ACTA HUMANA • 2022/3. 5–33. • DOI: 10.32566/ah.2022.3.1

The Doctrinal Inconsistencies in Claims for Compensation for Accommodation Conditions that Infringe Fundamental Rights

Opinions and Proposals

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The criticism of the current regulation of the compensation procedure under the Prison Act can be given in the legal-dogmatic contradiction and the imprecision of the normative text. The latter inaccuracies have led to the different interpretation of the law by the judiciary in the penal and civil fields. In conclusion, therefore, if the claim to be enforced is related to the circumstances of the placement which violate fundamental rights, it is possible, as explained above, to bring an action only for the enforcement of objective sanctions for violation of personal rights, but not for damages in addition to sanctions independent of the responsibility. Civil proceedings under the general rules are only possible if the claim is not related to accommodation conditions which infringe fundamental rights. In such a case, however, it must be borne in mind that, under Article 143 subsection (1) to (2) of the Prison Act, a prisoner cannot bring a claim for damages against a prison directly before a court: he must bring it before the prison authorities where the damage occurred. The prisoner may appeal against this decision within a time limit of 30 days from the date of notification. Only in the case of a claim for damages arising from a violation of personal rights (i.e. not linked to an injury caused by conditions of detention which infringe the prohibition of torture, cruel, inhuman or degrading treatment), it is possible to go directly to court and the action does not have to be preceded by proceedings before the penitentiary institution.

In our view, it would be worthwhile to reintroduce the possibility to claim for harm caused by placement conditions that violate fundamental rights into the framework of civil litigation. However, this would require the creation of a legal environment which does not give rise to the above-mentioned dogmatic contradictions. It should be pointed out, by way of example, that the ECtHR does not wish to introduce a separate, formalised procedure for compensating detainees, but is "content" with the possibility of bringing a civil action based on a violation of personal rights.

Keywords: fundamental rights in penitentiary institutions, accommodation circumstances, overcrowding, Prison Act, compensation

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Introduction of compensation

As a starting point, we consider it necessary to briefly describe the possibilities and mechanisms for a detainee to seek redress for placement conditions that violate fundamental rights, also for the understanding of subsequent conclusions, including those on civil law.

Pursuant to Article 10 of Act CCXL of 2013 on the Enforcement of Penal Sanctions, Measures, Certain Coercive Measures and the Imprisonment for Offences (hereinafter: the Prison Act/Penal Code/Penitentiary Act), convicted persons and persons detained on other grounds may submit an application in a prison case or in connection with detention and may lodge a complaint against the decision on the application, and shall be entitled to other remedies under this Act. If this Act allows for such a remedy, the convicted person and the person detained on other grounds shall be informed of it when the decision is taken.[2]

According to the commentary to Section 10 of the Prison Act, the detainee may submit an application in any matter related to the person of the detainee or his detention. This is therefore an effective first step to prevent future harm and disadvantages.[3] The decision on the application takes the form of a decision, against which a complaint may be lodged if the detainee does not accept it. Complaints are the most common form of appeal, which can be lodged quickly and are usually within the competence of the body which took the basic decision. However, in addition to the complaint, other remedies are available under the Prison Act.[4]

With the provisions of Act CX of 2016 amending Act CCXL of 2013 on the enforcement of sentences, measures, certain coercive measures and the detention for offences and other related acts, the legislator introduced the legal institution of compensation for the violation of fundamental rights and the related complaint into the Hungarian legal system as of 1 January 2017. The relevant provisions are mainly found in Section 10/A–10/B, 70/A–70/B, 144/B and Section 436 (10)–(12) of the Prison Act. Of lifestyle and work after release, etc. can continue to be pursued under

2 In addition, § 10 regulates further "forum systems" related to the enforcement of rights, which are characterised by the fact that the detainee may directly contact the relevant organisations with his/her request or complaint. Accordingly, the Prison Act provides a taxative list, some of which are: the prosecutor in charge of the supervision of the legality; the Commissioner for Fundamental Rights; the staff of the Ombudsman authorised to perform the tasks of the national preventive mechanism; international human rights protection organisations recognised by the international convention promulgated by the law.

3 Pallo József: I. fejezet. In Juhász Zsuzsanna (szerk.): Kommentár a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvényhez. Wolters Kluwer, Budapest, 2020, 10. §-hoz fűzött magyarázat. [József Pallo: Chapter I. In Zsuzsanna Juhász (ed.): Commentary to Act CCXL of 2013 on the Enforcement of Penal Sanctions, Measures, Certain Coercive Measures and the Imprisonment for Offences. Budapest, Wolters Kluwer, 2020, commentary to § 10.]

4 Curia: *Reminder on the New Civil Code of the Curia. The meeting of the New Law Case Groups on 5 October 2018.* 6.

the general personal rights litigation procedure. It would be appropriate to introduce a similar rule in the new legislation, but one that is now doctrinally correct, referring to the different legal titles.[5]

The legislator intended to react to the judgment of the European Court of Human Rights (hereinafter: ECtHR) in Varga and others v. Hungary[6] pilot judgment,[7] by creating an effective remedy for detainees in accordance with Article 13 of the European Convention on Human Rights (hereinafter: ECHR).[8] In its judgment of 10 March 2015, the ECtHR, after examining the Hungarian case law, concluded that detainees in Hungary had no effective preventive or reparative remedy because of the detention conditions that violated the fundamental rights guaranteed by the Treaty of Rome, as proclaimed in Article 3 of Act XXXI of 1993, which prohibits cruel, inhuman or degrading treatment, and therefore accepted applications from detainees who had come directly to it. As the ECtHR explained in paragraph 47 of its judgment, the effectiveness of a remedy can be established if it is capable of preventing the violation or its continuation, or of providing adequate compensation for violations already committed. In this respect, it considered that neither the complaints which prisoners could bring nor the actions for non-pecuniary compensation brought against the prison authorities which had detained them for personal infringements were effective. It stated that "the State has an obligation to organise its prison system in such a way as to ensure the exercise of the right to human dignity of prisoners, despite financial or logistical difficulties". For this reason, it required the Hungarian State to introduce "appropriate" measures to provide preventive and compensatory remedies in the event of a breach of Article 3 of the Convention.[9] It also pointed out that "in order to achieve this objective, the State may modify existing remedies or introduce new ones".[10]

The ECtHR has opted for the pilot judgement procedure precisely because it is designed to resolve dysfunctions at national level as quickly and efficiently as possible in order to protect ECHR rights. The procedure was prompted by the 450 applications on the merits against Hungary, which were then pending a first examination by the ECtHR, in which the main grievance was inadequate detention conditions. On this basis, the human rights body expressed that it was not convinced that, under

5 Curia (2018): op. cit. 6. For their analysis see Anita Nagy: A kártalanítási eljárás. *Miskolci Jogi Szemle,* 14, Special Edition no. 2 (2019). 221–232.

6 Varga and others v. Hungary, ECtHR, judgment of 10 March 2015 (cases 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13).

7 For more information on the pilot judgment procedure see Sándor Szemesi: Az emberi jogok európai őrének új fegyvere: a *pilot judgment* eljárás a strasbourgi bíróság gyakorlatában. *Jog–Állam–Politika,* 5, no. 4 (2013). 47–63.

8 For a description of the judgment see Andrea Erika Juhász: Varga és mások kontra Magyarország – az EJEB döntése. *Jogászvilág,* 17 April 2015; Andrea Erika Juhász: *A kínzás, az embertelen, a megalázó bánásmód tilalma a fogvatartottakkal szemben.* Doctoral thesis. Szeged, SZTE-ÁJTK Doctoral School, 2016. 175.

9 Varga and others v. Hungary, ECtHR, judgment of 10 March 2015, paragraph 113.

10 Curia (2018): op. cit. 6–7.

Hungarian law as interpreted and applied by the Hungarian courts, the complainants could receive compensation for non-contractual damages on the grounds of inhuman or degrading treatment. Thus, civil actions for damages for breach of personality rights resulting from inhuman or degrading treatment do not satisfy the conditions for an effective remedy, according to the terminology of the time, on the basis of which there is a reasonable possibility of success and of judicial remedy. In order to address the problems described in the ECtHR judgment, the legislator created the compensation procedure in the Penal Code to remedy the harm caused by the placement conditions that violated fundamental rights, which was referred to the court in charge of prison matters. Its aim was to create an effective reparative legal instrument, without any examination of culpability, by ensuring that the decision is taken within a short time, on an objective basis, that the decisions are duly reasoned and that the decision is enforced without delay.[11]

However, it is also necessary to note that the above-mentioned pilot judgment of Varga and others v. Hungary not only resulted in the legislature taking steps to bring the legislative environment into compliance with Article 13 of ECHR, but also – and I will emphasise the importance of this later – a large-scale prison construction programme was launched in Hungary to alleviate overcrowding.[12]

Complaints and compensation for violations of fundamental rights have thus become the newest legal institutions of penitentiary law, with which the legislator has pursued a twofold objective, on the one hand, to create the possibility of mitigating and compensating for the damages resulting from such violations in a relatively simple procedure, and on the other hand, to set the amount of compensation in line with the income conditions in Hungary.[13] Although there is little public support for such compensation for prison conditions in Hungary,[14] the complaints and compensation procedure can be considered a success in one respect: the ECtHR ruled in Domján v. Hungary[15] on 14 November 2017 that it is in conformity with the Convention.

