

## **SZILVIA DOBROCSI: Special rules of criminal procedure in crimes related to the border closure**

### 1. General remarks about Hungarian criminal procedure

In Hungary criminal procedures are conducted upon rules regulated by act XIX of 1998 on criminal procedure (herein after referred to as: CCP).

1.1 The CCP distinguishes between three forms of criminal procedure: (i) *general procedure*: most of the CCP's regulations define the general rules of criminal procedure. In lack of any special circumstances the general rules should be applied for determining the guilt of the accused; (ii) *special procedures*: if special circumstances occur in the procedure, either related to the subject of the procedure (accused) or its subject matter (the crime committed), or the circumstances and the rules allow the simplification and speed-up of the procedure. Within the latter ones there is a procedure within which the prosecutor brings the case to court within 30 days following the first hearing of the accused. This means that it is an expedient procedure in which some of the general rules are disregarded of, for the sake of a quick decision. Another one is the waiver of the accused's right to trial, which is somewhat similar to plea bargaining used in the United States, but the agreement made between the accused and the prosecutor concerns the waiver of the right to trial and the application of some special rules of the Penal Code; in general real bargaining about the crime and the legal consequences is not allowed; (iii) *specific procedures*: applied against final court judgments ~~is~~ any correction or amendment of the judgment is necessary.

### 1.2 Sources and principles of criminal procedure

Since 1 January 2012 Hungary's Fundamental Law defines the basic framework of the legal system. Its provisions are relevant for criminal procedure law, because it lists human rights (right to life, personal freedom, human dignity, right to use one's mother tongue, etc.) and declares their protection, defines the conditions of their restriction. Article XXVIII is especially important, because it contains several principles and guarantees which are essential in order to conduct fair criminal procedures (right to defence, nullum crimen sine lege, right to appeal, presumption of innocence, right to court and right to fair trial). The Fundamental Law also regulates the basic framework of state organisations which proceed in criminal

cases, such as the police, the prosecutor's office and the courts. It protects children in several ways, which includes their special status in a criminal procedure. In addition to the Fundamental Law, the CCP also declares the most important principles<sup>1</sup> and contributes to their protection ~~also~~ with its detailed rules. It protects juvenile offenders by ordering the use of special procedural rules in their cases. It allows everyone to use their mother tongue in the procedure, even though the official language of the procedure is Hungarian, but no one may suffer any disadvantage due to the lack of Hungarian knowledge.

The level of human rights' protection in Hungarian legal instruments reaches the European standard, it complies with all obligations derived from human rights conventions, primarily from the European Convention on Human Rights<sup>2</sup>.

### 1.3 Some rules of criminal procedure

During the procedure authorities may apply several coercive measures in order to ensure its success. These may contribute to the successful completion of the procedure in several ways, for example by preventing the escape of the accused, by this ensuring his presence in the procedure, or preserving evidence until further use. Coercive measures are authority actions which assume the use of force, and they restrict the rights of the subject (usually the accused) in order to reach a certain goal. It is very important that the Constitutional Court of Hungary has ruled on the conditions of restriction several times: it has held that a necessity-proportionality test shall be applied in order to determine which form of coercive measures is the most appropriate in the given case to reach the desired goal. As criminal procedures may affect the most important human rights of the accused, it is essential to restrict these rights only if it is absolutely necessary, only with the lightest possible restriction and only for the necessary period of time.<sup>3</sup>

The court procedure requires lawful indictment in which the prosecutor requests the court to judge upon the guilt of the accused. The court shall act upon the indictment, but shall not exceed its framework. After the proper preparations for the trial the court holds public hearing in order to review the evidence. The publicity of the hearing may be limited only in special cases. In some of the special procedures or if the CCP otherwise allows the court may hold a public meeting, at which the prosecutor and the accused (with the defence lawyer) may be

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<sup>1</sup> These are, for example, the presumption of innocence, the burden of proof, right to defence, the prohibition of self-incrimination, the right to use one's mother tongue.

<sup>2</sup> Especially Article 6 of the European Convention on Human Rights.

<sup>3</sup> For details see: Section 2.2 of Decision 30/1992. (V. 25.) AB of the Constitutional Court

present and the evidence procedure is very limited. The prosecutor shall prove the guilt of the accused during the trial, the threshold of guilt for the court is certainty without any reasonable doubt, which means that if there is any doubt about the accused person being guilty, they shall be acquitted.

