit Hungary in 2015 marked the beginning of a new era in the history of migration in Europe and in Hungary, both in terms of quality and scale. In response, the Hungarian government formulated a package of measures consisting of several points. The first step was the construction of the temporary security border (also known in the literature as the “physical border barrier”), and the second was the adoption of Act CXL of 2015 by the Hungarian Parliament, which created the legal background for the management of mass immigration (the “legal border closure”). As the Hungarian solution was a unique one in the European Union in our paper we have to examine first the legality of constructing the border barrier. Once the test of legality has been met – as the second step – we turn to the presentation of the Hungarian substantive criminal law and its analysis. Finally, we evaluate the Hungarian legislation in the light of the principle of legality and from the perspective of symbolic criminal legislation. To support our arguments we also use criminal statistics provided by the Hungarian Prosecutor General’s Office for our research.

Keywords: irregular migration ■ crimes against the border barrier
■ Hungarian migratory situation ■ principle of legality
■ Hungarian substantive criminal law

I. INTRODUCTION

The migratory wave that hit Hungary in 2015 and showed the European Union the weaknesses of the Schengen system,^[1] marked a begin-

[1] See further information: Colombeau, 2020.

ning of a new era in the history of migration not only in the European Union but also in Hungary. Facing the mass migration the Hungarian government adopted a package of legal and administrative measures in 2015 to stop the irregular migratory flow and to be able to handle it. The first step was the construction of the physical border barrier and the creation of legal rules to facilitate its construction. As a second step, the Act CXL of 2015 was adopted by the Hungarian Parliament which set the legal background for the management of mass immigration by amending several internal legal rules. Of course, the legislator's aim was also to provide legal protection of the physical border barrier which has already been built or that may be built in the future. As the legislator pointed out: „the protection of state's borders can only be ensured by the installation of increasingly serious facilities and equipment. The function of the mentioned items is to complete the self-defence of the State and to indicate that the state wishes to exercise its right to self-defence, a right which must be respected”.^[2]

The abovementioned legal response by the Hungarian legislator was not without precedent, as in 2015 the number of asylum seekers per 100.000 inhabitants was the highest in Hungary in the European Union with 1797 persons. In comparison with it, Sweden had „only” 1667 registered asylum seekers, while Austria had 1028.^[3] These figures are, however, overshadowed by the fact that asylum seekers – taking advantage of the fact that they could move around Hungary without any controls – mostly left for the Western European countries. The mentioned act can be regarded as an amendment affecting several segments of the Hungarian legal system which amended – without claiming to be exhaustive – not only criminal law and criminal procedure law but also the law on asylum, the law on state border, and the rules on the entry and residence of third-country nationals.

As the crimes against the border barrier are in our focus, before to the presentation of the concrete crimes and their elements of crime, we deal with the international and European legal context in which the construction of a physical border barrier can be assessed. Our aim is also to answer the question of whether the construction of physical barriers at the so-called external borders conflicts with any of Hungary's obligations under international or EU law. This question is treated as a preliminary question, since without it, the assessment of the facts established for the protection of the physical border barrier cannot be credible.

II. THE PHYSICAL BORDER BARRIER IN THE LIGHT OF INTERNATIONAL AND EU COMMITMENTS

A state's right to self-defence is based on its sovereignty. It means that states can decide – based on their right to self-defence – how to protect their sovereign

[2] Part of the legal justification of the Act CXL of 2015.

[3] Juhász – Molnár, 2016, 265.

territory from persons seeking to enter illegally, unless their international obligations limit this right. The form of protection is determined by geographical circumstances, but the establishment of physical protection can have a clear preventive function against uncontrolled influxes of people.^[4] Some authors even stress the importance of border control in the context of the terrorist attacks against the US in 2011.^[5]

According to the thought mentioned above it can be considered as a fact that the protection of state border is one of the rights of states based on their sovereignty, but also an obligation towards their citizens. Articles 3-4 of the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter: „Treaty”) also clear that the mentioned question analyzed above cannot be considered as a policy of exclusive competence of the EU or as an area where the EU has shared competence with the Member States. However, it is also important to underline that the EU – on the level of the Treaty - also declares the importance of the prevention of irregular migration and stepping up of the fight against it. As the Article 79 Par. (1) of the Treaty regulates: „the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”.

However, the Convention on the Schengen Borders Code^[6] (hereinafter: „the Schengen Code”) recodified based on Article 77. Par. (1) point c) and Par. (2) points b) and e) of the Treaty is also an important legal document to answer our scientific question mentioned above. It shall be underlined that the Schengen Code already under Par. (6) of its Preamble states that border controls carried out by Member States at the external borders must contribute to the fight against irregular migration and trafficking of human beings and to the public security of each Member State. Based on the mentioned aim declared by the Preamble Article 5 Par. (3) treats the management of external borders as a task deployed to the level of Member States. According to this obligation, Member States shall introduce into the internal law sanctions that are sufficiently effective, proportionate and dissuasive against persons who seek to cross the external borders illegally at places other than the border crossing points which have been opened. However, Member States shall take into account the exceptions declared by Article 5. Par. (2) of the Schengen Code. Examining the exceptions, it can be noted that members of irregular migration flows intending to enter the territory of a Member State in a way that constitutes a violation of the established border barrier cannot be included in these exceptions, and therefore the requirement that unauthorised entries should be subject to sanctions is applicable.

[4] Filipec – Mackova, 2019, 64.

[5] Vallet – David, 2012, 111-119.

[6] Regulation (EU) 2016/399 of the European Parliament and of the Council OJ L 77, 23.3.2016, 1-52.

