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Evaluation and assessment of the constitutionality of penitentiary decisions, in the light of the introduction of the penitentiary credit system

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Abstract

Aim: Criteria for the evaluation by the Constitutional Court of decisions on the execution of sentences.
Methodology: Descriptive, documentary and content analysis.
Findings: According to the Section 27 (1) of the Act on the Constitutional Court, the decision on the merits, i.e. the decision on the substance of the charge and the decision on criminal responsibility, or the decision on the guilt and the acquittal, can be the subject of a constitutional complaint. The final decisions – the order not to proceed to trial and the order terminating the proceedings – cannot be considered as decisions on the merits within the meaning of the Constitutional Court Act. However, these decisions can be examined in the context of a constitutional complaint, because they correspond to the Section 27 (1) of the Constitutional Court Act, the other decision ending the court proceedings.
Value: So far, no academic article has been published that analyses which decisions of the penitentiary judges can be challenged by a constitutional complaint following the latest amendments to Act CCXL of 2013 (Act XCVII of 2023).

The study gives an overview of the investigative criteria applied by the Constitutional Court in the reception and assessment of decisions on the execution of sentences. It also records the tests that the Constitutional Court has applied over the years. It presents the Constitutional Court's practice in prison cases, some

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of which it decided before and some after the entry into force of the Fundamental Law. An analysis of the decisions taken under the credit system introduced in the framework of the penitentiary system, from the point of view of whether these decisions can be challenged by means of a constitutional complaint.

Keywords: prison decisions, credit system, constitutional complaint, constitutional court test

Introduction

The exercise of a number of fundamental rights and rights guaranteed by the Fundamental Law arise in the course of detention in the context of the execution of sentences (Czine, 2023). The Constitutional Court has a wide range of legal protection instruments at its disposal to examine the exercise of these fundamental rights. The relevant Constitutional Court decisions show that these powers have been exercised by the Court on a number of occasions in order to answer constitutional questions and to address constitutional concerns regarding various aspects of enforcement.

The provisions of Act CLI of 2011 on the Constitutional Court provide the legal basis for the Constitutional Court to examine the conformity of a legal provision or a court decision with the Fundamental Law in the context of the execution of a custodial sentence. The framework for this is laid down in the Constitutional Court Act Chapter II for the Constitutional Court, which governs the procedures and legal consequences falling within the scope of the Constitutional Court's duties and powers.

From the early days of its operation, the Constitutional Court has consistently provided guidance to the state and state authorities to ensure that the enforcement of criminal law sanctions is in line with the requirements of the Constitution and later the Fundamental Law. The list of decisions of the Constitutional Court which contain rulings on the enforcement of these legal consequences cannot be considered extensive. However, a review of them reveals a specific set of constitutional requirements.

Aspects of Constitutional Court investigations

The Constitutional Court has already in early decisions – in the context of the right to appeal against decisions of the penitentiary judge – set out the criteria for the constitutionality of the prison system.

In its Decision 5/1992 (I.30.) AB, it stated that the criminal power affecting the individual is most markedly exercised at this stage of the criminal conviction. *'There is no doubt that the legal basis for interference with fundamental human rights is created by the final judgment handed down in the criminal proceedings, but the actual restriction, the interference, occurs in the course of the execution. It is the conviction, in legal terms, but the actual execution which makes the perceptible difference to the situation of the individual'*.[1]

The Constitutional Court formulated the constitutional content and purpose of criminal sanctions for the first time in its Decision 30/1992 (V.26.) AB. In addition to stating that criminal law is the ultima ratio in the system of legal liability, the Constitutional Court also stated in its decision that the legal consequence of criminal law necessarily, by its very purpose, restricts human rights and freedoms.[2]

In the reasoning of the Decision 13/2001 (V.14.) AB, the Constitutional Court further explained that *'the prisoner is not the object of the execution of the sentence, rather he is the subject of it, who has rights and obligations. [...] The right to human dignity and personal security on the one hand, and the prohibition of torture and cruel, inhuman or degrading treatment or punishment on the other, are the extreme values of the constitutional framework of the penitentiary system. The extent to which the state may interfere in the life of the individual and restrict his fundamental rights and freedoms by means of the execution of punishments and measures is derived from the rule of law and the constitutional prohibition on restricting the essential content of fundamental rights'*.[3]

The tests to be applied in Constitutional Court inquiries into the penitentiary system