Against the judgment of the court of first instance appeal may be filed to the court of second instance. In general, this right to appeal is very broad, entitles all participants of the procedure and covers all material grounds. In principle, the right to legal remedy may be restricted only under certain conditions defined by law (e.g. in case of procedural decisions).

The above brief description of Hungarian criminal procedure is necessary because the modifications of the CCP related to the mass migration situation concern some of these basic rules.

## 2. The modification of the rules of criminal procedure due to mass migration

2.1 In September 2015 Articles 24 and 25 of Act CXL of 2015 on the modification of certain acts with regard to the management of the mass migration situation modified some provisions of the CCP and introduced a new chapter which contains all special rules about the management of crimes which were newly introduced into the Criminal Code with the same act due to the mass arrival of immigrants to the Hungarian border. These are crimes related to the closure of the state border, namely illegal crossing of the closure, damaging the border closure and obstructing the construction or maintenance of the border fence. The provisions were promulgated on 7 September and entered into force on the 15th. Government Decree 269/2015. (IX. 15) proclaimed national crisis situation due to mass migration which forms basis of the use of the modified rules of the CCP. The crisis situation ends on 15 March 2016.<sup>4</sup> Later the government extended the territorial scope of the crisis situation to four more counties, therefore today it applies to six counties out of 19.

## 2.2 The nature of modifications

The new rules aim at managing the cases related to mass migration in a way which is more reasonable and feasible under the given circumstances. The reasons for introducing the new provisions mainly concerned the length and speed of the general procedure and the (expected) massive increase of the number of cases in the remaining part of the year. These were the

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<sup>4</sup> [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1500269.KOR#lbj0id752](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1500269.KOR#lbj0id752)

main problems which the legislator wanted to handle. It chose the legal technique of introducing some new rules which deviate from the general rules of the CCP, adding that in all other issues not regulated by the new chapter the general provisions of the CCP apply. This means that the modification created a new special procedure with regard to mass migration. It also modified some rules of two already existing special procedures, the quick procedure and the waiver of the right to trial. In addition to rules concerning adult perpetrators the modification also touches upon some sensitive issues regarding minors. It may be stated in advance that the modifications, even though they were adopted in relation with a so-called emergency situation due to mass migration, and are applicable only during the emergency period, concern some of the most fundamental principles and guarantees of criminal procedure and human rights law, which definitely raises concerns about their justification.

## 2.2 Introducing a new special procedure

The new Chapter XXVI/A<sup>5</sup>, a procedure in case of crimes related to the border closure regulates the special rules which deviate from the general procedural provisions.

First of all, it lists those already mentioned three crimes which belong to its subject matter jurisdiction, meaning that these rules apply only in these cases. It stipulates that these cases shall be managed out of turn, which means that they shall be completed as soon as possible. It refers to the delivery of official documents related to the case and states that if the accused persons' whereabouts is unknown and he has no residence, either permanent or temporary, in Hungary, the documents shall be delivered to the defence lawyer. Regarding the participants of the procedure, the participation of a defence lawyer is obligatory in these procedures. The National Judicial Office's president appoints the proceeding judge who acts alone, without the participation of lay judges. The modification (together with a later amendment) appoints the tribunals of certain counties concerned and the district courts at their county seats as proceeding courts in these cases with exclusive jurisdiction.<sup>6</sup>

A very clever legal technique is used in the modifying act to exclude the application of some of the most important legal principles and guarantees during the aforementioned procedures. The act only refers to some provisions of the CCP [e.g. article 219 paragraph (3), chapter

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<sup>5</sup> Articles 542/D-542/M of the CCP

<sup>6</sup> Article 17 paragraphs (6) and (6a) of the CCP. This means that the Szeged District Court, the Szeged Tribunal, the Pécs District Court and the Pécs Tribunal, finally the Zalaegerszeg District Court and the Zalaegerszeg Tribunal may proceed, depending on the place and nature of the crime.

XXI] without actually detailing their content and the related changes. In case of a less thorough examination of the modifying act, one may even miss these rules due to this legislative solution.

The mentioned rules, which are not applicable in the criminal procedures conducted upon the three relevant crimes in the situation of mass migration stipulate the right to the use of mother tongue and the special provisions regarding juveniles. Therefore, in these procedures it is no longer a requirement to translate the indictment filed to the court by the prosecutor and the judgment delivered by the court to the language the accused understands. Interpreters may be used on the spot though if the accused requires so, to clarify certain issues.