The essence of the regulation (Prison Act was in force until 31 December 2020[16]), compensation is due to the prisoner for the harm caused by the lack of living space provided for by law and any other related housing conditions that violate the prohibition of torture, cruel, inhuman or degrading treatment, in particular the lack of separate toilets, inadequate ventilation, lighting, heating or insect control (hereinafter together referred to as: "housing conditions violating fundamental

11 Curia (2018): op. cit. 7.

12 Mária Bagossy: *Kártalanítás az alapvető jogokat sértő elhelyezési körülmények miatt.* Budapest, György Mailáth Scientific Competition, Award-Winning Papers, OBH, 2018. 260.

13 Curia (2018): op. cit. 8.

14 Bagossy (2018): op. cit. 284–285.

15 Domján v. Hungary, ECtHR, decision of 14 November 2017 (case no. 5433/17); Bagossy (2018): op. cit. 252.

16 In the following, when referring to the legislation, the term "old Prison Act" refers to the legislation in force until 31 December 2020.

rights"). Compensation shall be payable for each day spent in housing conditions which infringe fundamental rights and shall be payable by the State.

One of the distinctive (cornerstone) points of the compensation procedure was Paragraph (6) of Article 10/A of the Prison Act, according to which: the submission of a claim for compensation is also subject to the condition that the prisoner or – with the exception of those under compulsory or temporary compulsory treatment – the prisoner under other legal titles, must submit a complaint to the head of the body responsible for the execution of the sentence, as defined in Article 144/B, due to the housing conditions violating fundamental rights. This condition shall apply if the number of days spent in conditions of detention in breach of fundamental rights exceeds thirty. If the placement conditions in breach of fundamental rights persist for a longer period, no further complaint need be lodged within three months. The convicted person or person otherwise detained shall not be held liable if, for reasons beyond his control, he has been unable to exercise his right to lodge a complaint.

The failure to fulfil this condition was accompanied by the consequence of rejecting the application without examining the merits, as provided for in Section 70/A subsection (5) point c) of the Prison Act, which stated that the prison judge shall reject the application without examining the merits on the basis of the documents if the prisoner has not submitted the complaint provided for in Section 144/B. This was in line with the provisions of Article 21 of the Prison Act, which stipulates that the primary remedy in the context of the enforcement of sentences is a complaint against an act or decision of the body responsible for enforcement or the failure to act, which may be lodged with the head of the body responsible for enforcement.[17]

The procedure itself was that the application for compensation had to be submitted to the prison institute of the place of detention [old Prison Act: Section 10/A subsection (5)], which forwarded the application to the competent prison judge for consideration. If there were no grounds for refusal and the application was well-founded, the prison judge would award compensation to the prisoner (or convicted person or other person detained under other legal grounds [applicant]) by a decision. Compensation was paid for each day spent in accommodation conditions that violated fundamental rights, the amount of which per day was at least 1,200 and not more than 1,600 HUF [old Prison Act: Section 10/A subsection (1), (3)]. The judge shall assess the accommodation conditions as a whole and determine the amount of the daily compensation in accordance with the extent of the damage caused, and then determine the amount of compensation as the product of the daily compensation and

17 This was in line with the provisions of Article 21 of the Penal Enforcement Act, according to which the primary form of legal remedy in the context of the prison–confinement relationship is the complaint, which may be submitted to the head of the body responsible for enforcement against the action or decision of the body responsible for enforcement or the failure to do so (Zoltán Boda: Az alapvető jogokat sértő elhelyezési körülmények miatt indított kártalanítás aktuális jogértelmezési kérdései. *Acta Humana,* 8, no. 1 (2020). 20).

the time spent in detention in accommodation conditions which violate fundamental rights [old Prison Act: Section 70/A subsection (4)].

The payment must be made by the Ministry of Justice [old Prison Act: Section 10/B subsection (2)]. The amount of compensation awarded may be used to satisfy, on the one hand, the civil claim awarded in connection with the offence for which compensation is determined in respect of the execution of the custodial sentence for which compensation is determined and, on the other hand, the claim asserted in the enforcement proceedings for the recovery of child support [detailed rules: old Prison Act, Section 70/B subsection (1)–(5)].

The new rules of doctrinal relevance[18]

On 18 December 2020, Act CL of 2020 amending certain acts necessary to eliminate abuses in the context of the prison overcrowding compensation procedure (hereinafter: Act CL of 2020) was promulgated.

In the general part of the legislator's final explanatory memorandum, we can find the reasons for the need for the changes:

> "[…] [s]ubstantial compensation is often awarded to convicted persons for housing conditions that violate fundamental rights, with little reparation for the harm suffered by victims of the crime that led to the imprisonment sentence and their relatives. […] [w]hile the possibility to claim for victims of crime and their relatives has not been sufficiently effective. […]

It has therefore become necessary to develop a new regulation which, in addition to providing an adequate opportunity for victims to assert their claims, also ensures that the amount received as compensation, if the convicted person has other obligations to satisfy, can serve as a basis for recovery in the event of non-compliance with the voluntary fulfilment of those obligations. Accordingly, the draft law aims to extend the claims directly deductible from compensation to all debts arising from private law relationships with the debtor and subject to enforcement, in particular to claims by victims of previous offences committed by the debtor. On the other hand, the aim is also to make claims which are not directly deductible from compensation but which can be made available for enforcement, includable in the compensation procedure, in particular the recovery of debts payable in the context of criminal proceedings (criminal costs, confiscation of property, etc.) and the recovery of any public debt owed to the State (e.g. tax debt). Finally, the bill also aims to make the compensation

18 On the new rules on compensation under the Prison Act see Zsuzsanna Nagy – Zoltán Boda: Az alapvető jogokat sértő elhelyezési körülmények miatti kártalanítás új szabályai, visszatekintés a panasz jogintézményére. *Büntetőjogi Szemle,* no. 2 (2020). 99–112; Zoltán Boda: Az alapvető jogokat sértő elhelyezési körülmények miatti kártalanítási eljárás és a személyiségi jogsértés miatt indult polgári per konkurálása. *Acta Universitatis Szegediensis,* 11 (2021). 5–22.

procedure more efficient and, among many other amendments, introduces a simplified procedure for the assessment of applications in cases not requiring discretionary powers, in order to simplify and speed up the compensation procedure."

One of the most important new rules of the Act is that it has simplified the compensation process by removing the requirement to submit a complaint about the accommodation circumstances as a prerequisite for filing a claim. The reason for this is that the legislator has also noticed the interpretative (enforcement) complications related to this legal instrument.[19]

A further substantial change is that the amending Act introduced *the simplified compensation procedure,* the institutional framework and conduct of which – by specifying in a taxatised manner (Section 75/G of the Prison Act) the conditions under which the application for compensation may be subject to a simplified procedure – are set out in the penitentiary institution. At the same time, in order to avoid imposing an additional, discretionary burden on the prison authorities, the new procedure currently provides for the possibility of the Prison Act (HUF 1,200 per day) would be awarded in such a case, as opposed to a judicial assessment which would carry out a full examination of the accommodation conditions that violate fundamental rights. The newly enacted rules have divided the "forum" for deciding on compensation claims between the prison institute and the prison judge, a distinction based on whether or not a decision on the merits can be made on the basis of the material compiled by the prison institute. If the investigation of the victim's claims must also be carried out, a criminal court's procedure must be carried out in any event (the judge of the criminal court does not carry out the victim's enquiry in connection with the assertion of any civil claim).

A simplified assessment by the police organisation is not precluded if the applicant objects to circumstances other than the living space. However, in case of a compensation procedure conducted by a prison organisation, it is also important to ensure that the person concerned obtains compensation as quickly and simply as possible, and therefore no circumstances other than the living space need to be examined when the application is assessed [Section 75/G subsection (1)–(2) of the Prison Act].

