

MÁGÓ, BARBARA

The Role of the Defendant's Nationality in Criminal Law **The path of drugs today**

*„The criminal can evolve and become a decent member of society.
A foreigner cannot develop. Once a foreigner, always a foreigner.”
/Mikes: How to be an Alien, 1946/*

Foreword

The complex nature of the citizenship procedure means that it is linked to many areas of law.¹ This study aims to examine the criminal law aspects of citizenship law, in addition to the obvious administrative, constitutional and immigration law links. It can be assumed a priori that citizenship permeates the institutional framework of criminal law at several points and that the existence or otherwise of a citizenship status also plays a significant role in criminal proceedings.

The relationship between criminal law and citizenship law

In the times before the first modern criminal codes, the punitive norms were based primarily on the figure of the citizen, or the “son of the country”, as it was called at the time in Hungarian. The parallel legislative processes of the Csemegi Code and the first Hungarian Citizenship Act (Act L of 1879) had a reciprocal influence on each other. It is interesting to note that it was

¹Mágó, B. (2024): Az állampolgársági eljárás mint speciális közigazgatási hatósági eljárás [The Citizenship Procedure as a Special Administrative Authority Procedure]. In: Gaál, Gy. – Hautzinger, Z. (eds.): Pécsi Határőr Tudományos Közlemények XXVI. Pécs. 233–237. o.

the first criminal bill to use the term “citizen” in Hungarian legislation.² The concept of citizenship, as defined during the parliamentary debate on Act V of 1878, served as the public-law basis for the scope of the criminal law.³ From that time onwards, Hungarian criminal law applied, within its territorial and personal scope, to offences committed in Hungary, irrespective of whether the offender was a Hungarian citizen.⁴ These provisions make it clear that criminal prosecution does not require citizenship; the primary objective of criminal proceedings is to protect society against perpetrators of crimes, irrespective of their citizenship.

Additional criminal law obligations for foreigners?

The state's criminal jurisdiction extends to foreigners as well, and foreigners can be prosecuted on equal terms. However, the literature on aliens focuses on the need to meet the additional criminal law obligations arising from the specific situation of aliens, without specifically examining their nationality. While these approaches are correct in the vast majority of cases, they often overlook the specific legal characteristics of special categories of citizenship. Although the majority of criminal law provisions relating to foreigners have not been given a separate chapter in Hungarian legislation, there are rules in both substantive and procedural law and in the penal system which are indispensable for the application of the rules to foreign nationals.

²Varga, N.: Az állampolgárság fogalmának kialakulása a magyar közjogban [The Development of the Concept of Citizenship in Hungarian Public Law]. *Acta Universitatis Szegediensis – Acta juridica et politica*. 2008. 508–510. o.

³Barna, A.: Az állam elleni bűncselekmények szabályozása a 19. századi Magyarországon, különös tekintettel a büntettekről és vétségekről szóló 1878. évi 5. törvénycikk előzményeire és megalkotására [The Regulation of Crimes against the State in 19th-Century Hungary, with Particular Regard to the Antecedents and Enactment of Act V of 1878]. *Universitas-Győr Nonprofit Kft. Győr*, 2015. 251. o.

⁴Csemegi-kódex, 5–6 §; Btk., 3 §

In Act XC of 2017 on Criminal Procedure (hereinafter referred to as the "Act"), such general additional obligations include the right to use the mother tongue, the provision of mandatory protection, the possibility of contacting the consular representative and the requirement to notify the aliens and asylum authorities. Although these additional obligations seem to apply to foreign nationals without exception, a closer examination of the legal situation from a nationality law perspective call into question their exclusivity. The Act, correctly, does not state that foreigners have the right to use their mother tongue in criminal proceedings, but rather grants this right to all persons who do not understand or speak Hungarian.⁵ It cannot be excluded that a Hungarian citizen — typically a foreigner, but also a resident — may lack Hungarian language skills. While in the case of Hungarian citizenship acquired by naturalisation, knowledge of Hungarian is a statutory prerequisite, in the case of citizenship by descent, there is no such requirement. In their case, therefore, it is just as necessary to use an interpreter and translator at all stages of the procedure as it is for persons who are exclusively foreign nationals.⁶ By the same analogy, providing compulsory defence for the accused is also not a matter of nationality, but of language skills. As a result, defence counsel's participation in criminal proceedings is not mandatory if the accused is a foreign national who does not know Hungarian.⁷ Thus, there are only two formal additional obligations for non-Hungarian nationals: the right to consular assistance and the obligation to report to the aliens' police.