As regards the constitutionality yardstick and tests to be applied in matters of prison law, the practice of the Court has been consistent from the beginning of its operation as follows. Furthermore, in its decisions on criminal law, the Constitutional Court has consistently stressed that the requirements that may be applied to the criminalisation of conduct (the necessity-proportionality test, the clarity of the rules and the exclusion of the possibility of arbitrary interpretation of the law) are also valid for criminal penalties.[4] Therefore, the tests and

1 Decision 5/1992 (I.30.) AB.
2 Decision 30/1992 (V.26.) AB.
3 Decision 13/2001 (V.14.) AB.
4 For details see e.g. Decision 30/1992 (V.26.) AB, Decision 58/1997 (XI.5,) AB, Decision 18/2000 (VI.6.) AB, Decision 47/2000 (XII.14.) AB, Decision 13/2001 (V.14.) AB.

criteria developed in the context of the control of the constitutionality of a substantive criminal law provision are also relevant and applicable in the context of the examination of the law of imprisonment.

In accord with this principle, the Constitutional Court has already stated in its more recent practice, after the entry into force of the Fundamental Law, that a further criterion of the exercise of penal power under the rule of law is that the same constitutional requirements apply to the entire criminal liability, from the conditions of criminal liability to the rules governing the enforcement of the sentence. The limits imposed by the constitutional guarantee system of criminal law apply to all the elements and institutions of this criminal liability system. Accordingly, the constitutional principles applicable to the whole process of criminal liability must be considered to govern the criminal penalties and their enforcement (e.g. Decision 3116/2016 (VI.21.) AB, Reasoning).

The Constitutional Court's practice in penitentiary system matters

A review of the relevant decisions shows that the Constitutional Court has a very wide range of legal protection. In the context of its exercise of control over the penitentiary system, it has already used the elements of its toolbox to answer a number of constitutional questions.

The practice of the Constitutional Court before the entry into force of the Fundamental Law

The following cases from the period before the entry into force of the Fundamental Law illustrate the diversity of the Court's practice.

In Decision 13/2001 (V.14.) AB,[5] the Constitutional Court ruled, in relation to the provisions of the law amending Decree-Law 11 of 1979 on the execution of sentences and measures in force at the time, that: the specific restriction on

5 *'The Constitutional Court has ruled on Article 37/B(1) of the Act amending Decree-Law No 11 of 1979 on the enforcement of sentences and measures, inserted by Article 1 of the Act adopted by Parliament on 5 December 2000, and on Article 118(6) of the Act inserted by Article 2 and Article 122 of the Act inserted by Article 3(2), as amended by Article 3(2). § Article 3(3), which refers to Article 37/B, states that it is unconstitutional to restrict the right of a convicted person, a person under arrest or a person serving a sentence to make statements to the press in order to protect public safety, the reputation or personal rights of others, to prevent crime, to prevent the disclosure of official secrets or other confidential information.'*

the right of a convicted person to make statements through the press in order to protect public security, the reputation or personal rights of others, to prevent crime, to prevent the disclosure of official secrets and other confidential information was unconstitutional.

The Decision 569/B/1999 (7 October 2002) AB [6] examined the possibility and conditions for the establishment of an interest organisation for prisoners in penitentiary institutions, and did not find any unconstitutionality in this respect.

The Constitutional Court proceedings underlying the Decision 248/B/1998 (17 June 2003) AB focused on the rule[7] concerning the change of the degree of imprisonment for those convicted with final sentence. The petitioner based his allegations on the violation of the right of defence, but no violation of the constitution could be established in connection with them.

According to Decision 132/2008 (XI.6.) AB, the Parliament had created an unconstitutionality by omission failing to provide for the rules of search by the penitentiary organisation, which violated the level of regulation prescribed by law for the restriction of fundamental rights.[8]

Unconstitutionality by omission was also examined in Decision 369/E/2009 (14 December 2009) AB, in the context of how a person previously arrested can exercise his right to vote in a penitentiary.[9] As a result of the examination, the panel found no unconstitutionality in the exercise of the right to vote.[10]

The provision of the Health Care Act[11] was compared with the requirements of the Constitution in Decision 386/B/2005 (11 April 2011) AB. The Constitutional Court found that the contested legislation, which limited organ donation to close relatives of prisoners, complied with the proportionality requirement.[12]

The Constitutional Court has examined the constitutionality of various legal provisions on the remuneration of work performed by prisoners in several decisions, such as Decision 176/B/1990 (12 June 1990) AB, Decision 461/B/1990 (12 June 1990) AB, Decision 684/B/2001 (7 December 2004) AB. The Court explained that *'the exercise of the fundamental right to work and to free choice of occupation is not excluded, but is severely restricted in the case of convicted persons. The restriction covers both the positive and the negative aspects of the*

6 On the examination of the unconstitutionality of Article 36(5)(f) and (6)(b) of Decree-Law No 11 of 1979 on the execution of sentences and measures in force at the time.