It is important to note that the cited provisions of the Schengen Code and the subsequent provisions on checks at external borders do not prohibit the use of deployed technical equipment for border management. This is confirmed by the Schengen Code's definition of border surveillance and its more detailed definition in Article 13 Par. (1). The Code defines border surveillance as the protection of borders, including external borders, to prevent the circumvention of border traffic controls. Furthermore, the Article 13. Par. (1) declares that the main purpose of the border surveillance is to prevent unauthorised border crossings and to counter cross-border criminality and to take measures against migrants who want to cross the border illegally.

To achieve effective border surveillance, it would not be possible to regulate the list of tools to be used at the level of a regulation, so Article 15 of the Schengen Code only sets out the expectation that the tools used must be effective, uniform, and provide a high level of protection. In summary, concerning the protection of the external borders, the provisions of the Schengen Code require Member States to: (a) protect the external borders efficiently and effectively; (b) organise border surveillance in such a way that it is capable of detecting unauthorised border crossings; (c) use means of organising border surveillance which allow the Code's requirements to be met at a high level; (d) take account of the exceptions provided for in the Schengen Code. Based on these cumulative requirements, according to our opinion, the physical border barrier at the Hungarian external borders is not objectionable under the above-mentioned rules of EU law. It should be noted at this point that even Regulation (EU) 2016/1624 of the European Parliament and of the Council on FRONTEX declares in its Article 5. Par. (1) that Member States remain primarily responsible for the management of protection of their external borders.

At the same time, from a humanitarian legal perspective, there have been numerous criticisms of both the physical border barrier and the Hungarian criminal legal provisions providing its legal protection, typically based on the assertion that members of the irregular migration wave were essentially treated as refugees. The starting point for examining this question is the provisions of the International Convention relating to the Status of Refugees, adopted on 28 July 1951, and the Additional Protocol relating to the Status of Refugees, adopted on 31 January 1967 (hereinafter: „Geneva Convention”), and, in the EU context, the provisions of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.^[7]

Under Article 31 Par. (1) of the Geneva Convention, Hungary has an obligation not to penalise refugees who have entered its territory unlawfully from a territory where their life or freedom was threatened, provided that they report to the authorities without delay and provide sufficient justification for their unlawful entry. Technically, the EU legislation referred to also takes this framework set

[7] 2016/C 202/2 OJ C 202, 7.6.2016, 389-405.

by the Geneva Convention as a point of reference. Article 78 Par. (1) of the Treaty provides that a common asylum policy in the Union shall be established in accordance with the provisions of the Geneva Convention. Article 18 of the Charter of Fundamental Rights of the European Union, which regulates the right to asylum, also calls for compliance with the international treaty referred to. In the light of the above, the question to be answered is whether the construction of the physical barrier violates the provisions of the Geneva Convention.

If we start from Article 31 of the Convention, which has already been referred to, it can be concluded that the international legal provision binding Hungary does not in itself exclude the possibility of applying criminal sanctions for unlawful entry into the territory of Hungary. That provision attaches fundamental importance to the principle of non-directness in that regard. Under the Geneva Convention, Hungary has undertaken „only” to refrain from penalising unlawful border crossings directly from the territory of a state where the life or freedom of the person or persons who subsequently obtained refugee status was threatened to the extent declared by the Geneva Convention. Since the geographical characteristics of Hungary – and the nationality composition of the immigrants who have entered our country through the physical border barrier – do not generally give rise to any breach of the principle of non-directness, it is for the reason that the setting up of a security border and the fact that the legislature intended to ensure that immigrants enter our territory in a legal and verifiable form at the so-called external border are not objectionable. In other words, a physical border barrier does not constitute an obstacle to direct entry within the meaning of the Geneva Convention, nor can it be interpreted as such.

It is another question that the intention of an irregular immigrant who wishes to enter the territory of a country at a physical border barrier cannot be to cooperate with the authorities, so that the condition of impunity guaranteed by the Geneva Convention, which concerns the obligation to report immediately to the authorities, cannot be met. The unlawful crossing of a temporary security border barrier in itself constitutes a failure to satisfy the conditions laid down by the Geneva Convention. The EU-compatibility of the solution is also confirmed by the above-mentioned Schengen Code, which in its Article 5 Par. (3) explicitly provides for the possibility for national legislation to develop internal sanctions for illegal border crossing.

In summary, it can be stated that the fact that Hungary, as a Member State of the European Union, has set up a physical border barrier at its external borders, thus protecting the public security of the country and expressing its claim to sovereignty, is not objectionable from the point of view of EU or international law. The fence does not ‚hermetically’ seal off the country from persons wishing to enter, but facilitates entry in a controlled way. Since the design of the security border fence itself is not objectionable, there is no reason to doubt that the Hungarian legislature intended to give it criminal legal protection. However, the fact that the physical border barrier is unobjectionable does not mean that the legislative solution associated with would also be unobjectionable. Therefore, the relevant statutory definitions and their evaluation will be discussed in the next chapter.

III. CRIMES AGAINST THE BORDER BARRIER AND THEIR EVALUATION

In 2015, the Hungarian legislator created not only a physical border barrier but also a legal border barrier by introducing into Hungarian criminal law the so-called crimes against the border barrier in Act CXL of 2015 amending the Criminal Code (hereinafter: „the Amending Act”), which are the following: unlawful crossing the border barrier (Article 352/A), damaging the border barrier (Article 352/B) and the obstruction on construction work of the border barrier (Article 352/C). The Amending Act criminalized new forms of human trafficking and increased the applicable penalties for the crime. In addition, the system of criminal sanctions was changed, as the Act modified the provisions on expulsion and suspended prison sentence.