In the simplified procedure, there is no right of appeal against the decision of the penitentiary institution, however, upon the request of the convicted person or the defence counsel within eight days of the notification of the decision, the penitentiary institution shall forward the request together with the documents necessary for the examination to the penitentiary judge, and the decision of the penitentiary institution on the simplified examination shall lapse without any special action being taken [Section 75/G subsection (6) and (7) of the Prison Act].

According to Section 75/G subsection (2) of the Prison Act, the prison will not examine other conditions of placement that violate the fundamental right to lack of

19 See draft law T/13954 on the amendment of certain laws necessary to eliminate abuses in connection with the compensation procedure for overcrowding.

living space in the simplified procedure, although practice shows that the number of applications that only mention the lack of adequate living space is negligible.

On the basis of the above, the simplified compensation procedure may become a weightless legal instrument similar to the complaint procedure, but on different grounds.

Opinion on the new rules

In our opinion, the legislator has not necessarily fulfilled its "promise" – that the regulation of victims will not be limited to the reform of the compensation procedure for overcrowding, but will be a comprehensive improvement of the legal conditions for the assistance of victims and the enforcement of claims (not only for victims of crimes with a custodial sentence), but will also mean regulatory solutions for the special support of victims in general – by introducing the new legislation.

The rules previously in force also provided that, in order to safeguard the interests of the victim, the prison judge must, if a decision on the merits is not excluded, take into account the claims of the victim of the criminal case on which the detention is based and investigate the circumstances of the compensation for the damage or injury caused by the crime before taking a decision. As a result, under the previous rules, it was still the duty of the judge to order in his decision that the amount of the compensation for the violation of fundamental rights in the custody of the prisoner be paid to the civil claimant or the holder of the compensation or damages for the crime, up to the amount of the outstanding claim.

As under the previous rules, the order for payment is still subject to a number of conditions, including the fact that the offence has not yet been committed or has only been partially committed by the convicted person despite the conviction and that the judge, after examining the defence of the convicted person or his defence counsel, has found that the general limitation period under the Civil Code has not yet expired.

As regards the assessment of limitation periods, the new rules clarify that the general limitation period of five years does not necessarily apply to the assessment of damages (non-material damage) caused by a criminal offence. Pursuant to Section 6:533 subsection (1) of the Civil Code, the statute of limitations rules apply to damages, with the exception that in case of damage caused by a criminal offence, the claim is not barred beyond five years until the criminal liability for the offence has expired. However, it may still be a problem for the application of the law that, if the convicted person invokes the statute of limitations, it may also be necessary to examine whether the limitation period has been interrupted. However, the usual "depth" of uncertainty that is usual in a trial cannot be applied in the context of a judgment on the basis of the documents, although it may be that the victim can prove, even by documentary evidence, that the limitation period has expired. In our view, therefore, where the convicted person invokes the statute of limitations, the victim cannot be required to provide documentary evidence in support of his claim that the statute of limitations

has been interrupted. If, however, no such document is provided, it will be presumed, mutatis mutandis, that the limitation period has run – if the limitation period has indeed expired.

However, it is a real innovation in the interest of victims that the decision on the award of compensation does not have to determine the payment but the right of the holder of the civil claim or of the compensation or damages awarded for a criminal offence to deduct the amount of the outstanding claim from the compensation, and that the determination is no longer conditional on the fact that no enforcement proceedings for the recovery of the claim have been initiated previously.[20] A further "forward-looking" rule from the victims' point of view is the new provision according to which the Minister responsible for justice is now required to examine, as part of his pre-payment duties, together with all other claims under enforcement, whether a civil claim awarded to the victim is a civil claim which has not been satisfied by the convicted person, or whether enforcement proceedings have been initiated for the recovery of compensation or damages for criminal offences, the task of examining this circumstance by means of a request to the Hungarian Executor's Office prior to the decision on compensation is abolished from the previous legislation [detailed rules: Section 75/N subsection (4)–(7), Section 75/O, Section 75/P of the Prison Act].

As with the previous procedural system, the new rules have taken over, but also added to, the order of priority of satisfaction in cases where the amount awarded as compensation is insufficient to satisfy all deductible claims. The claim for child support remains at the top of the order of priority. If there is no outstanding claim for child support or if there is a balance of the compensation amount after deduction, it shall be used to pay the civil claim awarded for the offence or the compensation or damages awarded for the offence. The entitlement shall be based on the decision of the enforcement judge or, if enforcement proceedings for recovery are already pending, on the bailiff's reservation of claim. One of the main changes introduced by the new rules is to extend the number of victim claims to be taken into account in this line compared to the previous rules. It also provides for the deduction of the victim's claims awarded for any offence committed by the accused other than the criminal offence on which the detention is based, if the bailiff has made a reservation of claims in relation to that offence. Thereafter, any claims other than those referred to above which are subject to enforcement by the bailiff may be deducted before payment.

Another important innovation of the new legislation is that it has also created the possibility for the enforcement bodies to take action for the recovery of other claims which are not subject to enforcement proceedings and which cannot be deducted before payment, as in the case of any other amount of money due to the debtor concerned. Accordingly, in addition to tax debts and public debts to be recovered by way of taxes, it is also possible to take action for the recovery of a number of debts

20 Although, on the contrary, the final explanatory memorandum to Section 75/N states that one of the conditions of the payment provision is still that no enforcement proceedings for the recovery of the claims have been initiated.

payable in connection with criminal proceedings, such as fines, criminal costs, fines, confiscation of property, etc. [Prison Act, Section 75/R].

However, this area is also one of the critical points of the new legislation, as it raises doubts as to the conformity of Hungarian law with international law, since the payment of debts of a public nature owed to the state by the convicted person from the amount of compensation may raise doubts as to the conformity of the existing law with the Convention. According to the case law of the ECtHR,[21] compensation must be exempt from any form of enforcement, since the State cannot be both debtor and creditor. Due attention has been paid to this in the drafting of the legislation, so that although claims against the State are not directly deductible from the compensation, the law allows the tax authority to be notified of the payment of compensation to the convicted person and then to recover it under the general enforcement rules.[22]

In the context of the legislator's promise that the new rules will be more effective in satisfying victims' claims, it should also be pointed out that statistics from recent years show that the average occupancy rate of prisons has been 131% in 2016, 129% in 2017, 122% in 2018 and 112% in 2019.[23]

In Article 2 of Act IV of 2020 on immediate measures to end the abuse of prison overcrowding compensation, Parliament called on the Government to ensure that the average occupancy rate of penitentiary institutions does not exceed the full (one hundred per cent) occupancy rate by 30 September 2020 in order to end prison overcrowding. According to the detailed explanatory memorandum to Article 2 of Bill T/9241: "[The] Government's aim is not to treat the symptoms, but to solve the whole problem, i.e. *to eliminate overcrowding in prisons, which is the basic legal basis for compensation*."

In view of the above, it can therefore be stated that the compensation procedure will not be able to satisfy the claims of the victims in the event that the overcrowding is completely eliminated and no compensation for the convicted persons is likely to be awarded.

Furthermore, it should be noted that under the simplified procedure, the penitentiary institutions do not even investigate the claims of victims.

So, on their own, these new rules will not make a substantial difference to the satisfaction of civil claims awarded to victims. Victims will therefore still have to initiate enforcement proceedings against convicted persons, the chances of success of which are doubtful in the vast majority of cases.

In our view, the new rules will therefore not put victims in a better position. It is worth noting that the legislator has already attempted to give priority to the enforcement of victims' claims, but this too has met with little "success". Compared to the new

21 For example Kartashov v. Russia, 10376/07, 18 March 2014, § 12.

22 Balázs Kóródi: A börtönzsúfoltsági kártalanítás új szabályai a korábbi jogalkalmazási dilemmák tükrében. *Magyar Jog,* 69, no. 2 (2022). 109.