Regarding juveniles (minors above the age of 14) the modification excludes the use of the set of rules which aim at protecting juveniles from the harmful effect of criminal procedure and at ensuring increased protection they might require due to their age. The reason for this is mainly that a mass arrival of minor immigrants was expected, many of them were expected to arrive without their legal guardian, therefore applying the special procedure would have been difficult. But with excluding all rules of the special procedure from the scope of application, all possible and necessary protections of minors were abolished. This means that there is no requirement to appoint a guardian for unaccompanied minors and parents or legal guardians cannot exercise their rights related to the case of ~~the~~ a minor even if they reside within Hungary. Neither the favourable rules relating to deferred prosecution, nor the specialized rules of evidence pertaining to juveniles (e.g. the prohibition of the use of lie detectors) apply in these cases. This modification is definitely not in favour of the protection of children, as defined in several relevant international agreements.

Furthermore, in the abovementioned cases the court shall primarily apply house arrest as a coercive measure, which shall be realised in immigration or asylum facilities. The court shall act with the outmost care, considering the interests of minors. However, it is questionable whether these centres are ready and suitable for ensuring the success of such coercive measures. Moreover, the modification stipulates that in necessary cases pre-trial detention may also be ordered and may be realised in police jail or at the mentioned immigration or asylum facilities (in addition to prisons, as general rules allow). The before mentioned concern remains, especially because jail and prison population in Hungary is rather high, the conditions are quite poor, therefore it is doubtful whether it is possible to find proper institutions for the realisation of these measures. Finally, the outmost consideration of the

interest of minors is not detailed further in the law, therefore it might be considered simply a reassuring, but empty rule, especially in light of the aforementioned situation of minor offenders.

Criminal procedures shall be terminated if the accused persons' whereabouts is not known and he does not have a permanent or temporary residence in Hungary, except if the crime caused death or if the procedure is already at the court of second instance.

### 2.3 Modified rules of existing special procedures

The general rules of expedient procedures and the waiver of the right to trial have been also modified, simplified in order to facilitate a simpler and faster completion of procedures.

Instead of the general 30 days the prosecutor may bring the accused to court within 15 days following the first hearing if the case is simple, evidence is ready and the accused confessed. If the accused was caught in action, the third condition is not relevant and the 15 days period is reduced to 8 days. The prosecutor presents the indictment at the hearing, this is the first time when the judge and the accused hear it. The general requirement about the punishability of the crime, i.e. that it shall not exceed 8 years is not applicable, which means that any relevant crime may be brought to court within few days, even if the law allows the use of long imprisonment of 10-20 years. This clearly raises concerns about the fairness of the procedure and the enforcement of human rights.<sup>7</sup>

The general rules of the waiver of the right to trial were also modified. Public court meeting shall be held instead of public hearing within 15 days following the first hearing of the accused during the investigation. Not only the accused, but also the defence lawyer may initiate this special procedure. Before initiating the court's procedure, the accused and the prosecutor enter an agreement containing the description of the crime, the sanction proposed by the prosecutor and its details (length and other features). If the court agrees, it judges accordingly. The general rules of this special procedure are obviously not applicable in these cases.<sup>8</sup>

### 3. Conclusion

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<sup>7</sup> Article 542/N of the CCP

<sup>8</sup> Articles 542/O-U of the CCP

As it may be seen from the abovementioned facts, significant changes occurred in the Hungarian criminal procedure in September. Even though they apply only for a specific period of time and concern only a certain group of perpetrators, they do raise concerns. As it has been experienced in practice since September most people accused leave before the end of the procedure and do not suffer real harm due to the new rules. Usually, due to their intention to leave as soon as possible, they do not participate actively in the procedure and do not resort to interpreters on the spot. Mostly minors and those held in custody remain, and they have to face court proceedings conducted upon the modified regulations. In September an ambitious Hungarian defence lawyer decided to take the case of his client through the complete criminal procedure (resort to all of the available remedies) and if possible challenge the regulations at the European Court of Human Rights in Strasbourg at the end. A judgment of the ECHR, either way, would put these issues into a new context and would make a statement about the protection standards of human rights in present day Europe.