7 Article 7 of Decree-Law No 11 of 1979 on the enforcement of sentences and measures in force at the time.

8 Decision 132/2008 (XI.6.) AB.

9 Section 248 of 6/1996 (VII.12.) decree of Minister of Justice (hereinafter: MJ) on rules for the enforcement of custodial sentences and provisional detention at the time.

10 Decision 369/E/2009 (14 December 2009) AB.

11 Act CLIV of 1997 in force at the time.

12 Decision 386/B/2005 (11 April 2011) AB.

fundamental right: the prisoner may not choose the occupation of his choice, may not be employed in the employment of his choice, and the right to refuse or refuse to work is also restricted. [...]. However, the legislator saw the need to lay down in law [...] the principles from which no derogation is possible. According to the provisions concerned, [...] the work of a convicted person must be remunerated in accordance with the general principles of remuneration'.[13] In the light of this, Decision 470/B/2006 (17 May 2011) AB[14] held that the contested legislative provision [15] does not contain rules on the general principles of the employment of convicted persons and does not substantially restrict the right to work and the right to choose one's occupation.

Penalty cases in numbers

If you look up the term 'penitentiary' in the Constitutional Court's search engine, you will find the following figures:

Table 1
Case numbers of the Constitutional Court

In total: 72 AB decisions			
36 AB decisions since the entry into force of the Fundamental Law (01.01.2012)			
17 decisions taken		19 orders	
12 grace period		24 councils of five members	
12 decisions	0 order	5 decisions taken	19 orders

Note. The Author's own edition.

If we analyse the content of the 36 cases in the table since 01 01 2021, i.e. since the entry into force of the Fundamental Law, we can select 25 cases that actually focused on a constitutional investigation on the subject of prison law. Among these cases, we can identify 4 that were based on an objection relating to compensation for housing conditions that violated fundamental rights. This is another group of cases that should definitely be mentioned.

The legal institution of compensation for accommodation conditions that violate fundamental rights was introduced by the legislator on 1 January 2017. This follows the decision of the European Court of Human Rights (ECtHR)(Czine,

13 Decision 684/B/2001 (7 December 2004) AB.
14 Decision 470/B/2006 (17 May 2011) AB.
15 Decree 6/1996 (12 VII) MJ on rules for the enforcement of custodial sentences and provisional detention at the time.

Szabó & Villányi, 2008) a number of judgments in the previous period which found against Hungary under Article 3 of the European Convention on Human Rights (the Convention) violations,[16], mainly on grounds of inadequate accommodation conditions due to overcrowding in prisons (Boda, 2021). On 10 March 2015, the ECtHR delivered its leading judgment in the case of Varga and Others v. Hungary (Czine, Szabó & Villányi, 2008) on complaints of prison overcrowding, calling on Hungary to end the unconstitutional detention conditions and to develop effective preventive and compensatory remedies. The legislator designed the compensation referred to resolve this situation (Boda, 2021). It should be noted that this regulation has recently been reconsidered by the legislator and significantly amended with effect from 1 January 2021.

If you search the Constitutional Court's search engine for 'compensation', 57 decisions will be found in which this term is used. By reviewing these decisions, we can select 28 decisions relating to the legal instrument of compensation for accommodation in breach of fundamental rights. Of these, 20 decisions and only the remaining 7 orders. Thus, the proportion of substantive inquiries in this group of cases is particularly high.

If we add together the decisions on compensation for housing conditions that violate fundamental rights with the other cases related to the execution of sentences mentioned above, we see that since the entry into force of the Fundamental Law, there have been about 50 cases before the Constitutional Court in this area of law.

In the following, I would like to highlight some examples of substantive proceedings.

The practice of the Constitutional Court after the entry into force of the Fundamental Law

The first substantive related decision was taken shortly after the entry into force of the Fundamental Law. As a result of the proceedings in connection with the legislation on the health care of prisoners, the Constitutional Court found an infringement of the Fundamental Law in Decision 30/2013 (X.28.) AB and ordered the annulment of the challenged rules.[17] The Constitutional Court essentially examined the element of the petition according to which the legislator's enactment of a regulation on the restriction of the right of prisoners to health

16 *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*
17 Then in force Decree 5/1998 (6 III) MJ on the health care of prisoners.

self-determination in a decree, which falls within the scope of the legislation, is contrary to the Fundamental Law. The Court based its decision on the fact that there is a constitutional requirement to regulate at the level of the law in cases where the right to health self-determination, which is a fundamental right to human dignity, is restricted. Since the contested provisions did not comply with this requirement, they had to be annulled.