23 István Feleky: A kártalanítás és a feltételes szabadságra bocsátás feltételei a büntetés-végrehajtási bírói gyakorlatban. *Forum Sententiarum Curiae,* no. 1 (2020). 4.

rules of the compensation procedure, which may be linked to the compensation of the victims of criminal offences, the new Act LXX of 2020 on summary proceedings for compensation of damages and compensation for damages caused by a criminal offence may undoubtedly be able to guarantee more effective[24] legal protection, which is intended to provide procedural relief for victims whose criminal proceedings have already been finally disposed of and whose claim for compensation for criminal damage or compensation for damages has not been asserted as a civil claim in the criminal proceedings, nor has a civil action been brought for it, and whose claim has not yet expired. In order to ensure the efficiency and speedy conclusion of the summary proceedings,[25] the the law provided for an out-of-court procedure and set a number of deadlines different from those set out in the Civil Code. Furthermore, in order to facilitate the enforceability of claims at a later stage, an injunction may be granted in summary proceedings without the creation, amount and expiry of the claim having been proved by a public or private document with full probative value. A further reason for introducing this type of suit was that a victim who, for whatever reason, was unable to pursue his civil claim in the proceedings for compensation for prison overcrowding, but who might have suffered damage or prejudice as a result of the offence, could pursue his claim by means of an accelerated procedure, of which he had to be informed by the prison judge.

Assessment and conclusion of difficulties and inconsistencies in the application of the law

The anomalies and practical uncertainties regarding the legal rules on compensation have been present in practice from the very beginning of the introduction of the legal instrument. Several factors have contributed to this. The first factor worth mentioning is the legal status of the instrument itself. The basic task of the judge is to define the legal framework for the enforcement of the sentence imposed by the decision of the trial court and to amend and review it after the sentence has been handed down. In carrying out this task, the prison judge applies the substantive and procedural criminal law rules in addition to the Penal Enforcement Code, which can be regarded as the traditional role of the law enforcement officer. However, a sharp distinction is made between this and the procedure for compensation for placement conditions that violate fundamental rights, in which the prison judge is forced to step outside the criminal law framework and approach (also because of the nature of the legal instrument, which lacks

24 The very name of the law has been criticised from a civil law perspective. For more information see Mónika Csöndes: Polgári anyagi jogi szempontú észrevétel 'A bűncselekménnyel okozott kár, illetve sérelemdíj megtérítése iránt indított gyorsított perről' szóló 2020. évi LXX. törvény címéhez és szövegéhez. *Corvinus Law Papers,* no. 1 (2021); Tibor Pataky: Néhány gondolat a gyorsított perről szóló törvényről. *Kártérítési és Biztosítási Jog,* 2, no. 3 (2020).

25 For more information see Balázs Kóródi: A bűncselekménnyel okozott károk megtérítésének új hatékony módja – a gyorsított per. Budapest, György Mailáth Scientific Competition, Award-Winning Papers, OBH, 2021. 6–28.

the characteristics of criminal law) in order to decide on a claim with a fundamental rights dimension, similar to a civil law obligation. The classical principles of criminal substantive and procedural law cannot provide a basis for this, i.e. for interpreting the legal norms of compensation and filling the legal gaps.

The system of legal remedies may also have hindered the development of a uniform jurisprudence and thus allowed for the emergence of divergent national interpretations. According to the main rule of the Prison Act, the (undoubtedly justifiable) peculiarity of the legal remedy forum is that the initiation of extraordinary legal remedy proceedings (of which only legal remedies in the interest of legality are actually possible) is a rare exception.

It should also be mentioned that in the period following the introduction of the legal instrument, the courts were faced with a huge case load and the resulting serious challenges may also have explained the practical uncertainties and conflicts of interpretation of the instrument.

In response to the systemic problems of overcrowding and poor detention conditions identified by the ECtHR, the Hungarian state has been able to show significant results in recent years: in the former, the overcrowding rate has significantly decreased as a result of new prison construction and capacity expansion, and in the latter, physical and hygienic conditions have improved in most of the domestic penitentiary institutions. At the same time, the legislation, which is fraught with enforcement difficulties and contradiction, is in need of comprehensive reform and action by the legislator has become inevitable. The reasons for this were to create *more effective legal protection,* to ensure predictable application of the law, to protect victims of crime more effectively and to curb the questionable and abusive practices that had arisen in connection with the previous legislation.

Of these, we believe that the most burdensome enforcement problems have been solved, based on the experience of the new legislation so far. Furthermore, we can see that the prevention of abuse has also been effectively achieved by the new legislation.

However, we believe that the current compensation system is open to criticism as regards the protection of the law and the more effective protection of victims of crime.

In the context of the protection of victims, it must be seen that even if overcrowding is completely eliminated, it is unlikely that compensation will be awarded to the convicted persons, and the prison institutions will not even examine the claims of the victims in the framework of the simplified procedure, the new rules on compensation will not substantially facilitate the satisfaction of the civil claims of the victims. Victims will therefore still have to initiate enforcement proceedings against convicted persons, the chances of success of which are doubtful in the vast majority of cases.

The new provisions further reinforce the original objective of compensation claims, which was to ensure that the decision is taken in a short time and on objective grounds: the simple model introduced by the Hungarian legislator for compensating for the harm caused by overcrowding has been further simplified by allowing the institution commander to decide on cases that are easy to judge and do not require

judicial discretion. The ECtHR has stated in several cases[26] that the forum for effective redress does not necessarily have to be judges and that administrative bodies can also be taken into account, and that the current legislation therefore appears to be fully in line with international standards. However, the very fact that the law does not provide for the possibility to control and possibly correct the processing of the application for compensation by the prison institute in the event that the prisoner (applicant) does not request that his application be forwarded to a prison judge is objectionable in this context. As a result, a possible wrong decision or simplified treatment can no longer be remedied. On the other hand, the downside of the simplified assessment is the limited margin of discretion of the judiciary, which is why the domestic legislation does not provide any compensation for other, possibly unlawful, circumstances of detention, if there is a minimum amount of detention space per person.[27]

The controversial doctrinal issues: The relationship between the harm caused by placement in violation of fundamental rights and violations of personality rights

The question arises as to what the relationship is, or can be, between violations of fundamental rights and violations of personality rights

According to the Constitutional Court decision No. 3254/2019 (X.30.), Section 143 of the Prison Act on compensation for damages does not distinguish between pecuniary and non-pecuniary compensation or damages, and sanctions independent of fault (i.e. the Prison Act does not distinguish between the type of damages claimed by the prisoner – for damage to his/her material goods or for violation of personal rights).

It was also stressed that the *rules on compensation are not related to the compensation procedure for prison institutions and that the former is intended to compensate for injuries other than personal injuries (!).* The Constitutional Court stressed that

> "[…] [the] legislator introduced a new, sui generis legal instrument, the compensation procedure, which is proportionate to the injury suffered, providing effective compensation for the circumstances of placement other than violations of personality rights, which are specifically named and which violate fundamental rights. The rules on compensation for circumstances of accommodation which infringe a fundamental right cannot be linked to the rules on compensation for damages, for which the legislator has adopted different rules".

26 Klass and Others v. Germany, 6 September 1978, § 67; Campeanu v. Romania, 47848/08, 17 July 2014, § 149; Norbert Sikorski v. Poland, 17599/08, 22 October 2009, § 111; Torreggiani v. Italy, 43517/09, 46882/09, 55400/09, 8 January 20013, § 51.

27 Kóródi (2022): 102–104, 108–109 (supplemented by own edition).

It also stated in principle that "[…] [i]t cannot be argued that the exclusion of the enforceability of a damages award (or a sanction independent of fault) cannot be justified, as this cannot be read either from the contested provision of the Section 143 of the Prison Act".[28]

In contrast, the *practice of ordinary civil courts* has shown that the plaintiffs' injuries caused by accommodation conditions that violated their fundamental rights were examined in the context of the legal consequences of the violation of personality rights. Although this practice has been unfavourable to detainees, it is precisely what led to the introduction of the compensation rules. However, this practice was later changed in a way that was favourable to the defendants, but still using the concept of personality rights.