1. Definition of the crimes against the border barrier – A brief overview

According to the statutory definition of unlawful crossing the border barrier, “any person who enters unlawfully the territory of Hungary across the facility installed for the protection of state border”. The crime is punishable by imprisonment up to three years in the simple case, but increasing to one to five years if the crime is committed with weapons or other deadly instruments or as a participant in a riot, and in the most serious case – causing death – to two to eight years.

The external borders of Hungary can be entered at border crossing places or border crossing points. The crime is committed if the perpetrator unlawfully enters the territory of Hungary on the border section where the facility for the protection of the border, the so-called border barrier or, mentioned in the public discourse, ‘fence’, has been constructed. Unfortunately, the concept of the facility installed for the protection of the border is not defined by the Criminal Code. According to the legal literature, this can only be an artificial fixed or mobile facility built or installed specifically for the purpose of border protection. Examples are fences, cordons, mobile containers, installed wire barriers, and fixed or mobile checkpoints.^[8] The crime can be considered as a so-called *delictum commune* since its perpetrator can be anyone. However, if we look at the reason for creating this statutory definition, it is quite clear that the Hungarian legislator drafted it specifically to curb irregular migration. This fact is also confirmed by the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution. Namely, according to relevant data, most of the perpetrators of the crime had the following nationality: Afghan, Iraqi, Syrian, Pakistani, Iranian, and Kosovo.^[9]

In practice, the crime is committed by entering the country after damaging the border barrier, cutting or breaking down the fence, or climbing over or

[8] Király, 2016, 275.

[9] Bartkó, 2021, 287.

crawling under the fence.^[10] Unlawful entry by circumventing the border barrier or flying over the barrier in an aircraft^[11] is not a criminal offence, only an infraction, since "any person, who crosses or attempting to cross the state border of Hungary without authorization or in an unauthorized manner commits an infraction titled unlawful crossing the border and is punishable with a fine".^[12] The question arises whether, if the unlawful crossing of the Hungarian state border was already sanctioned by the infraction law, was it necessary to codify the new criminal offence of unlawful crossing the border barrier.

Damaging the border barrier is a criminal offence if the perpetrator 'destroys or damages a facility or device installed for the protection of state border unless the act constitutes a more serious crime'. The crime is punishable by imprisonment from one to five years in the simple case, the aggravated cases are the same as the previous offence but are punished more severely so that the most serious case, if the crime causes death, is punishable by imprisonment between 10 and 20 years.

This criminal offence is no more than the crime of criminal damaging committed on a specific object. The perpetrator either damages the facility installed for the protection of the border, such as cutting the border fence with wire cutters, or damages or destroys the device installed for the protection of the border, such as electric sensors or signposts. The extent of the damage caused by the crime is irrelevant, and this criminal offence is a so-called subsidiary statutory definition, which means that it can only be established if the act does not constitute a more serious crime.

Damaging the border barrier and unlawful crossing of the border barrier cannot be established cumulatively, namely, the perpetrator will not be prosecuted for both offences. If the offender damages the border barrier and then enters the country through it, he or she is only liable for the more serious offence of damaging the border barrier. The question arises whether it was necessary to introduce damaging the border barrier as a new criminal offence, given that the crime of criminal damage existed and still exists in the Hungarian Criminal Code.

Obstruction on construction work of the border barrier is committed by "any person who obstructs work on the construction or maintenance of a facility installed for the protection of the state border unless the act constitutes another crime". The crime is punishable by imprisonment for up to one year. Obstruction can take the form of any kind of conduct, such as placing objects in the working area, for example in front of vehicles on their way to the working area, or taking possession of equipment that cannot be used to carry out the construction work.^[13] However, if the perpetrator steals the equipment or physically assaults

[10] Madai, 2016, 251.

[11] Tóth J., 2016, 226.

[12] See Article 204 of Act II of 2012 on Infractions, Infraction Proceedings and the Infraction Registration System.

[13] Madai, 2016, 253.

the persons doing the work by obstructing the work, theft or assault will be established. This is explained by the fact that the crime is also a subsidiary statutory definition, which can only be established if the act does not constitute another crime. We would like to point out that from 31 July 2015, before the codification of the crime, a Government Decree^[14] sanctioned with an administrative fine any person who obstructed construction work in the area of the temporary security border barrier, or impeded the entry or exit of persons or vehicles carrying out works in the area of the barrier. This raises the question of why, if the legislator initially found the threat of administrative fine sufficient to protect public safety, it later decided that it was necessary to include the obstruction on construction work of the border barrier in the Criminal Code. To answer this and the above-mentioned questions, it is necessary to examine the reasons for the criminalization of crimes against the border barrier.

2. Reasons for criminalization of the crimes against the border barrier

According to the Explanatory Report of the Amending Act, there were several reasons for the criminalization, and the creation of the new criminal offences is justified by the following circumstances:

- (i) the serious economic burden on the country caused by illegal migration;^[15]
- (ii) the drastic increase in the number of illegal border crossings;^[16]
- (iii) the exercise of the State's right to self-defence and respect for that right;^[17]

[14] See Government Decree 213/2015 (VII. 31.), repealed on 15 September 2015.

[15] „As migration, especially illegal forms of migration, represents a serious economic burden for the country, it is necessary to examine the problem from different perspectives, which implies amendments of the relevant legislation.”

[16] „The number of illegal border crossings has also increased drastically in our country compared to last year.”

[17] „The effective protection of the state's borders can only be ensured by the deployment of increasingly massive facilities and equipment. The function of these facilities is to provide the self-defence of the State, and also to indicate that the State wishes to exercise its right of self-defence, and that this right must be respected.”

