



**CHANGING ON THE PRINCIPLE OF LEGALITY IN THE HUNGARIAN LEGAL  
FIGHT AGAINST THE IRREGULAR MIGRATION**

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**ABSTRACT**

In 2015, when Hungary was in the centre of the migratory flow, the decision on stopping the irregular migration was adopted by the Hungarian Government. The aim to stop the irregular migration and to protect the security of the Hungarian State and the citizens was acceptable for the Hungarian general public. In connection with the above-mentioned decision many modified regulations entered into force on 15 September 2015, among others the amendment of the Act on Criminal Procedure (Act XIX of 1998) and of the Hungarian Criminal Code (Act C of 2012) as well. Three new criminal offences were created by the legislator in relation to the irregular migration. These offences – the so-called crimes against the closing of border -were: irregular crossing the closing of border, damaging the closing of border and hindering the building on the closing of border. Taking account of the special character of these criminal offences, special procedural rules, a new Chapter titled „Special Criminal Proceedings”, were inserted into the Act on Criminal Procedure by the legislator. According to our research, there are many problems and anomalies in relation to this amendment, special reference to the principles of the criminal procedure, in particular the principle of legality. The aim of this short study is to present the problem with reference to this principle, in relation not only to the Act on Criminal Procedure in force, but also to the new Criminal Procedure Code (Act XC of 2017) as well, using the analytical method, and to create de lege ferenda proposal.

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**INTRODUCTION**

International migration has intensified during the last two decades, Europe has been receiving increasing number of migrants from the developing countries [10]. While between 2009 and 2010 yearly about 100.000 illegal border crossing were detected by the Member States [7], in 2014 276.113 migrants entered the European Union irregularly which represents an increase of 138% compared to the same period in 2013 [3]. It shall be underlined that the above-mentioned data increased in the past few years as well. The number of the irregular migrants reached unprecedented levels in 2015, and remained high in 2016 as well [8]. The irregular migration as a phenomenon is defined by the Member States in different ways. It is defined as an petty offence, however there are other Member States who solve the problem on the level of the administrative law. It shall be emphasized that the degree of *de jure* criminalisation is limited - in the most Western countries illegal residence as such is not crime [4]. In the political discourses, irregular migration is often described as a threat to state sovereignty and to public security as well [5]. According to the generally accepted argument the states

have a right to control who crosses their borders, and the migrants who want to evade the law, threaten the fundamental democratic values. From 2014 Hungary was in the centre of the migratory flow, and it was a serious burden for the country. The unfavourable effect of the irregular migration was recognized by the Hungarian Government, therefore the Act CXL of 2015 was adopted by the Parliament on 4 September 2015, which amended the relevant acts in relation to the mentioned problem. The legislator recognized that it was necessary to strengthen the southern borders of the country. The method of this was the building of a closing of border. According to the detailed explanation of the above-mentioned act, in order to protect the closing of border this establishment and the security of the country it was necessary to create „ sui generis” statutory definitions with reference to the closing of border, and to ensure that criminal procedures in connection with the referred crimes can be finished rapidly by the authorities. Therefore three statutory definitions -so-called crimes against the closing of border - were created by the legislator, and the Act on Criminal Procedure (Act XIX of 1998, hereinafter: Act in force) in force was amended as well. In line with the mentioned procedural amendment, the codification of the new Criminal Procedure Code was also in process. Considering that (a) the irregular migration did not decrease in the past years, and (b) the main directives of the

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mentioned codification were the rapidity and the efficiency [6], the special procedural regulations on crimes against the closing of border had been left by the legislator in the new Code (Act XC of 2017, hereinafter: new Code) will come into force on 1 July 2018. Although the already cited rapid political and legal answer to the migratory pressure was acceptable, the legislator did not manage to harmonize the mentioned special procedural regulations with the general rules of the Act in force. Furthermore, it is also true with reference to the new Code as well. It concerns specially the principle of legality, as a fundamental procedural principle of the Hungarian criminal procedure law. Therefore, the characteristic of the study will be the analytical method with the aim to create *ade lege ferenda* proposal.

**Description of the Legal Situation**

After the amendment of the Hungarian Criminal Code, many criminal procedures started for the crime against the closing of border in Hungary. The following table [9] which summarize the crimes against the closing of border were known to the authorities, clearly shows that the special procedural rules were applied by the authorities many times:

**Table 1** criminal statistic on the crimes against the closing of border committed between 15 September 2015 and 6 July 2017

	2015	2016	2017
Damaging the closing of border	22	1543	344
Irregular crossing the closing of border	914	2843	15

The table proves that the under-mentioned legal problem concerns the principle of legality is not a marginal problem. The Act in force defines the principle as follows: „it’s the responsibility of the court, the prosecutor and the investigating authority to initiate and conduct the criminal procedure, if the conditions set forth in the Act”/Sec. 6. par. (1)/. Namely, the principle of legality shows that the citizens, the public security and the law and order shall be protected by the state [2]. 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 is qualified as a crime and the defendant is punishable. It shall be emphasized that the meaning on principle of legality is in conformity with the changing on the traditional concept of the criminal law and with its aim to minimize dangers and risks [11]. Certainly, there are only a few exceptions of this general principle – for example the postponement of the indictment or the procedure before the mediator –, however the defendant shall cooperate with the authorities or with the victim, namely the defendant shall take part very actively in the criminal procedure. The cited definition was not modified by the legislator in the new Code, the principle of legality – with the same meaning – can be found under the Sec. 4. par. (1) of the new Code.