Thus, the practice of the civil courts stands on the opposite ground to the interpretation of the Constitutional Court: the vast majority of decisions argue that the mere failure to provide the required useful floor space objectively violates the plaintiff's personality rights, or more precisely his human dignity, i.e. the fact of overcrowding is a basis for the court to find a violation of personality rights as an objective sanction.[29] This is also in line with the practice of the ECtHR, according to which the lack of respect for human dignity is caused by detention in overcrowded conditions and falls within the definition of prohibited inhuman and degrading treatment.[30]

It is questionable whether the prisoner's claim for damages for the violation of his personal rights can be enforced directly before the court, or whether it must be preceded by proceedings before the penitentiary institution – i.e. whether Section 143 of the Penal Code can be applied to non-material damages in addition to compensation for material damage, and whether the claim for damages regulated therein can be understood to be exclusively a claim for material damage

Prisons *exercise public authority over* prisoners *during their detention, and liability for damages caused by the exercise of public authority in actions for the protection of personality arising from injuries suffered in the course of such detention is governed by the rules on liability for damages caused by the exercise of public authority, which may be established if the damage could not be prevented by ordinary legal remedies or administrative proceedings. This is the reason for the procedure for compensation for damages before the judicial body, as provided for in Section 143 of the Prison Act.* Several courts have accordingly examined the fulfilment of the rule that, if a prisoner

28 Constitutional Court decision No. 3254/2019 (30.X.) [30]–[31].

29 See Court of Appeal of Győr No. Pf.I.20.124/2017/3/I.

30 Botond Nagy: Az elítéltek vagy egyéb jogcímen fogvatartottak alapvető jogait sértő elhelyezési körülmények miatti sérelemdíj iránti igények joggyakorlata. *Debreceni Jogi Műhely,* 18, nos. 1–2 (2021). 55.

has been released, he may bring an action for damages directly before the court having jurisdiction for the place of the prison body within the limitation period under the Civil Code.

The Court of Appeal of Budapest also concluded that a civil action for damages and other legal consequences for an alleged violation of personal rights suffered during detention must necessarily be preceded by proceedings initiated at the request of the detainee and conducted by the detention authority, which are decided by a decision. This, as provided for cannot be disregarded, even if the plaintiff who failed to initiate the preliminary proceedings was already at liberty at the time the action was brought, since this is solely the consequence of his own failure to act, which he must bear himself.[31]

Judit Czukorné Farsang also argued in favour of this position, according to whom the detainee may only directly apply to the court in connection with other legal relationships not qualifying as detention cases (Section 10, Section 20–21 of the Prison Act), since the rules of the compensation procedure for detainees are set out in Section 2:52 of the Civil Code also apply to claims for damages by prisoners, and it can be concluded from this that the preliminary procedure should also be required for claims for damages for circumstances arising from detention.[32]

On the basis of a contrary view – which, however, is contrary to Constitutional Court decision No. 3254/2019 (X.30.) – *nevertheless, Section 143 of the Prison Act does not apply to intangible damages* [see: BDT2017. 3620.] and the *claim* for payment of damages based on a personal injury *can be enforced directly before the civil court.*[33]

It is disputed whether a claim for damages can be brought in view of the introduction of compensation under the Prison Act or whether the legislator merely intended to make it impossible to bring parallel claims (i.e. it limited the possibility of claiming non-monetary compensation/damages only to the case where the detainee decided to claim compensation for the violation of fundamental rights), i.e. the fact that the legal basis for compensation is the Prison Act. Does it follow from the fact that the legal basis for compensation is defined in the Penal Code that it is a compulsory forum for the enforcement of claims, that it is (as a whole) a sui generis legal institution and that, as such, the adjudication of the claim in question may fall exclusively within the competence of the prison courts?

According to the judicial practice published in BDT Decision 2018.3850, the enforcement of claims for placement conditions that violate fundamental rights falls under the jurisdiction of another court, the prison judge, and *cannot be avoided.*

31 Court of Appeal of Budapest No. 5.Pf.20.20.225/2020/6.

32 Judit Czukorné Farsang: Az alapvető jogokat sértő elhelyezési körülmények miatt érvényesíthető igények. *Bírósági Döntések Tára,* no. 6 (2018).

33 Curia No. Pfv.IV.21.654/2015/11.

The starting point for the competition between the compensation procedure under the Prison Act and the civil action for personal infringement is that the legal basis for the compensation of the criminal court and the claim for further compensation and damages are not the same:[34] the legal basis for the compensation of the criminal court is the Prison Act, while the legal basis for the claim for further compensation and damages is the system of conditions set out in the Civil Code. It is therefore questionable whether a claim based on placement conditions that violate fundamental rights can be decided exclusively by the judge of the criminal court or whether it is possible to choose between the criminal court or the civil court. However, the fact that the legal basis for compensation is also determined by the Prison Act seems to imply that it is a matter of forum necessity for the enforcement of claims, i.e. (as a whole) a sui generis legal institution,[35] and thus the adjudication of the claim in question falls within the exclusive competence of the Prison Act. In other words, *there is no way to bypass the criminal court's procedure*, so that *there is no legal possibility to directly* apply to the *civil court for a claim* for accommodation that violates fundamental rights [BDT 2018.3850].[36]

However, the *Debrecen Court of Appeal,* for example, in contrast to the legal position published in case no. 3850 BDT2018, held (see later in detail) that the legislator did *not intend to take away or limit the right of detainees to bring a civil action* based on the conditions of their detention violating their fundamental rights by *introducing the compensation* regulated in the Prison Act.[37]

However, if it is indeed the case that overcrowding conditions in prisons are completely eliminated, then the following must be faced. Because the interpretation of the criminal judiciary is that if overcrowding cannot be established, then other conditions of placement are not examined. However, if the detainees do feel that their detrimental situation needs to be "repaired", they should first submit a claim for compensation, even if they are aware that they were not placed in overcrowded conditions, because they should exhaust this "remedy" (see BDT 2018.3850). This clearly imposes an unnecessary administrative burden on penitentiary institutions and the courts hearing penitentiary institution's cases. However, if we take the interpretation that monetary claims cannot be brought before a civil court, but only before the courts in charge of penal cases, this will certainly be lost by the claimants if there is no overcrowding. In our view, this will therefore lead to the worrying situation that applicants will be completely excluded from asserting their personality rights claims (for monetary compensation) for injuries caused by other accommodation conditions, thus precluding their right to go to court. In this way, detainees will not

34 "[…] [T]he rules on compensation for circumstances of placement that violate a fundamental right cannot be linked to the rules of compensation procedure, the legislator applied different rules to these" (Constitutional Court decision No. 3254/2019 (X.30.), Reasoning [30]).

35 Curia No. Bt.I.1199/2019/5.

36 Feleky (2020): op. cit. 6.

37 Court of Appeal of Debrecen No. Pf.I.20.569/2019/5.

be able to rely on any substantive legal remedy either in compensation proceedings under the Prison Act.

Even if one were to allow for the "permissive" interpretation that if a prisoner exhausts the remedy of the compensation procedure and then brings an action for damages on the basis of a violation of personality, even if it is not attributable to any objective sanction, we would have to face the fact that the violation actually occurs in the exercise of public authority.

If the violation of personality rights occurs in the exercise of public authority by a body exercising public authority – and penitentiary institutions are considered such – it must be examined whether there is a law that entitles the violator to engage in the given conduct, i.e. whether the body exercising public authority acted in compliance with the laws governing it and within the framework of those laws, since this excludes the violation of personality rights.

If the presumption is rebutted by the defendant – by proving that he acted in accordance with the authority of the law – the legal consequences of the breach of personality (Section 2:51–52 of the Civil Code). However, if this proof is unsuccessful, i.e. if it is established that the defendant infringed a rule that applies to him and that also caused the plaintiff's right to personality, the application of damages (Section 2:52 subsection (1) of the Civil Code) may be applicable in addition to the objective legal consequences.

Since the damages award cannot be considered an objective legal consequence, a successful exculpatory proof may be made in the second stage, on the basis of which the claim for damages is rejected, which follows from Section 2:52 subsection (2) of the Civil Code. According to this place of law, the statement that "the rules of liability for damages shall apply" means that the conditions for exemption from the payment of damages must be determined on the basis of the liability regime applicable to the person of the infringer. Since prisons exercise public authority over prisoners during their detention, the rules of tort,[38] and the rules of liability for damages for harm caused by the exercise of a public authority,[39] apply to actions for personal injuries suffered in the course of such detention.[40]

According to Section 6:548 subsection (1) of the Civil Code, liability for damage caused in the exercise of public authority may be established if the damage was caused by the exercise of public authority or the failure to exercise public authority and the damage could not be remedied by ordinary legal remedies or administrative proceedings. This is the point where the procedure for compensation for damages before the penitentiary institution comes into view, as set out in Article 143 of the Prison Act.

38 So there is also a role for lack of responsibility in the context of bail-outs, which needs to be examined.

39 Section 6:519 of the Civil Code, Section 6:548 subsection (1) of the Civil Code.

40 Curia (2018): op. cit. 12.

Several courts have also applied the rule under Section 6:548 subsection (5) of the Civil Code in actions for damages brought by prisoners or former prisoners, and have examined as a legal precondition the rule under which, if a prisoner is released, he or she may bring an action for damages directly before the court having jurisdiction for the place of the convicted person's domicile within the limitation period.