The Constitutional Court's procedure concerning the rules[18] governing the treatment of prisoners, the way in which they are accommodated in prisons, has resulted in a serious legal consequence. In Decision 32/2014 (XI.3.) AB, the Court, in addition to annulling the legal provision in question, also found that it was contrary to an international treaty. As grounds for the decision, the decision states that *'the contested provision, following its amendment in 2010, does not comply with the requirements of international standards and the Fundamental Law, in view of the fact that it allows detainees to be placed in cells in which the minimum required space for movement is not guaranteed'*.[19] The Constitutional Court annulled the provision with effect from 31 March 2015, i.e. pro futuro.

Some further examples from recent Constitutional Court practice

In Decision 3254/2019 (X.30.) AB, the Court ruled on the rejection of a judicial initiative. The motion complained about the limited possibilities of enforcement of the right to privacy of the convicted persons. However, the Constitutional Court considered these objections to be unfounded.

In its Decision 3265/2021 (VII.7.) AB, the Constitutional Court dismissed the petition for a constitutional complaint. The petitioner alleged a violation of one of the specific requirements of legal certainty deriving from the rule of law under Article B para. (1) of the Fundamental Law, namely the prohibition of retroactivity, in connection with the legal provision governing the change of grade. The Court also found this to be unfounded.

Decision 3322/2022 (VII.21.) AB also rejects the constitutional complaint. The petitioner challenged the rules governing correspondence following their amendment. He submitted that while the previous legislation before 1 January 2021 contained the wording *'printed matter (e.g. book, catalogue, newspaper, periodical)'*, the wording of the new legislation did not. In the light of the above,

18 Decree 6/1996 (12 VII) MJ on rules for the enforcement of custodial sentences and provisional detention at the time.

19 Decision 32/2014 (XI. 3.) AB.

it is no longer possible, under the current regulation, to send textbooks, legislation, rulings and other forms to prisoners by letter. The Court examined the petitioner's claims in the context of the right to defence under Article XXVIII (3) of the Fundamental Law and also found them to be unfounded.

With regard to the decisions on compensation, it is worth highlighting that the Constitutional Court has typically examined the introduction and application of the new rules from the perspective of the non-retroactivity of Article B of the Fundamental Law.

Firstly, the Decision 3295/2018 (X.1.) AB held that *'the new rules of the Prison Enforcement Act on compensation for housing conditions that violate fundamental rights – and applied in the specific case – are only legal rules establishing rights, which do not contain any negative content, do not establish any obligation for the period prior to entry into force, do not make any obligation more onerous, and do not withdraw or restrict any right or declare any conduct unlawful, and have a law-making effect only for the future'*.[20] In the decision, the Court held that *'the legislation challenged by the applicant, which is the subject of the compensation claim, cannot be interpreted as having retroactive effect, since it provides for an obligation to pay compensation in the future or for the rejection of a claim for compensation on the basis of legal relations which have been closed for the purposes of compensation.'*.[21] It therefore held that the judicial interpretation of the law at issue did not infringe Article B(1) of the Fundamental Law and dismissed the constitutional complaint.

In Decision 3087/2020 (IV.23.) AB and Decision 3335/2019 (XII.6.) AB, the Court annulled a judicial decision, in both cases because the courts did not act in accordance with the obligation of interpretation under Article 28 of the Fundamental Law when they classified the decisions of the penitentiary judges rejecting the petitioner's previous application as 'adjudicated matter'. As a consequence of the fact that the courts erred in their assessment of the decisive nature and substantive validity of the earlier judgments, the judgments challenged in the constitutional complaint did not examine the merits of the applicants' claim for compensation. In so doing, the procedure of the courts deprived the applicants of their right to a legal judge and the contested court decisions were therefore liable to be annulled.

In Decision 3129/2022 (IV. 1.) AB, the Constitutional Court rejected a petition for a constitutional complaint which objected that the amended rules of

20 Decision 3295/2018 (X. 1.) AB.
21 Decision 3295/2018 (X. 1.) AB.

the Prison Enforcement Act had abolished the possibility of settling the compensation amount through a lawyer's escrow account. The Constitutional Court examined in the specific case the violation of the non-retroactivity requirement under Article B(1) of the Fundamental Law and the requirement of sufficient time to prepare. It also examined the infringement of the freedom of contract. However, it did not consider the petitioner's objections to be well-founded in any of these respects and decided to dismiss the petition.