- (iv) the criminality linked to illegal migration and the particular danger of these crimes to public order and public security.^[18]
- (i) We agree with the view that the economic burden on the country may be an indicator for changes in certain legislation, but cannot be a justification for creating new criminal offences;^[19]
- (ii) The fact is that the number of illegal border crossings has increased dramatically in 2015,^[20] and the proliferation of an illegal act may be a factor justifying criminalization, but criminal intervention based on a single argument is not appropriate;^[21]
- (iii) The right of the state to self-defence, and consequently the protection of the sovereignty and territorial integrity of the state, may be a legitimate justification for criminalization. In our view, the right of the state to self-defence is the basis for the legitimacy of the construction of the border barrier, as it was indispensable to counter mass and uncontrolled migration. However, crimes against the border barrier do not in themselves violate or threaten the sovereignty of the state and therefore the exercise of the state's right to self-defence does not justify the necessity of the new crimes;
- (iv) Public order and public safety can be considered constitutional values whose protection allows the limitation of fundamental rights by the criminal law^[22] and can be an acceptable justification for criminalization. Therefore, it is necessary to examine whether criminality linked to illegal migration poses a particular danger to public order and public safety.

As regards criminality linked to illegal migration, in our view, the concept includes the already existing 'traditional' criminal offences committed by migrants (theft, robbery, rape, and so on), crimes exploiting migration (in particular human trafficking), and the three new crimes against the border barrier created by the Amending Act. Research shows that the relationship between international migration and becoming a perpetrator of a crime can be considered atypical in Hungary,^[23] mainly because irregular migrants treat Hungary as a transit country and do not intend to settle here.^[24] Increasing criminality related to the growing irregular migration cannot be objectively justified with statistical data in our country.^[25]

[18] „Criminality linked to illegal migration and the increased threat to public order and public security of these acts justify the need to tackle the serious forms of these crimes, even by the most severe means of public authority, including criminal sanctions.”

[19] Madai, 2016, 246-247.

[20] Amberg, 2016, 204.

[21] Amberg, 2016, 211.

[22] Amberg, 2020, 186.

[23] Urbán, 2016, 74.

[24] Hegyaljai, 2016, 13.

[25] Hautzinger, 2016a, 306-310.

It is therefore doubtful that traditional criminality linked to the illegal migration, namely common criminal offences committed by migrants, would pose a particular danger to public safety. In contrast, typical crime exploiting migration, namely human trafficking, constitutes a serious risk to public safety, it was therefore justified and acceptable to strengthen the provisions of this crime by the Amending Act. Consequently, the question arises whether the new crimes against the border barrier really pose a particular danger to public order and public safety. In other words, whether the danger of these crimes to society be considered serious enough to justify the intervention of criminal law. To answer the questions it is necessary to examine the legal object of the new offences, namely the basic values and rights protected by the criminal law because the degree to which an act is dangerous to society is determined primarily by the protected legal object, and it can be considered as the basis of the punishability of a human act.^[26]

The titles of Chapters of the Criminal Code always refer to the protected legal object. Crimes against the border barrier are defined by the legislator in Chapter XXXIV titled Crimes against the order of the public administration. The order of the public administration as a legal object means the social interest for the proper functioning of public administration in a broader sense.^[27] The common legal object of the crimes, in a narrower sense, is the interest for the protection of the state border and the social interest for the lawful crossing of the state border,^[28] as part of public order and public security. Regarding obstruction on construction work of the border barrier, the Explanatory Report identifies the interest for the undisturbed operation of the facility as the legal interest to be protected.

To sum up: the interest in defending the state border, as part of public order and public security, is a fundamental legal value to be protected, which may justify criminalization and the creation of new criminal offences. However, criminalization and threatening with a criminal sanction should be based on constitutional reasons: it should be necessary, proportionate, and have the characteristics of an *ultima ratio*.^[29]

3. The *ultima ratio* and subsidiarity of criminal law

To maintain social order, several legal instruments are available for the state. Criminal law constitutes the most serious interference from the perspective of citizens. Consequently, the state needs to be chosen the legal instrument, among the instruments available to protect society, that is proportionate to the danger posed to society. Criminal law instruments need to choose only if other instruments are

[26] Molnár, 2019, 58.

[27] Molnár, 2019, 59.

[28] Gál, 2022, 845.

[29] Sántha – Csemáné – Jánosi, 2014, 52.

insufficient. It comes from the logical argument that criminal law has a subsidiary function in the legal system and has a so-called *ultima ratio* nature.^[30] "Criminal law is the *ultima ratio* in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, namely punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance."^[31]

The principle of *ultima ratio* is to be interpreted in two ways. On the one hand, within the criminal law, which means that the appropriateness of a criminal law instrument needs to be assessed by other criminal law instruments, and if the comparison shows that the less severe instrument is appropriate, it should be preferred. On the other hand, it is also to be interpreted in a non-criminal context, when comparing the instruments of criminal law with instruments outside criminal law, namely civil law, infraction law, and administrative law.^[32]

The necessity to criminalize certain human conduct must be judged by strict standards:

Criminal law instruments, which inevitably restrict human rights and freedoms to protect different living conditions, moral and legal norms, are justified only where strictly necessary and proportionate if the protection of the constitutional or constitutionally based state, social and economic objectives, and values are not possible in any other way.^[33] The question needs to be asked whether the criminalization of crimes against the border barrier complies with the *ultima ratio* principle, whether the codification of these offences was inevitable, or whether there are existing instruments in other branches of law that are suitable for protecting the legal object.