However, a brand-new exception was made by the legislator within the special procedural rules on the crimes against the closing of border [1] which is not in conformity with the meaning of the principle of legality. This exception was regulated in relation to the defendant who does not have habitation in Hungary, and her/his place of residence becomes unknown during the criminal procedure. It shall be underlined that this exception can be quite common in criminal cases where the defendant is an irregular migrant.

According to the Sec. 188. par. /1a/ and Sec. 266. par /1a/ of the Act in force, if the place of residence of the defendant becomes unknown, and it is impossible to continue the criminal procedure without the defendant, *the procedure shall be suspended*. Contrary to this rule, if the habitation of the defendant becomes unknown during the mentioned special criminal procedure – for example because the authority does not order custody or pre-trial detention, or these measures are cancelled by the authorities – *the procedure shall be terminated* by the authority, according to the Sec. 542/I of the Act in force. This rule can be found in the Sec. 832. par. (2) of the new Code as well, but there is a difference between the two Act concerning the exceptions of this rule. The following table tries to summarize this difference:

**Table 2** Exceptions of the principle of legality in relation to the criminal procedure on crimes against the closing of border

Exceptions in the Act in force	Exceptions in the new Code
the crime against the closing of border was committed by the defendant caused death	the crime against the closing of border was committed by the defendant is punishable by eight years or more imprisonment by law
the criminal procedure is in progress before the court of appeal	if an other crime was committed by the defendant in connection with the crime against the closing of border the criminal procedure is in progress before the court of appeal on the second or the third instance, or a repeated procedure is in progress owing to a repeal in the case

**DISCUSSION AND FINAL REMARKS**

According to our opinion, the legal problem with the cited rules is (a) on the one hand the unjustified discrimination applied by the legislator between the irregular migrants and the other defendants, who are under the mentioned criminal procedure, however they have known residence, and (b) on the other hand is the inconsistency of the rule.

In relation to the first legal anomaly, it shall be emphasized that not only an irregular migrant can be a defendant for a crime against the closing of border, but also such a person who has, for example, European citizenship. There is no legal reason to make a distinction regarding to the exemption from criminal liability between the defendants on the basis of irregular migration. This discrimination confronts the principle of legality and the rule of law, and the constitutional principle of prohibition on discrimination.

In relation to our second remark, according to the Act in force, the procedure shall be terminated by the court of appeal on the third instance, apart from that the defendant was convicted by the court of appeal on the second instance. As a matter of fact, a new ground for the termination of punishability was created by the Act in force if (a) the defendant is an irregular migrant who does not have known habitation in Hungary and (b) he or she commits a crime against closing of border, and (c) his or her place of residence becomes unknown during the criminal procedure before the court of appeal on the third instance. This regulation can be found in the new Code as well, however this exception was extended with the procedure before the court of appeal on third instance, and the repeated procedure. Although the anomaly outlined above was corrected by the new Code, the legal problem itself was not solved by the legislator.

Evidently, the aim of the legislator with creating the mentioned exception was that the state does not have to continue the criminal procedure and procedural measures unrequired against the defendant who has already left the country. The legal anomaly of our second remark is that the procedural measures of the authorities do not consider as measures unrequired (for example: accusation, conclusive decisions of the court, and so on). In relation to the principle of legality these measures shall be done by the authorities, if the defendant is punishable. Furthermore, according to the new Code, the above-mentioned decision on termination of the criminal procedure is a non-conclusive decision, therefore if the place of residence of the irregular migrant becomes known, or an other crime against the closing of border was committed by the same migrant, the procedure was terminated earlier shall be started again by the authorities. Furthermore, as a result of this, the cost of the criminal procedure (for example cost related to the defense counsel, or to the translator) on the one hand, and the job of the authorities on the other hand will increase as well, and this is not in conformity with the principle of legality.

Unfortunately, all the above shows that the legislator often uses criminal law and criminal procedure law to solve such social or security problem like the irregular migration is. Therefore, it can often appear that the rapid legislation serves mainly political aims and the practices shows the anomalies in the system of the regulations. It shall be underlined that the mentioned rule on termination of punishability does not fill the requirements of the principle of rule of law, violates the constitutional principle on the prohibition on discrimination, and does not have legal or practical reason, therefore it should be deleted by the legislator not only in the Act in force, but also in the new Code as well. Hungary is a state of rule of law, and aims to meet the international and European requirements, therefore we hope that the regulation criticized in our study will be repealed by the Hungarian Parliament in the near future.

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