The above examples illustrate, in my view, that the Constitutional Court's decisions have so far affected many aspects of imprisonment. The constant changes in the legislation provide the opportunity for the Constitutional Court to exercise this activity in an ever wider range of areas, covering more and more aspects of deprivation of liberty.

Penitentiary decisions that may be challenged in a constitutional complaint

The Court has not yet comprehensively analysed the decisions of the penitentiary system against which a constitutional complaint may be lodged with the Constitutional Court under Section 27(1) of the Constitutional Court Act. However, a review of the relevant decisions gives a picture of the consistent practice of the Court, as follows.

As a starting point, it should be noted that the decisions on the enforcement of criminal penalties are taken partly by the sentencing court and partly by the judge of the penitentiary. This distinction is also relevant to the answer to the question in the case in point.

For guidance on decisions in criminal proceedings, see Decision 3002/2014 (I.24.) AB. In this Decision – 3002/2014 (I.24.) AB – the Constitutional Court interpreted by comparing the rules of the Criminal Procedure Act[22] and the Constitutional Court Act[23] which decisions in criminal proceedings are subject to

22 Act XIX of 1998.
23 Act CLI of 2011.

constitutional complaint[24] under Section 27[25] of the Constitutional Court Act.[26] According to the wording of the decision, *'a decision on the merits within the meaning of the first turn of Section 27 of the Constitutional Court Act, and thus a constitutional complaint may be made against a decision on the merits of the charge or a decision on criminal liability, i.e. a decision finding guilt or acquittal. The final decisions – the order not to hear the case and the order terminating the proceedings – cannot be considered as decisions on the merits within the meaning of the Constitutional Court Act, but they can be examined in the framework of a constitutional complaint, because they correspond to the second turn of Section 27 of the Constitutional Court Act, other decisions terminating the judicial proceedings.'*[27] Applying this test, the Constitutional Court concluded in the specific order that decisions to order, maintain or terminate coercive measures taken in the course of criminal proceedings cannot be included in the concept of final decisions on the merits of cases and other decisions ending judicial proceedings and therefore cannot be challenged in a constitutional complaint. A similar conclusion was reached in Decision 3390/2022 (X.12.) AB in relation to the decision of the judge hearing an application for a postponement of the commencement of the sentence of imprisonment.

In relation to the decisions taken by the penitentiary judge, it is significant that the penitentiary judge acts as a review forum in some matters, while in others he or she decides on his or her own authority.

Pursuant to Section 24 of the Prison Enforcement Act,[28] an application for judicial review against a decision of the body responsible for enforcement may be made to the penitentiary judge, if this Act so provides. There is no right of appeal against a decision of the penitentiary judge in a judicial review procedure, except as provided by law.

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24 *'On the basis of all the above, it follows from the combined interpretation of the rules of the Criminal Procedure Code that decisions on the merits of the case are primarily those decisions which deal with the main criminal law issue, the substantive assessment of the charge. However, the scope of decisions on the merits of the case does not necessarily coincide with the concept of a decision on the substance of the case. Decisions on the substance of the case conclude the criminal proceedings 'on the merits' and have the force of res judicata, but do not contain a decision on the substance of the case equivalent to that of the judgment as regards criminal liability, and are therefore not considered to be decisions on the merits.'*

25 *'Under Article 24(2)(d) of the Fundamental Law, the person or organisation concerned in an individual case may lodge a constitutional complaint with the Constitutional Court against a judicial decision that is contrary to the Fundamental Law, if the decision on the merits of the case or any other decision that has terminated the court proceedings.'*

26 Act CLI of 2011.

27 Decision 3002/2014 (I.24.) AB.

28 Act CCXL of 2013.

In addition, under Section 50 of the Prison Enforcement Act[29], in the course of the proceedings provided for by the Act, the penitentiary judge shall, in his or her own discretion, issue a decision on the merits of the case, against which, unless otherwise provided by law, there is no right of appeal. Furthermore, once these decisions have become legally enforceable, no petition for review under the Criminal Procedure Act may be brought against them, but an appeal may be lodged in the interests of legality under the Criminal Procedure Act.