4. Crimes against the border barrier in the context of principle on *ultima ratio*

The new crime of unlawful crossing the border barrier is basically a special case of illegal crossing of the state border. This illegal act, namely crossing the state border without permission or by unauthorized ways was a criminal offence in Hungary during the socialist era. After the system change, however, only the crossing of the border by armed persons was punishable, and from 2002 illegal crossing of the state border is an infraction and punishable by a fine. Decriminalization of illegal border crossing has therefore already been seen in the history of Hungarian criminal law.

In our view, imposing criminal sanctions for the unlawful crossing of a state border is justified in cases where it is committed on a massive scale, uncon-

[30] Sántha – Csemáné – Jánosi, 2014, 48.

[31] Decision 30/1992 of 26 May 1992 of the Hungarian Constitutional Court.

[32] Nagy F., 2008, 59.

[33] Decision 30/1992 of 26 May 1992 of the Hungarian Constitutional Court.

trolled, or by violence against a person. The Hungarian government has set up the physical border barrier to prevent such acts, which performs this function adequately and effectively. In comparison, the criminalization of unlawful crossing of the border barrier, either committed individually or in small groups, raises the violation of the ultima ratio principle, particularly concerning the fact that the simple case of the crime is punishable by imprisonment of up to three years, and the aggravated cases even more severely, which suggests that the penalty is disproportionate to the gravity of the offence.

This criminal offence is not indispensable in combating irregular migration, since the act is already qualified as an infraction and is punishable by a fine. We note that there are infractions punishable by detention in Hungarian law and previously expulsion was also available as a sanction for infractions. It is therefore worth considering the decriminalization of the crime and, at the same time, the amendment of the Act on Infractions to provide the use of detention as an infraction punishment and expulsion as a separate infraction measure in cases of illegal border crossing.^[34] This solution would be consistent with the ultima ratio nature of criminal law, and the threat of deprivation of liberty and expulsion from the territory of the country could also provide the necessary deterrent effect.

Damaging a border barrier is basically a special case of criminal damaging. The penalty for this act is more severe than for the previous crime, with the most serious aggravated case punishable by 10 to 20 years imprisonment, as in the aggravated cases of intentional homicide. This is clearly an exaggerated sanction, which is neither proportionate to the gravity of the conduct nor to the punishment of other similar offences in the Criminal Code.^[35] It has long been recognized that the severity of penalties does not guarantee a higher general preventive effect and in most cases, the actual and potential perpetrators of these crimes, namely foreign nationals, are unaware of the level of the sanction they are committing.^[36] Damaging a border barrier, however, is not only inconsistent with the ultima ratio principle but, in the words of Husak, can be seen as a form of overcriminalization, namely a manifestation of overlapping statutes.^[37] This criminal offence is therefore not necessary in our legal system, and effective criminal law protection could be ensured by amending the statutory definition of criminal damaging by introducing a new aggravated case of the crime, namely criminal damaging committed against a facility or device installed for the protection of state border.^[38]

The legitimacy of obstruction on construction work of the border barrier is also questionable for several reasons. Firstly, the construction of the security

[34] Amberg, 2016, 73.

[35] Molnár, 2019, 64-65.

[36] Molnár, 2019, 65.

[37] Németh I., 2019, 94.

[38] Bartkó, 2019, 42-43.

border barrier has been completed, so unless the government intends to build a new barrier, the crime cannot be committed at all. Secondly, the substantive gravity of the crime is not proportionate to the potential imprisonment and, as we mentioned, before the codification of the new crime, the legislator also considered the administrative fine to be sufficient. Finally, statistics show that this crime is not committed in practice at all. Therefore, we consider that there is no justification for maintaining this crime in Hungarian criminal law. This act could be placed either in the system of infraction law or of infringements subject to administrative fines. Note, however, that we are rather skeptical about the proposed decriminalization, since the so-called symbolic criminal offences, which once entered the criminal law system, are difficult to eradicate because the symbolic nature of these norms is reflected in the fact that they become punishable by expressing social disapproval of certain behaviour.^[39]

Finally, as regards the changes of the sanction system, it is worth mentioning that the Amending Act made the expulsion mandatory for crimes against the border barrier. It is obvious from this provision that the real aim is not the imposition of an (executable) imprisonment, but the criminal expulsion and deportation of foreign perpetrators from the territory of Hungary.^[40] The new legislation no longer recognizes the right to respect for family life as a limit to expulsion, and compulsory expulsion is another undesirable example of the deprivation of judicial discretion. The right of discretion is also not provided concerning the provision which obliges the judge to set the term of the expulsion at twice the term of the imprisonment.^[41] Another change in the sanction system was the amendment of the rules on the suspended prison sentence. As a main rule, the execution of a term of imprisonment of two years or less may be suspended conditionally, if there is reason to believe, particularly given the personal circumstances of the perpetrator, that the aim of the punishment can also be achieved in this way. The period of probation shall be between one and five years. In comparison, in the case of crimes against border barrier, it is possible to suspend the execution of an imprisonment of less than five years, there is no need to examine the circumstances of the perpetrator, and the probation period is longer, from two to eight years. Obviously, the legislator's aim is not to further increase the prison population, but to implement mandatory deportation as soon as possible, and therefore judges also favour the suspended prison sentence.^[42] The question has to be asked, however, what is the point of envisaging the mentioned severe penalties in connection with the crimes against the border barrier, when in practice a suspended prison sentence is typically imposed?

[39] Molnár, 2019, 63.

[40] Hautzinger, 2016b, 192.

[41] Amberg, 2016, 208.

[42] Tóth M., 2015.