Similar conclusions can be drawn regarding the penitentiary system, even though the act on the penitentiary system devotes a separate chapter to prisoners of non-Hungarian nationality.⁸ This classification of foreigners is justified by the difficulties of communication during the detention of persons of another nationality, as well as by the tensions arising from their

⁵ Be., 8 § (2)–(3)

⁶ Be., 78 § (1)–(2)

⁷ Be. 44. § d

⁸ Bv. tv., 207–215 §

cultural habits and possible religious differences.⁹ However, the need for an interpreter, the free practice of religion, the provision of food in accordance with religion, the prevention of national and ethnic conflicts, and the requirement of Hungarian language education are not really additional obligations based on citizenship, but rather requirements of security, peaceful coexistence, successful communication within the prison, freedom of religion and, above all, effective reintegration. It would be a mistake to treat the former as a purely national issue.

The only additional obligation in criminal law based on real nationality, beyond the formal consular contacts and the flow of information between institutions discussed earlier, is found in substantive criminal law. This additional obligation, however, can be seen more as an option for the state's self-defence mechanism than as a procedural requirement or a legal expectation. However, in an era of codification tendencies that exclude or restrict judicial discretion¹⁰, the possibility cannot be ruled out that in the future expulsion could become a mandatory element in the imposition of penalties on foreign offenders, particularly given that it is currently not excluded for certain offences, such as border control and trafficking in human beings.¹¹

In addition to the above, it is also justified to deal separately with those criminal offences that presuppose special intent, i.e., an exclusively Hungarian citizen perpetrator, as these cases can be interpreted as a specific, negative aspect of citizenship from the point of view of criminal liability. The special intent requirement for the offences of treason and infidelity is based on the rights and obligations of citizenship, which do not extend to foreign citizens and thus do not affect them as either rights or obligations.

⁹ Hautzinger, Z.: A külföldiekre vonatkozó normatív szabályozás a magyar büntetésvégrehajtási jogban [Normative Regulation Concerning Foreigners in Hungarian Penitentiary Law]. *Börtönügyi Szemle*, Issue 2015/1. 55. o.

¹⁰ Ambrus, I.: Se veled, se nélküled – a pénzbüntetés és a kiutasítás kötelező együttes kiszabásának problémái [Can't Live With It, Can't Live Without It – Problems of the Mandatory Joint Imposition of Fines and Expulsion]. *Belügyi Szemle*, Issue 2021/1. 75. o.

¹¹ Btk., 60 § (2a) [On this issue, see also court decisions: BH 2022.31; BH 2023.55]

The nationality aspect of expulsion

The only legal institution in criminal law that presupposes an effective nationality test is expulsion. According to the fundamental right declared in the Fundamental Law, Hungarian citizens cannot be expelled from Hungarian territory.¹² The inverse, negating statement of this right, where the condition and the result are exchanged for their opposite, only mechanically, without further examination of the conditions of life, is: foreign nationals may be expelled from the territory of Hungary. Criminal law and aliens' law use precisely this inverse formulation, of course, in a formulation specific to certain groups of foreigners. According to the Criminal Code, a non-Hungarian offender whose stay in Hungary is undesirable must be expelled from Hungarian territory.¹³ EEA citizens and their family members can be subject to expulsion under the Szmtv.¹⁴, while third-country nationals can be subject to expulsion under the Btátv.¹⁵ Thus, a criminal court order and an expulsion order may never be imposed on a citizen (in this case, a Hungarian citizen).