When examining the constitutional complaints against the decisions of the penitentiary judge, the Constitutional Court started from the above-mentioned Decision 3002/2014 (I.24.) AB and its practice based on it. First of all, in its Decision 3005/2020 (II.4.) AB, it stated that the procedure for the subsequent examination of the possibility of conditional release is a penitentiary judge procedure under Section 50 of the Penitentiary Act,[30] in which the court decides by order. The possibility of appeal against the order is guaranteed, and the final decision is enforceable, so in view of all these factors it can be considered an independent judicial procedure. In the Constitutional Court's view, it therefore fulfils the condition laid down in the second sentence of Section 27 of the Constitutional Court Act and can therefore be the subject of a constitutional complaint.[31] This approach has subsequently been confirmed by the Court, see e.g. Decision 3333/2020(VIII.5.) AB. A similar conclusion was reached by the Constitutional Court in Decision 3301/2022 (VI.24.) AB in relation to a decision of a penitentiary judge on an application for reintegration detention.[32]. It also considered it as a decision against which a constitutional complaint could be lodged.

Thus, on the basis of the orders referred to, the final decisions of the penitentiary judge made under Article 50 of the Penitentiary Act, on his own authority, are court decisions against which a constitutional complaint may be lodged pursuant to Section 27 of the Constitutional Court Act.

29 Act CCXL of 2013.

30 Act CCXL of 2013.

31 Decision 3005/2020 (II. 4.) AB.

32 *'Article 187/A (1) If the purpose of the sentence can be achieved in this way, a convicted person who undertakes to do so and has been sentenced to imprisonment for the commission of a reckless offence or, if sentenced to imprisonment for the commission of a deliberate offence, may be placed in reintegration detention before the due date of his or her release on parole or, if this is excluded or not possible, before the expected date of his or her release, if they*
a) was not convicted of a crime of violence against a person as defined in Section 459(1)(26) of the Criminal Code,
b) was sentenced for the first time to a custodial sentence to be served or is a non-repeat offender, and (c) is serving a term of imprisonment not exceeding five years.'

Subsequently, in Decision 3376/2023 (VII.27.) AB, the panel analysed the decisions that can be taken by a penitentiary judge in the context of a judicial review of a disciplinary decision imposing a punishment. On the basis of the findings of Decision 3301/2022 (VI.24.) AB, the Constitutional Court held that *'in a given case, the decision of a penitentiary judge in the course of a review procedure is a decision closing the penitentiary case, which, pursuant to Section 27 of the Constitutional Court Act, constitutes another decision closing the procedure and may therefore be subject to constitutional review'*.[33]

According to the order, therefore, the decisions of the penitentiary judge made during the review procedure, i.e. decisions based on Article 24 of the Penitentiary Act, are also decisions closing the penitentiary case, against which a constitutional complaint may be lodged.

Table 2
Types of prison procedures in relation to the credit system

Type of procedure	Acts as a review forum	Makes a decision on its own authority
Legal basis	Article 24 of Act CCXL of 2013	Article 50 of Act CCXL of 2013
Competence of the penitentiary judge	Against a decision of the body responsible for enforcement (e.g.: review of a disciplinary decision)	In the course of the procedure laid down in the law, in its own discretion (e.g.: conditional release, reintegration detention)
Legal remedies	– In the event of a rejection of a request for review under Article 72(1)(a) (if it is out of time, excluded by law or not from the rightholder), the decision may be appealed against in accordance with the general rules – In all other cases, there is no right of appeal	– The appeal is heard by the Appeals Court Chamber – After the finality of the decision, no motion for review may be filed under the Criminal Procedure Act, but an appeal may be filed for the purpose of the law under this Act
Whether a constitutional complaint can be lodged	Yes (e.g. Decision 3376/2023 (VII.27.) AB)	Yes (e.g. Decision 3005/2020 (II.4.) AB, Decision 3301/2022 (VI.24.) AB

Note. Constitutional Court database May 2024.

In my view, the decisions of the penitentiary judge, both in his or her own capacity and as a review forum, constitute a decision against which a constitutional complaint may be lodged under Section 27 of the Constitutional Court Act.

33 Decision 3301/2022 (VI. 24.) AB.

A new system for classifying and categorising prisoners

Under Article 97[34] of the Penitentiary Act, imprisonment continues to be carried out by the penitentiary organisation. However, the execution is carried out in so-called categories based on the degree of execution determined by the court.

The definition of this category is set out in Section 82 of the Penitentiary Act, Section 6.[35] According to this, the category is: an enforcement environment based on the principle of individualisation, which is adapted to the risk of recidivism and imprisonment, the behaviour and the cooperation of the prisoner and which serves the individual crime prevention objectives by providing reintegration programmes adapted to the needs of the prisoner.