IV. THE CRIMINAL STATISTICS AND SYMBOLIC NATURE OF CRIMINAL LEGAL RULES AND THE PRINCIPLE OF LEGALITY

As it has been seen from the brief analysis of the crimes against the border barrier, the legislation can be criticised on the one hand from the point of view of principle on *ultima ratio*. However, the criticism mentioned in the previous section also raises another criminal legal problem, and to be able to analyze it we need to look at the relevant statistical data. Two sources were used to collect the data. The first one was the official website of the Hungarian Police Force, where data on irregular migration are displayed. The second one was the statistical data report of the Hungarian Prosecutor General's Office which was published at our request in June 2023.^[43] According to our opinion, the data will clearly show the symbolic nature of the legislation in the field analyzed in our paper and the continuing violation of the principle of legality, which – in addition to the criticism of the violation of *ultima ratio* – also call into question the justification for criminalisation. Before presenting the data, however, we explain what the symbolic legislation and the principle of legality mean.

The symbolic legislation is an additional act of the state whose sole purpose is to convey the message to citizens that the state does everything to protect them.^[44] The problem of the products of the symbolic legislation – which are called redundant statutory definitions in the Hungarian literature^[45] – is on the one hand that these legal regulations are not enforced in practice and on the other hand that the rules and statutory definitions are also characterised by disharmony^[46] which the previous section tried to illustrate. In other words, there is a serious risk that the criminal law will be unable to fulfill its purpose fully and therefore, it will be reduced to a symbolic function, its latent function will be strengthened and it will serve more to reassure the citizens.^[47] This can lead to a situation where the law is largely without practical application.^[48] „Therefore, symbolic legislation is a form of legislation that can be interpreted as a pretence, which is especially important to deal with if it prevails in the area of criminal law. Regarding the fact mentioned above, the symbolic legislation results in at least two legal problems: the violation of the criminal procedural principle of legality and the normative disharmony.”^[49]

As for the principle of legality, according to this rule criminal procedure shall be initiated and conducted, and the defendant shall be punished, if the act committed can be qualified as a crime and if the defendant is punishable. In other words,

[43] LFIIGA//360-3/2023.

[44] Nagy F, 1995, 131.

[45] Molnár, 2019, 64-68.

[46] Molnár, 2019, 64-65.

[47] Salinger, 2022, 287.

[48] Peters, 2020, 417.

[49] Bartkó, 2023, 189.

if there is a reasonable cause to believe that the act committed by the perpetrator can be qualified as a crime based on the Hungarian Criminal Code, the authorities must conduct the procedure and must examine all elements of the crime committed. Namely, the investigating authorities must investigate the circumstances of the crime, the prosecutor must arraign against the perpetrator – if there is no other opportunity to carry out the criminal procedure or the judicial trial – and the judge must sentence the defendant if the statutory definition is proved in court and the defendant is punishable. The crimes against the border barrier can be considered as products of symbolic legislation not only because of the normative and dogmatic problems which were presented in the previous section, but also because they do not respect the procedural principle mentioned above.

To substantiate our statement it is necessary to compare two basic figures: the number of irregular migrants detected and the number of criminal procedures for the crimes against the border barrier based on the Hungarian Prosecutor General's Office report. As the data concerning the crimes against the border barrier and the irregular migration were processed only up to 2022 after entering into force of the Amending Act, and since the armed conflict between Russia and Ukraine started at the beginning of 2022 which colors the data, we can only deal with the period between 2015 and 2021.

Between 2017 and 2022 the Hungarian Police Force published weekly data concerning the number of irregular crossings hindered by the authorities, migrants held up and redirected to the border gates, and the captured and arrested migrants. The number of these migrants was in total 19.524 in 2017, 6507 in 2018, 16.924 in 2019, 46.335 in 2020, 121.790 in 2021, and 268.795 in 2022.^[50] Although the published statistics also include the migratory data relating to the Russian-Ukrainian armed conflict, and concern not only the border barrier – mainly in 2022 – but they clearly show how high levels of migratory pressure have affected the Hungarian border. To ensure the rapidity of the redirecting processes,^[51] the Act on State Border was amended by the Hungarian legislator in 2016. According to this modification, if an irregular migrant is detained by a police officer within 8 kilometres of the Hungarian-Serbian or the Hungarian-Croatian border (the Schengen external borders), the authority shall redirect this migrant to the border barrier to ensure that the migrant returns to the country he or she unlawfully entered from. If we look at the statistical data, we can see how the migratory routes have changed^[52] because of the creation of the border barrier and how the number of criminal procedures has changed for the past years in the context of the legal amendment mentioned above.

[50] The document which contains the data is available online at police.hu (See police.hu: Illegális migráció alakulása, 2019).

[51] Bartkó, 2021, 103.

[52] In connection with this topic see the data on detection of illegal border crossings in the EU between 2014 and 2019 published by FRONTEX. See: Annual Risk Analysis for 2015-2020 (<https://frontex.europa.eu>).

Translating the fact mentioned above into figures, while in 2015 and 2016 a total of 1395 cases were started for the crime of unlawful crossing the border barrier and only 5 cases for the damaging of the border barrier, in 2017 already only 10 cases were conducted for both crimes. The number of criminal procedures has not increased after that with a total of 14 cases for the two crimes mentioned between 2018 and 2021, based on the report of the Prosecutor General's Office.^[53] It shall be emphasized that no criminal procedure has been started and conducted for the obstruction on construction work of the border barrier since its entering into force.