However, certain categories of non-citizens may be exempted from the general expulsion rules, so that the sanction of expulsion does not apply to them, despite their foreign status. In particular, persons enjoying international protection, such as refugees and beneficiaries of subsidiary protection, are exempted.¹⁶ However, the principle of non-refoulement¹⁷ applies not only in the field of asylum law, but also in the field of aliens policing law, so that the non-refoulement principle can be considered as one of the most important principles of expulsion. Persons enjoying the right of

¹²Alaptörvény XIV. cikk (2)

¹³ Btk. 59. § (1)

¹⁴ Act I of 2007 on the entry and residence of persons with the right of free movement and residence [Detailed rules on expulsion are set out in § 40–49]

¹⁵ Act XC of 2023 on the General Rules on the Entry and Residence of Third-Country Nationals [Detailed rules on expulsion are set out in Chapter XIII]

¹⁶ Btk. 59. § (2)

¹⁷ Principle of non-refoulement [No one may be returned to a country where they face persecution, torture, inhuman or degrading treatment, or other serious violations]

free movement and residence, and long-term residents, may be removed from the country only in exceptional cases of very serious crime; the freedom of movement and compensation for long-term legal residence granted by the Union will give them exceptional protection status. In addition, expulsion can only be considered lawful if it does not disproportionately affect the right to family life of the person concerned. Individual living conditions must always be taken into account by the authorities, in particular where the person concerned has a long-lasting and deep family connection in the country. The more deeply rooted one's family and cultural roots are in a given society, the greater the protection against expulsion.

The relationship between "special" categories of citizenship and expulsion

In a binary system, the prohibition on expelling a Hungarian citizen and the possibility of expelling a foreigner seem straightforward, since all that is needed is to decide whether the person is Hungarian. However, the field of nationality law is much more complex, and the decision-maker is often unable to take a clear position on the Hungarian or foreign nationality of the person concerned due to a lack of specialised knowledge. In the following, these specific categories of citizenship will be analysed, without revisiting the "close to citizenship" statuses described above (refugee, long-term resident — previously settled, family member of a Hungarian citizen). The two-tier system is based on the principle that a person has a single nationality. However, under legal pluralism, a person can be a citizen under the laws of several states; they are called dual, or more correctly, multiple, citizens. Their number has multiplied due to the disintegration of nation-states, globalisation, and increased migration. In their case, it is necessary to examine whether one of their multiple citizenships is Hungarian, since the applicable outcome for Hungarian citizens is then applied by ignoring

the foreign citizenship(s).¹⁸ In cases involving multiple foreign nationalities, the basic rules for foreign nationals apply.

Stateless persons are at the opposite pole of the multiple nationality provision. Statelessness is not specifically regulated in the field of expulsion. However, from a practical point of view, it can be concluded that, although neither the UN Convention on Statelessness¹⁹ nor the Civil Code contain any obstacles to their expulsion, and the latter clearly states that stateless persons are third-country nationals, the implementation and enforcement of their expulsion in the absence of a country of origin or a readmission obligation is practically unenforceable.

The obstacle to expulsion presupposes existing Hungarian citizenship. However, it is wrong to sanction a formally unknown citizenship with expulsion. Hidden or latent citizens are persons who qualify as Hungarian citizens under the country's citizenship law (for example, based on descent), but whose citizenship is not evidenced by official records or the exercise of rights. In the event of the discovery of this potential Hungarian citizenship during criminal proceedings, it is necessary to clarify the exact citizenship status, since the decision to expel is conditional on the possession of only foreign citizenship.

The near-citizenship statuses discussed in the previous chapter are, in fact, categories of "not yet citizens", but their legal and social embeddedness is such that they have every chance of acquiring citizenship. National citizenship legislation usually includes naturalisation benefits. In addition to "not yet citizens", it is also worth mentioning "no longer citizens". Following an effective renunciation or announced revocation procedure, the person concerned is considered a foreigner even if the renunciation of nationality was not ideologically motivated but was required solely by the

¹⁸ Ápt., 2 § (2) [A Hungarian citizen who is also a citizen of another state shall, unless otherwise provided by law, be considered a Hungarian citizen for the purposes of Hungarian law]

¹⁹ Act II of 2002 on the proclamation of the Convention relating to the Status of Stateless Persons, done at the United Nations in New York on 28 September 1954, Article 31

legal provisions of the country of naturalisation, which excludes dual nationality.