According to the legislative explanatory memorandum to the Act, the new legislation will create a more transparent system of prisoner classification, replacing the current regime, which will allow the principle of progressivity to prevail more effectively (Vókó, 2020). The new classification system will replace the current nine regimes with a simpler five-tier system of categories as the basis for the enforcement of custodial sentences. The categorisation system, which also responds to the security and detention risks of prisoners, will allow for an efficient allocation of prison staff, flexibly adapted to the need to maintain security of detention, and will help to optimise the use of prison capacity. The aim is to create a complex structure that reflects the crime committed, the social threat posed by the offenders and their willingness to cooperate more strongly than the current structure, effectively enforces the aims of punishment, and improves the control mechanisms and motivational tools of the prison service.

Under the new rules, a prisoner will be placed in a category at the start of the period of imprisonment.[36] This is the so-called initial category classification.[37]

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34 Act CCXL of 2013.

35 *'Credit system: a system of progression based on the number of credits calculated on the basis of the prisoner's conduct, cooperation and performance in the framework of reintegration activities, which determines the number of credits, in proportion to the duration of the imprisonment, which, if accumulated, may be transferred to a more favourable category than the initial one, and in relation to which the number of credits acquired by the prisoner and deducted from him shall determine his advancement or demotion between categories.'*

36 *'Article 92(1) The Central Institute of Investigation and Methodology and its agglomeration units shall carry out, on the basis of the Risk Analysis and Management System, risk analysis of convicted persons as defined in this Act, as well as the examination of convicted persons to facilitate the selection of reintegration programmes and other decisions.'*

37 Statutory Explanation to Article 95, point 10: *'The Admission and Detention Committee shall hear the prisoner before the initial classification, but the decision to award credits, the aggregation of credits and the change of classification on that basis are activities which do not require a hearing of the prisoner.'*

The categories are numbered from I to V. It is based on a risk assessment of the prisoner, carried out by the Central Institute for Investigation and Methodology or the Commission for Admission and Detention, as defined in the Penitentiary Act.

The technical background for the risk analysis assessment is the Risk Analysis and Management System,[38] which has been developed in recent years in terms of both technical and software developments, making it suitable as a basis for category classifications. The new regulation also defines the elements of the classification criteria. The first classification defines the initial category determining the placement and living conditions of the sentenced person, taking into account the sentence.

The category classification can be changed later, during the period of detention. This is possible under the credit system under the new rules.

According to the legislative explanatory memorandum to the Act, the credit system is introduced as a new motivational tool, aimed at providing a predictable and transparent framework for the transfer of sentenced persons between different categories, based on objective criteria. After the initial classification, the prisoner can accumulate credits and be placed in a more favourable category or, if he loses points, be reclassified in a worse category. The credit system assesses the prisoner's behaviour, their willingness to cooperate and their participation in reintegration activities. This system of motivation strengthens the prisoner's sense of responsibility, makes them interested in maintaining the order of execution and in implementing the reintegration plan, and helps to achieve individual penal objectives by giving positive recognition to good behaviour.

The concept of a credit system is also set out in Section 82 of the Prisons Act in point 8: a progression system based on the number of credits calculated on the basis of the convict's conduct, cooperation and performance in the context of reintegration activities, which fixes, in accordance with the duration of the imprisonment, the number of credits which, if accumulated, may be transferred to a more favourable category than the initial one, and in relation to which the number of credits acquired by the convict and deducted from them determines their advancement or demotion between categories.

The change between categories creates the possibility of a change in the life of the convicted person. In essence, it is the main content of the categories which determines the way in which the custodial sentence is implemented.

38 *'Article 82 (3) Risk assessment and management system: a professional system designed and operated to assess, evaluate and manage the risk of recidivism and detention of a prisoner.'*

At the same time, in order to maintain the security of detention, the security requirements within each category may be stricter, based on the individual risk assessment of the prisoner, for the guarding, supervision, control, keeping the locked door closed, movement within the prison, receiving visitors in a security booth or through a bar, participation in a common cultural or sporting event, religious services, employment in an outside workplace, leaving the prison, production and transport of the prisoner.

An example is the case where the initial categorisation of a prisoner according to the level of enforcement is based on the results of a risk assessment:

(a) in the case of a level 1 prison degree, if the convicted person is sentenced for the first time to a term of imprisonment of less than one year Category I,
(b) in the case of imprisonment at a level other than those specified in (a), category II or III,
(c) in the case of a level 2 prison sentence, category III or IV,
(d) category IV or V in the case of a level 3 prison degree.