If we look at the real meaning of the data mentioned above, an irregular migrant who is detained, arrested or hindered during or after the irregular crossing of the border barrier or who is caught in the act, commits at least the crime on unlawfull crossing of the border barrier. Otherwise, how could the irregular migrant get to the Hungarian territory within 8 kilometres of the border, if not by committing the mentioned crime. Therefore, it shall be underlined that the amendment of the Act on State Borders caused changings in the authority's method and it moved from the strict application of the principle on legality towards the law and border enforcement ones. Based on the data it can be stated that due to its rapidness, efficiency and cost-effectiveness the Hungarian Police Force preferred mainly the non criminal procedural methods and tools to stop the irregular migratory flow. If we add to this statement that no perpetration had been detected due to the crime on obstruction on construction work of the border barrier, even the whole system of the crimes against the border barrier and the Amending Act can be questioned and be considered as a symbolic one.

“Considering the statistical data, one of the biggest weaknesses of symbolic legislation, the marginalisation of the principle of legality, can be clearly established. If we examine the number of irregular border crossing attempts published by the Hungarian Police Force, as well as the number of registered crimes related to border barrier, the weightlessness of the principle of procedural legality is striking, and clearly shows not only the changing migratory routes but also the changes in the attitude of the authorities. In addition to the data presented in our paper, the question rightly arises of whether it is justified to retain such elements of crimes in a system of the substantive criminal law in a case in which the authorities consider it more effective to use the law enforcement or immigration enforcement tools instead of the criminal legal ones, enforcing literally the principle of *ultima ratio* with it.”^[54]

[53] Based on report number LFIIGA//360-3/2023 of the Prosecutor General's Office.

[54] Bartkó, 2023, 196.

V. FINAL REMARKS

According to the data analyzed in our paper and to the changings of the migratory routes after 2017 it can be stated that the authorities applied criminal legal measures in a relatively large number of cases before the amendment of the Act on State Borders, between September 2015 and 2017. However, law enforcement and immigration control tools along the border have become more prevalent since the modification above-mentioned. Criminal proceedings are initiated in a much smaller, even insignificant number, although, based on the numbers related to migratory pressure, much more should or could have been initiated. The authorities moved from the use of criminal legal tools towards the use of quick law enforcement tools, in line with efficiency and cost-saving aspects, thus abandoning the principle of legality, which is one of the most important principles in criminal procedure law. Due to the omitted legal matters, the statutory definitions are burdened with several dogmatic problems, therefore, it is a normal reaction of the authorities to try to avoid the application of these statutory definitions in practice. The inapplicable elements of crimes challenge the main substantive legal principle of legality and the command of procedural legality. "If the criminal policy of the state constantly emphasises the importance and effectiveness of stricter and expanding criminal legal actions, it actually – paradoxically – sacrifices criminal legal legality on the altar of symbolic criminal legislation".^[55] According to our opinion, therefore, there is no use in for keeping these statutory definitions in the Hungarian Criminal Code. The criminal legal policy of the legislature should change in the future, and after repealing these crimes it should give more space to law enforcement and immigration enforcement tools.