However, the dissenting view is that it should not be given such a role. Although the new Civil Code uses the concept of damage only in relation to pecuniary damage, it has introduced the compensation of non-pecuniary damage as a new legal institution, and the legislator has not amended the Prison Act. As a result, Article 143 of the Prison Act, which entered into force on 1 January 2015, cannot be applied to intangible damages, and therefore the realisation of such damages cannot be required in actions for damages; the legislation referred to can only be applied in the case of claims for pecuniary damages asserted by the prisoner. This position is also reinforced by the fact that other amendments to the Prison Act explicitly use the concept of the legal instrument of damages where the legislator intended to place it, where it considered its application justified.[41] *To sum up, a claim for damages by a prisoner based on an infringement of personality rights may be brought directly before the civil court, outside the cases already described above, i.e. where it does not fall within the jurisdiction of the criminal court.* A contrary jurisprudence would unnecessarily and contrary to the legal provisions restrict the enforcement of rights of detainees and former detainees. This is also the hallmark of the decision of the Curia Pfv.IV.21.654/2015/11.

Referring back to the rules of the simplified compensation procedure, it may be questionable *how,* if overcrowding cannot be established, *claimants can claim against their fundamental rights suffered by their other accommodation conditions.* If there is no overcrowding, the other circumstances will not be examined either by the prison authorities or by the prison judges on the basis that they can only be challenged in relation to the lack of living space.

In our view, if the occupancy rate of penitentiary institutions falls below 100%, the detainee applicants will have to exhaust the legal remedies under the Penitentiary Act due to the conditions of their placement violating their fundamental rights – which would thus impose an unnecessary burden on the penitentiary institutions. However, since their legal remedies cannot be limited, it is likely that they will repeatedly turn to the civil courts in larger numbers, where an increase in the number of cases can be expected.

41 The decision of the Court of Appeal of Debrecen No. Pkf.II.20302/2015/2 published under No. BDT2017.3620.

If the applicant considers that the compensation awarded for the accommodation conditions violating his/her fundamental rights is insufficient, he/she may claim additional compensation as a damage award

In the practice of the criminal judiciary, it has been established without exception that an applicant *may assert a claim before the civil court* on the grounds of accommodation conditions that violate fundamental rights, which have already been assessed by the criminal court in the compensation procedure, *if the amount of compensation awarded to him is inadequate or insufficient.*

This is supported by the decision published under No.130 BH2020, as well as by the summary opinion of the Criminal Chamber of the Curia's Case Law Analysis Group No.2020.EL.II.JGY.B.1/23, according to which from a civil law perspective, *there is a right to claim damages before a civil court both for violations other than those of the housing conditions that violate fundamental rights, and for the fact that the detainee claims violations that exceed the adequate living space provided.* The case law analysis group also noted, however, that the conditions for compensation are exclusively set out in the Prison Act, and that, consequently, any claim going beyond these conditions (e.g. amount exceeding one day, interest on the compensation amount, damages) is unfounded in the relevant part of the application and must be rejected in this part, as it is compensation or damages in the purely civil law sense, i.e. not compensation. The term "further" in the Prison Act also means that the claim in excess may only be asserted after the preceding criminal procedure.[42]

However, according to the civil experts, if it were established that a party can claim damages or compensation for damages before a civil court, in addition to the amount of compensation awarded, on the grounds of the accommodation conditions, this would confirm that the legislator has not achieved its aim by introducing a compensation procedure and that the right to apply to the ECtHR could even be raised. Thus, *civil proceedings are not admissible, even if the plaintiff alleges the circumstances of the placement as provided for in the Prison Act, but thereby claims a violation*

42 The Jurisprudence Analysis Group of the Criminal Chamber of the Curia No.2020.EL.II.JGY.B.1/23, Summary opinion on "The conditions of compensation and conditional release in the practice of prison judges", page 30.
In contrast, see the judgment of the Court of Appeal of Budapest No.40.P.21.509/2019/14, which considered the defendant's argument that the plaintiff seeks to obtain its claim in a personal injury lawsuit due to the failure to meet the deadline for compensation as indisputable, since the plaintiff has the inalienable right to assert its claim in a personal injury lawsuit, in which the court can only examine whether the injury and the claim based on it are well-founded or not. According to the Court, the failure to observe the time limit for payment of compensation cannot have the effect of depriving the applicant of the right to bring a claim based on the infringement of his right to personality under the Civil Code, since the law does not provide for such a loss of rights for failure to observe the time limit. It concludes that the plaintiff whose right to privacy has been infringed is entitled to damages pursuant to Section 2:52 subsection (1) of the Civil Code.

of the personality rights of another (only admissible if it only calls for a decision on objective sanctions independent of the fault).[43]

The question may also be raised as to whether, if the applicant claims that the judge of the criminal court wrongly rejected his claim for compensation, he is entitled to bring a civil action to defend his rights

According to a permissive answer given by the Curia in one of its judgments, this may also be possible: "[…] [o]nly in the case of a multiple claim, where the *basis of the claim for compensation for damage* caused by the exercise of public authority *is the deprivation of the possibility of asserting a claim based on a statutory provision due to the unlawful conduct,* and the claim is therefore not asserted, it is possible to adjudicate the claim that could be brought in the previous action in the damages action, taking into account the criteria governing the particular action."[44]

The Court of Appeal of Debrecen also reached a similar opinion, but in the context of a different compensation: "[N]either could the defendant's argument that the court of first instance could not have examined the amount of compensation to which the applicant would have been entitled if it had brought its claim within the time limit be upheld."[45]

It may also be a controversial question whether the compensation under the Criminal Procedure Code per se "excludes" the possibility of claiming compensation under the Prison Act, or whether there are cases where this may arise

The Court of Appeal of Debrecen took the view that only a person who has been lawfully convicted and serving a sentence of imprisonment is entitled to compensation if he or she suffers harm caused by the conditions of detention that violate fundamental rights, and therefore no claim for non-material damages can be made for the unlawful serving of the sentence.

From the above, we can therefore conclude that since the basis for compensation under the Criminal Procedure Code is the groundlessness (unlawfulness) of the deprivation of liberty, and if the injured party asserts a claim for compensation under the Criminal Procedure Code on this basis, this in *practice alone precludes the Prison Act,* since the latter – as explained in the above decision – can only be interpreted and invoked in the case of lawful detainees.

However, it is clear that the above exclusion does not apply in the case of a claim for compensation for harm suffered in connection with the execution of an arrest because of housing conditions that violate fundamental rights. Even in such cases, the

43 Curia (2018): op. cit. 11.
44 Curia No. Pfv.IV.22.074/2017/4.
45 Court of Appeal of Debrecen No. Pf.I.20.253/2020/17.

illegality of the coercive measure cannot always be established by a final judgment. However, it may be that a later judgment reveals that the person's freedom was unjustifiably restricted by the enforcement of the coercive measure, and it becomes clear that, as a person unlawfully detained, he or she would not have been entitled to compensation under the Prison Act.

A similar question arises as to how to assess a situation where a sentence of imprisonment or detention has already been executed on the basis of a final judgment, but the court has acquitted the convicted person by a final judgment on extraordinary appeal and from the execution until the acquittal judgment the convicted person has submitted a claim for compensation under the Prison Act and has been granted compensation.

In such cases – i.e. when it is later found that the restriction of liberty was unjustified and the detention was therefore unlawful – can the state even claim reimbursement (on the grounds of unjust enrichment) from the former detainee on the grounds that it was later established that the former detainee would not have been entitled to compensation under the Prison Act because his detention was unlawful? Or does it simply follow from the above decision that no action may be brought under the Prison Act after the judgment of acquittal, since it has then been established that the unlawful detention was carried out?

However, this also raises the further question of the *procedure for claiming compensation for the prejudice(s) suffered as a result of the detention in violation of fundamental rights during unlawful detention. How does judicial practice interpret the forum requirement in such cases,* and does it allow direct action before a citizen's court?

In this light, it would be particularly worrying to interpret the compensation rules of the Prison Act as a compulsory forum for the enforcement of claims, since on the basis of the above decision, compensation under the Prison Act cannot be claimed for the harm caused by the violation of fundamental rights secured during unlawful detention. However, *as a consequence of the decision BDT2018. 3850, this remedy should still be exhausted before civil proceedings. However, this seems to me to be completely unnecessary and the position becomes defensible that it is also possible to directly apply to a civil court for a* complaint of placement conditions that violate the fundamental rights mentioned in the Prison Act.