In this arrangement, the enforcement grades will in future play a decisive role in determining the initial classification.

The legislator has also defined the limits of categorisation. Therefore, if the enforcement level of a custodial sentence

- level 3 prison, the sentenced person is to be upgraded to category I,
- level 1 prison, the prisoner may not be reclassified to category V, except in cases of very serious misconduct.

A further restrictive provision applies to prisoners serving life imprisonment: they must be reclassified in category V and may not be reclassified in category I or II. Even if he is upgraded to category IV or III, he shall not be allowed to receive visitors outside the institution, to be absent or on leave, or to engage in outside employment.

There is also a rule on the acquisition and loss of credits in the Penitentiary Act § 99. Accordingly, during the execution of a custodial sentence, a prisoner may, in accordance with the law, acquire credits according to their conduct, their cooperation and their participation in reintegration activities, and may also acquire additional credits for their outstanding performance, or lose credits according to their punishment, which will result in their being promoted or demoted between categories.

The number of progress credits to be acquired by the prisoner during the enforcement period and the possible date of advancement to a new category, as well as the number of credits acquired, deducted or suspended, shall be recorded

in the prisoner's record. Every six months, the Committee on Admission and Detention shall record the total number of credits earned and deducted by the prisoner. If, based on the credits acquired or deducted during the aggregation period, a prisoner needs to be reclassified, the Committee on Admission and Detention shall take an extraordinary decision.

Guaranteeing provision in § 100 of the Penitentiary Act: the penitentiary institution must ensure that the convicted person

- to be informed of the timetable for possible category advancement,
- information on his current credits,
- be able to follow-up on changes in his credits,
- be able to determine how many credits are needed to be promoted to a higher category,
- loss of credits will result in downgrading to a lower category.

These provisions ensure that the prisoner is aware of the implications of the credit system for their detention.

No individual complaints may be lodged in relation to individual credits. The possibility, related to the enforcement of the convicted person's rights, of

- the credit accumulation period,
- the possible date of category advancement,
- they category reclassification

may submit a request to the Committee on Admission and Detention[39] to examine whether the failure to award or the deduction of credit points or the extent of the deduction is justified.

In the context of the change of category, the new legislation also provides for the possibility to apply for judicial review in four areas, which are relevant to the examination of constitutional complaints.

Of these, it is important to highlight the following:

- if the penitentiary authority, in the initial classification of the category, establishes a category one stricter than the two categories linked by the Penitentiary Act to the given level of execution,
- in the case of downgrading on the basis of a risk analysis,
- in the case of immediate downgrading by the commander of the penitentiary institution,
- finally, against the decision to examine the credit scoring.

39 Explanation to Article 96 of Act CCXL of 2013: *'The penitentiary organisation, through the Admission and Detention Committee, has the possibility to periodically examine the development of the personality and behaviour of the prisoner and to determine accordingly, within each stage, the determination of the life order that is justified for the prisoner. In accordance with the principles of the rule of law, the Act establishes the right of the sentenced person to appeal against the decisions of the Admission and Detention Committee.'*

A common feature of these four new types of cases is that the first instance decision is taken by the penitentiary institution, against which an application for judicial review can be made. No further appeal is possible against the decision of the penitentiary judge, nor against any other decision taken under the review jurisdiction.

In general, the new legislation provides for a new possibility of judicial review in cases where the prison intends to deviate from the statutory framework in its decision on the classification of a prisoner. These cases are significant because these court decisions may be the type of decisions which, in the event of a constitutional complaint being lodged against them, will need to be examined to determine whether a constitutional complaint can be lodged against them under Section 27 of the Constitutional Court Act.

The above-mentioned practice of the Constitutional Court in relation to constitutional complaints against decisions of penitentiary judges suggests that in these cases there may be room for admission of constitutional complaints.

Summary

So far, the Constitutional Court's decisions have affected many areas of imprisonment. Constant changes in the legislation provide an opportunity for the Constitutional Court to exercise this activity in an increasingly broader field, covering more and more aspects of deprivation of liberty.

In my view, the Constitutional Court, having regard to its practice to date, may regard decisions taken by a penitentiary judge, both in their own capacity and as a reviewing court, as decisions against which a constitutional complaint may be brought under Section 27 of the Constitutional Court Act.

The new classification and credit system creates new areas of judicial review for penitentiary judges. The Constitutional Court's practice to date in relation to constitutional complaints against decisions of penitentiary judges, as described above, suggests that in these cases there may be room for admission of constitutional complaints.

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