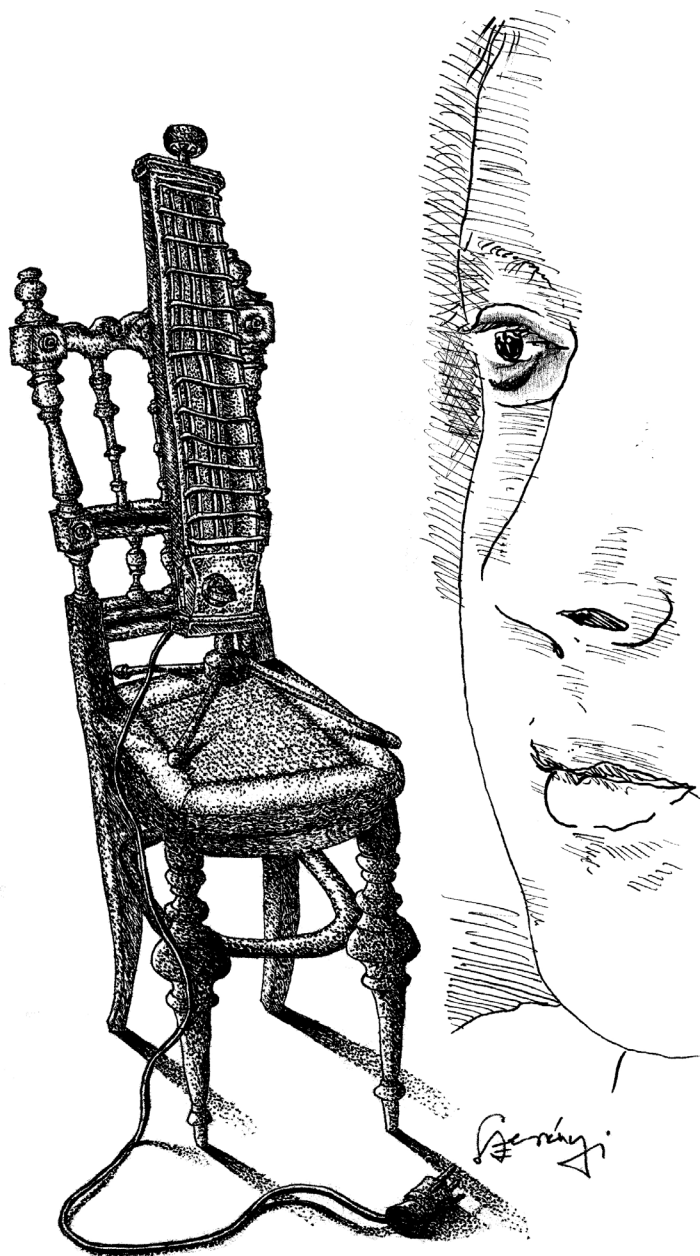
BIBLIOGRAPHY

- Amberg Erzsébet (2016): Migráció, büntetőjog, ultima ratio. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Amberg Erzsébet (2020): *A büntetőjogi felelősség helye és ultima ratio szerepe a felelősségi alakzatok rendszerében*. PhD értekezés. Pécsi Tudományegyetem, Pécs.
- Bartkó Róbert (2019): *Az irreguláris migráció elleni küzdelem eszközei a hazai büntetőjogban*. Gondolat Kiadó, Budapest.
- Bartkó Róbert (2021): Criminal Legal Tools in the Fight Against the Irregular Migration in Hungary. In: *Jog-Állam-Politika*. 2021/2. sz.
- Bartkó Róbert (2021): The enforcement of principle of legality in the Hungarian fights against the irregular migration. In: *NORDSCI Conference proceedings* (Book 2, Conference Proceedings, 2021). DOI: <https://doi.org/10.32008/nordsci2021/b2/v4/25>.
- Bartkó Róbert (2023): Symbolic Criminal Legal Tools in the Hungarian Fight against Irregular Migration. In: *Lex et Scientia*. Vol 1/2023.

[55] Bartkó, 2023, 197.

- Colombeau, Sara Casella (2020): Crisis of Schengen? The effect of two „migrant crises” (2011 and 2015) on the free movement of people at an internal Schengen border. In: *Journal of Ethnic and Migration Studies*. Vol. 46/2020. DOI: 10.1080/1369183X.2019.1596787.
- Filipec, Ondrej – Mackova, Lucie (2019): Fortifying against the Treat: can Walls stop irregular migration? In: *Slovak Journal of Political Sciences*. Vol. 19/2019, No. 1. DOI: <https://doi.org/10.34135/sjps.190104>.
- Gál Andor (2022): A közigazgatás rendje elleni bűncselekmények. In: Karsai Krisztina (ed.): *Nagykommentár a Büntető Törvénykönyvhöz*. Wolters Kluwer, Budapest.
- Hautzinger Zoltán (2016a): Félelem az idegentől. In: Finszter Géza – Kőhalmi László – Végh Zsuzsanna (eds.): *Egy jobb világot hátrahagyni... Tanulmányok Korinek László professzor tiszteletére*. PTE ÁJK, Pécs.
- Hautzinger Zoltán (2016b): Büntetőjogi tényállások a külföldiség és a migráció vonzásában. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Hegyaljai Mátyás (2016): Migráció – bűnügy – nemzetközi kitekintés. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Juhász Attila – Molnár Csaba (2016): Magyarország sajátos helyzete az európai menekültválságban. In: Kolosi Tamás – Tóth István György (eds.): *Társadalmi riport 2016*. TÁRKI, Budapest. DOI: <https://doi.org/10.61501/trip.2016.13>.
- Király Balázs László (2016): Gondolatok a határárral kapcsolatos bűncselekményekről. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Madai Sándor (2016): A „tömeges bevándorlás okozta válsághelyzet” kezelésének büntetőjogi eszközei hazánkban. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Molnár Erzsébet (2019): Dogmatikai határárral. Dogmatikai és kriminálpolitikai elemzés a határárral kapcsolatos bűncselekményekről. In: *Állam- és Jogtudomány*. 2019/4. sz.
- Nagy Ferenc (1995): Súlypontok a kriminálpolitikában. In: *Kriminológiai Közlemények*. 1995/52. sz.
- Nagy Ferenc (2008): *A magyar büntetőjog általános része*, HVG-ORAC, 2008.
- Németh Imre (2019): A túlkriminalizáció jelensége és az alkotmányos büntetőjog válsága. In: *Jog-Állam-Politika*. 2019/3. sz.
- Peters, Kristina (2020): Symbolisches Strafrecht? In: *Juristische Rundschau*. Vol. 8/2020. DOI: <https://doi.org/10.1515/juru-2020-0027>.
- Police.hu: Illegális migráció alakulása, 2019. (Accessed at: https://www.police.hu/hu/hirek-es-informaciok/hatarinfo/illegalis-migracio-lakulasa?weekly_migration_created%5Bmin%5D=2018-01-01+00%3A00%3A00&weekly_migration_created%5Bmax%5D=2019-01-01+00%3A00%3A00. Downloaded on: 20.03.2023.).
- Salinger, Frank (2020): Positives und symbolisches Strafrecht. Von guter und schlechter Kriminalpolitik. In: *Zeitschrift für Internationale Strafrechtswissenschaft*. Vol. 3/2022.
- Sántha, Ferenc – Csemáné Váradi, Erika – Jánosi, Andrea (2014): Foundations of European Criminal Law – National perspectives – Hungary. In: Negau, Norel – Váradi-Csema, Erika – Tracogna, Clara (eds.): *Foundations of European Criminal Law*, Editura C.H. Beck, 2014.
- Szoboszlai-Kiss Katalin (2023): Idegenek az athéni demokráciában. In: Szoboszlai-Kiss Katalin: *Miről beszélnek, amikor a görögökről beszélnek*. Gondolat Kiadó, Budapest.

- Tóth Judit (2016): Hatékony, arányos és visszatartó? Az engedély nélküli határátlépés szankcionálása. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Tóth Mihály (2015): A menekültkérdés kriminalizálása. In: *Élet és Irodalom*. 18 September 2015.
- Urbán Ferenc (2016): Bevándorlás és bűnelkövetők kapcsolata Magyarországon. In: Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság, Budapest.
- Vallet, Élisabeth – David, Charles-Philippe (2012): The (Re)building of the Wall in International Relations. In: *Journal of Borderlands Studies*. Vol. 27/2002, No. 2.
DOI: <https://doi.org/10.1080/08865655.2012.687211>.



Szerényi Gábor grafikája