The doctrinal inconsistencies of compensation claims, the need for new regulation

There is a rigid dividing line between criminal and civil procedural law, with hardly any interface between the two areas of law. One of these is compensation for the wrongful deprivation of liberty, where the link is obvious: the application of a criminal procedural measure which has wrongfully restricted or deprived a person of his liberty causes damage to the person charged. The basis for the claim must be sought in the

criminal proceedings, and its enforcement is a matter for civil procedure. A similar dichotomy can be observed in the context of the procedure for compensation under the Prison Act. However, it is important to note an important difference: in contrast to the compensation procedure under the Criminal Procedure Code, the compensation procedure under the Prison Act. Nevertheless, the Penal Code makes a reference – which seems somewhat vague – in Section 75/B subsection (4): certain claims may be pursued in civil proceedings.[46]

The delimitation of individual claims and the decision as to when a civil action is appropriate and when the claim should be pursued in the procedure under the Prison Act. In this connection, it is worth pointing out at the outset that, although both the Criminal Procedure Code and the Prison Act use the term "compensation", in our view this is not correct in the case of the latter. The distinction requires clarification as to whether the damage is the result of unlawful conduct or the result of lawful conduct authorised by law.

The former, compensation under the Criminal Procedure Code can indeed be considered such and not compensation. Although Article IV subsection (4) of the Constitution provides that a person whose freedom has been unlawfully or unjustly restricted is entitled to *compensation for his or her loss,* and does not use the term compensation, we are not talking about unlawfully applied restrictions on freedom – it is not by chance that the Criminal Procedure Code uses the word "unlawfully" – and we can conclude that this legal instrument is indeed close to compensation.[47]

However, when the doctrinal question of compensation is raised in connection with compensation under the Prison Act, it is not really a question of compensation,[48] since the damage does not arise from the – indeed lawful – detention, but from the fact that the detainee/convict is placed in conditions that violate fundamental rights, the latter being a wrongful conduct. For this reason, we can dogmatically speak of compensation as a special responsibility.

In addition to the foregoing, the fact that the legislator has placed essentially civil substantive and procedural law issues within the rules of the Penal Code in relation to the compensation of detainees under the Penal Code in a way that they do not correspond to civil law doctrine and concepts can be linked to the effectiveness of the possibilities of enforcing claims. The rule of the Penal Code referring to civil litigation [Section 75 subsection (4) of the Penal Code] is not only dogmatically imprecise, but also difficult to interpret for citizens seeking justice and for legal practitioners. Due to the civil (material) law aspects of the conditions of the detainee's placement in

46 Péter Balázsy: Kétarcú eljárások – polgári eljárásjogi kérdések a büntetőeljáráshoz kapcsolódó kártalanítási igények érvényesítésével összefüggésben. *Jogelméleti Szemle,* no. 1 (2022). 2.

47 On the contrary, according to Tamás Lábady, we can actually talk about compensation under the Criminal Procedure Code, as it covers a liability situation. Lábady also refers to Article 55 subsection (3) of the former Constitution (Act XX of 1949), which explicitly provides for compensation (Tamás Lábady: Felelősség a szerződésen kívül okozott károkért és a biztosítási szerződés az új Polgári Törvénykönyvben. *Polgári Jogi Kodifikáció,* nos. 4–5 [2001]. 40–53).

48 Balázsy (2022): op. cit. 4.

breach of his fundamental rights, it is not clear whether civil proceedings can be brought in addition to the compensation procedure provided for in the Prison Act. Perhaps the greatest difficulty in making such a distinction is that it is problematic in itself in view of the wording of Article 75/B subsection (1) of the Prison Act. In other words, it is not even clear which claims fall within the scope of the Chapter III/A of the Prison Act of the compensation procedure. We are of the opinion that the list in Section 75/B subsection (1) of the Prison Act is not exhaustive but illustrative (it only mentions the most common cases), but according to court practice it is a taxative list, only the cases listed give rise to a claim for compensation.

This has also resulted in the practice of the civil courts, according to which, if the plaintiff wishes to assert a claim under Section 75/B subsection (1) of the Prison Act, such claims are subject to compensation proceedings under the Prison Act and therefore the civil court has no jurisdiction to hear them. It may be raised that a civil action (bypassing the compensation procedure under the Prison Act and asserting its claim in a civil action) may be possible if the plaintiff does not indicate Section 75/B subsection (1) of the Prison Act as the cause of action – i.e. as the right to be enforced – but claims a violation of a personal right. However, the case law has also taken a negative position in this area, according to which, if the majority of the violations alleged by the plaintiff fall within the scope of the cases covered by Section 75/B of the Prison Act. Moreover, even if the plaintiff, in addition to the injuries defined in Article 75/B subsection (1) of the Prison Act, also submits a claim which does not otherwise fall within the placement circumstances infringing fundamental rights, the application must be rejected (in its entirety, i.e. there is no room for partial rejection) even if the ground for rejection concerns only a part of the application.

However, on the basis of the above approach, the wording of Section 75/B subsection (4) of the Prison Act is already inaccurate, it would be correct to say that *"no further compensation or damages may be paid beyond the compensation based on the damage specified in Section 75/B subsection (4) of the Prison Act, but the convicted person is entitled to assert his other claims before the civil court".*

The criticism of the current regulation of the compensation procedure under the Prison Act can be given in the legal-dogmatic contradiction and the imprecision of the normative text as described above. The latter inaccuracies have led to the different interpretation of the law by the judiciary in the penal and civil fields. In conclusion, therefore, if the claim to be enforced is related to the circumstances of the placement which violate fundamental rights, it is possible, as explained above, to bring an action only for the enforcement of objective sanctions for violation of personal rights, but not for damages in addition to sanctions independent of the responsibility. Civil proceedings under the general rules are only possible if the claim is not related to accommodation conditions which infringe fundamental rights. In such a case, however, it must be borne in mind that, under Article 143 subsection (1) to (2) of the Prison Act, a prisoner cannot bring a claim for damages against a prison directly before a court: he must bring it before the prison authorities where the damage

occurred. The prisoner may appeal against this decision within a time limit of 30 days from the date of notification. Only in the case of a claim for damages arising from a violation of personal rights (i.e. not linked to an injury caused by conditions of detention which infringe the prohibition of torture, cruel, inhuman or degrading treatment), it is possible to go directly to court and the action does not have to be preceded by proceedings before the penitentiary institution.

In our view, it would be worthwhile to reintroduce the possibility to claim for harm caused by placement conditions that violate fundamental rights into the framework of civil litigation. However, this would require the creation of a legal environment which does not give rise to the above-mentioned dogmatic contradictions. It should be pointed out, by way of example, that the ECtHR does not wish to introduce a separate, formalised procedure for compensating detainees, but is "content" with the possibility of bringing a civil action based on a violation of personal rights.[49] Undoubtedly, it is in the light of (civil) judicial practice that the ECtHR has stated that compensation cannot be considered an effective remedy under Article 13 of the ECHR,[50] according to which prison establishments are subject to an objective obligation to accommodate and therefore, in the absence of fault on their part, a claim for damages arising from overcrowding or other detrimental conditions of accommodation cannot be brought against them.[51]

However, even before the entry into force of the compensation procedure under the Prison Act on 1 January 2017, the Curia ruled in its judgment Pfv. IV.21.344/2015/6 of 27 January 2016 that the existence of the obligation to admit does not exclude the imputability of the conduct of the Prison Act. And in its decision Pfv.IV.21.654/2015/11 of 24 February 2016, it stated that if a penitentiary institution fails to comply with its obligation under the relevant governing detention, thereby engaging in conduct for which it is responsible, the penitentiary institution with legal personality is liable for damages for the harm suffered by the detainee in the institution. This was confirmed by the decision of the Court of Appeal of Pécs (Pf.VI.20.023/2016/4) following these judgments, according to which the judgments of the ECtHR have changed the Hungarian judicial practice in the area of overcrowding and the granting of bail-outs in penitentiary institutions. In the light of the favourable development of practice for convicted persons/prisoners, we believe that the legislator made an incorrect decision by creating the possibility of compensation – and in a dogmatically flawed way – in the framework of a separate procedure regulated by a separate penal code.

In our view, if the compensation scheme in its current form – which, in the absence of overcrowding, makes it virtually impossible to address harm caused by

49 For example, in case of Latak v. Poland, the ECtHR found civil damages to be an effective remedy.

50 The ECtHR has stated that civil actions for damages for violation of personality rights resulting from inhuman or degrading treatment do not meet the conditions for an effective remedy, on the basis of which there is no reasonable possibility of winning a case and seeking redress.