It should be noted that at the time of finalising the manuscript of this study, the amendments to the legislation on the suspension of citizenship had already entered into force. Still, in the absence of experience of procedural practice, the topic will not be dealt with in detail here. At the outset, it is only necessary to state that a person whose Hungarian citizenship has been suspended and who also holds the citizenship of a third country may be expelled from the territory of the country in accordance with the rules applicable to foreigners for the duration of the suspension.

Deprivation - an alternative criminal sanction

The unilateral, punitive termination of citizenship by the authorities is not a new institution. It was also used in Hungarian law before the regime change, primarily to retaliate and exclude people who opposed or were considered undesirable to the system at the time. In the decades following the fall of communism, during the period of EU integration and the emergence of humanitarian ideals, few would have imagined that citizenship management would eventually revert to a protective role, becoming a central element of action against persons posing a risk to national security. Recently, an increasing number of European countries have reintroduced rules on deprivation of nationality, adapted to national security. This trend may also signal a shift in the direction of citizenship legislation towards criminal law.²⁰ So far, European deprivation measures have mainly been used to protect against persons linked to terrorism, but rapidly changing international trends suggest that confidence in their effectiveness could lead to their extension to other areas. The UK is considered to be at the forefront of deprivation, but France and Germany are also leading the way. In addition,

²⁰Mágó, B. (2023): Az állampolgárság nyújtotta védelem irányai [Directions of Protection Provided by Citizenship]. In: Gaál, Gy. – Hautzinger, Z. (eds.): *Pécsi Határőr Tudományos Közlemények XXV.* Pécs. 273–278

Austria, Italy, Finland, Denmark, the Netherlands, and Bulgaria also use exclusion through sanctions.

- Deprivation, although not a criminal sanction in the classical sense, has become an effective instrument of state power. Criminal proceedings under the rule of law are a long and costly process, surrounded by procedural safeguards. In contrast, deprivation of nationality provides a swift and cost-effective response to high-security policy situations, thanks to its swift procedures, cost-effectiveness, and limited appeal possibilities. However, such deprivation of citizenship may raise serious concerns about fundamental rights, in particular regarding procedural guarantees and respect for human rights. The balance between the security interests of states and the rule of law is essential when considering the use of these two forms of sanctions. In many cases, the institution of modern-day deprivation is not primarily intended to punish past violations, but is clearly aimed at preventing future risks. This preventive focus on administrative measures rather than criminal sanctions calls for a change of perspective that requires a redefinition of the boundary between classical criminal law and administrative instruments.

Conclusion

Criminal liability is not dependent on nationality, but certain elements of criminal procedure and the enforcement of sentences, such as interpretation, mandatory protection, and the specifics of the prison environment, reflect, in part but not exclusively, the accused's nationality status. Expulsion, as a sanction on the borderline between criminal law and aliens' law, is essentially the only response by the criminal justice authorities to foreign suspects. The applicability of this sanction can only be determined based on an assessment of the existence or absence of nationality, in which the

specific categories of multiple nationality, latent nationality and statelessness are of particular relevance. Without a precise classification of the status in terms of immigration status and nationality, criminal law decision-making cannot be lawful.

The line between classical criminal sanctions and administrative mechanisms of national defence is often blurred today²¹. The administrative instrument of the redefined deprivation of nationality is a good example of this trend. Although deprivation of citizenship is not formally a punishment, its function, effect, and purpose are akin to those of criminal sanctions.

Overall, it can be concluded that legal institutions at the intersection of criminal law and citizenship, such as modern-day deprivation and expulsion, are not only legally significant but also of strong security and social policy significance. Thorough and careful regulation of this complex system is essential to ensure the rule of law, legal certainty, and the exercise of fundamental rights.

²¹Zoltán Hautzinger: Migration Impacts on Law Enforcement. In: Zoltán Hautzinger (ed.): Dynamics and Social Impact of Migration. Dialóg Campus, Budapest, 2019. 168. o.