51 See decisions No. BDT2011. 2404, BDT2013. 2969.

other accommodation circumstances – is maintained, it may even lead to a situation where, despite a previously considered effective remedy, potential applicants do not lose their victim status and may successfully reopen their claims before the ECtHR.[52] For this reason, we believe that Hungary has not chosen the right regulatory solution with the compensation procedure under the Prison Act following the outcome of Varga and others v. Hungary. For this reason, it may be necessary to *review the rules of compensation procedure under the Prison Act with the regulatory objective (the main legal policy objective) to develop a system in which claims for injuries caused by torture, cruel, inhuman or degrading treatment or placement conditions that violate the prohibition of torture, cruel, inhuman or degrading treatment can be enforced in a simple, fast and efficient way, but before judges specialised in civil cases.* It should also be stressed that, as explained above, the legislation currently in force contains inconsistencies which also hinder its effective application, and that the legislator should therefore find a solution to eliminate these ambiguities.

This may justify the introduction of a less burdensome civil enforcement procedure, which offers an alternative fast-track route to the general litigation of the Civil Procedure Code, allowing for an efficient – damages – claim as required by the ECtHR. Efficiency could be ensured if in this particular type of litigation the procedural rules themselves were to grant certain advantages to the party seeking redress. The justification for a special procedural regime could also include the equitable nature of the claim asserted by way of action. In many respects, the special type of action to be created could differ from the procedure under the Civil Procedure Code in that it could be based on the need to speed up the procedure, by allowing the special provisions to be used in a less formalised way, with greater reliance on written procedures, to enable the claims privileged by law to be decided in a summary manner. For example, in the context of procedural rules facilitating the enforcement of rights, it is worth ensuring that legal representation is not compulsory, in addition to the inclusion of provisions on jurisdiction and legal aid which are favourable to plaintiffs. A number of special features can also be included in the procedural provisions to speed up the procedure, which are closely linked to the effectiveness of enforcement. In addition to shortening the time limits for out-of-court procedures and the general obligation of the court to take measures and other time limits (e.g. for lodging a statement of opposition), it would seem necessary to provide that an action brought in the course of proceedings cannot be joined with another action. In the context of speeding up the procedure, it could also be considered to exclude the separation of the trial and the hearing on the merits under the general procedural rules of the Civil Procedure Code, even with a provision in the procedural law that it should be possible to conclude the dispute on the merits without a hearing if, as in the current compensation procedure under the Civil Procedure Code, no evidence other than documentary evidence is required. In any case, efficiency may also require simplifying

52 See Rasinski v. Poland, ECtHR, judgment of 28 May 2020, case no. 42969/18, paragraphs 27–28.

the burden of proof by necessarily making the scope of evidence in court narrower, so that the legislation would create the possibility of evidence without a trial by giving priority to static material evidence. The simplification of proof would be best served by allowing the plaintiff to claim a predetermined, fixed amount of damages in the lawsuit (as under the current Prison Act), since this would create a legal presumption that the amount of damages itself is proven. Although this would place considerable limits on judicial discretion in determining the amount of damages, I do not believe that the ECtHR would impose this on the domestic legislature, as it has not done so even under the compensation rules of the Prison Act. In order to avoid doctrinal inconsistencies, I would consider it necessary to set out in a taxative list exactly which other circumstances of placement – beyond possible overcrowding – could be invoked in the special type of suit. Coupled with this, practice should already enforce one of the most important rules of damages law, the rule on the non-proof of prejudice (which has undoubtedly also generated most of the different interpretations of the law). Section 2:52 subsection (2) of the Civil Code exempts the plaintiff from the procedural obligation to prove prejudice, creating a rebuttable presumption that prejudice due to a personal infringement has occurred. In our view, the current wording of the Prison Act "compensation is due" could be replaced by the phrase "damages are due", excluding counter-proof by specifying the amount of the damages from-to – and simplifying the rules of evidence so that the application of damages is an automatic consequence of the finding of a violation.[53] This would also avoid the fact that, in general, the occurrence and extent of harm to the personality is in some cases unprovable, although it is common knowledge, and therefore cannot be required to be proved. However, it is also unnecessary to include evidence because the harm suffered is no different from the harm suffered in general and generally in the case of similar infringements and is therefore common knowledge.[54] The practice of previous civil proceedings has also shown that the courts have found that the occurrence of non-material harm was a matter of common knowledge and could be established on the basis of general life experience, and that the additional disadvantages alleged by the plaintiffs in connection with the conditions of placement in the prison were admissible under the doctrine of common knowledge. We believe that the special procedure as set out above would also meet the ECtHR test, given that the success of exculpatory evidence can be virtually ruled out, the weighing of the non-material harms resulting from the objective circumstances of the violation is predetermined, and the plaintiff can be relieved of the often undignified burden of proof. In addition to this, however, I believe that the abolition of the simplified assessment by the penitentiary institution is not strictly necessary, and that the new regulation I have

53 According to decision No. PJD2016.14, the plaintiff does not have the burden of proving the prejudice, but the rightholder may claim damages for the non-material damage suffered by him, therefore the application of damages is not an automatic consequence of the finding of infringement (Curia No. Pfv.IV.21.764/2015/4).

54 See Curia No. Pfv.III.21.174/2019/4.

written could be directed at cases where the person concerned would consider that the outcome of the penitentiary institution assessment has not remedied his or her violation.

I consider it important to note that the legal basis of the claim would undoubtedly be a rule of substantive law, and therefore particular attention should be paid to the dogmatically correct definition of the applicable law. It is necessary to avoid a conflict of norms due to the different regulation of two separate pieces of legislation. For this reason, an example for the definition of the applicable law is Act LXX of 2020 on summary proceedings for compensation for damage caused by a criminal offence and for damages (Gyptv.). Therefore, for the special type of lawsuit I have outlined, it is also justified to draft a special law, which would indicate that, in addition to the special procedural rules under the special law, the Civil Procedure Code should be applied as a general rule. In all matters not covered by the new "code", the rules of the Code of Civil Procedure should apply. In this special law, substantive provisions could be included, as is currently the case in the Prison Act, to clarify exactly which claims for damages for injury caused by placement conditions that violate the prohibition of torture, cruel, inhuman or degrading treatment can be brought directly to court in the special type of suit.

Overall, we are of the opinion that the enactment of a new special action as described above would achieve the regulatory objectives along which the compensation procedure under the Prison Act. At the same time, civil actions for compensation for violation of personal rights resulting from inhuman or degrading treatment may meet the conditions for an effective remedy, on the basis of which there would be a reasonable possibility of winning a lawsuit and seeking redress. A fundamental justification for a civil procedural law could be that, although the conduct giving rise to private law liability (placing a detainee in conditions which violate fundamental rights) has a fundamentally penitentiary dimension, it nevertheless gives rise to a civil law consequence. In addition to the legal effect of liability, civil action may be more appropriate (more effective) in the context of the special form of liability for damages, both from a procedural and a doctrinal point of view. As I have already mentioned above, I consider it wrong to link compensation for injuries arising from detention with compensation for damages caused by lawful harm. It is correct to speak of tortuous harm giving rise to civil tort liability (human conduct in breach of the law gives rise to a tort), the consequence of which must be compensation. The new type of litigation outlined above should, in our view, not be optional but mandatory, creating a forum for the enforcement of claims and concentrating these privileged claims in a higher court (tribunal). It should be added that, given the advantages to be granted to claimants, it would not be in the interest of claimants to opt for a litigation route other than the new enforcement option under the general litigation rules.

Additional harms beyond the above, which are well known to be associated with the restriction of liberty[55] (psychological strain of being in prison, separation from family, limited contact with relatives, the spread of the news of the arrest in the workplace and in the home environment and the associated negative social perception, as well as the harm suffered in terms of lifestyle and work after release, etc.) can continue to be pursued under the general personal rights litigation procedure. It would be appropriate to introduce a similar rule in the new legislation, but one that is now doctrinally correct, referring to the different legal title.

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55 It is a settled case law that deprivation of liberty in itself gives rise to a claim for non-material compensation (damages). It is well established that the prolonged restriction of personal liberty and the psychological and physical effects of imprisonment are both onerous and generally harmful. These harms also have a detrimental effect on life after release. A significant period of deprivation of liberty justifies higher than average compensation. These well-known facts are taken into account by the court without proof (see decisions No. BH 2002.186, BH 1998.82, BDT 2015.3282, BDT 2001.371, BDT 2001.372, BDT 2009.2100).

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