

Presidential pardon and the judgement of the European Court of Human Rights in Hungary

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I. Introduction

The European Court of Human Rights has condemned Hungary for its adoption of real life imprisonment (also known as whole life imprisonment¹), and in response to this criticism, Hungary has made modifications to its presidential pardon system. Before considering the new provision in greater detail, it is helpful to take a more general look at the presidential pardon.

The problem of prison overcrowding is a prominent issue in the literature. An example of this problem is illustrated in Figure 1.

¹ *CASE OF LÁSZLÓ MAGYAR v. HUNGARY* (Application no. 73593/10), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{\"itemid\":\[\"001-144109\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{\). The case originated in an application (no. 73593/10) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr László Magyar (“the applicant”), on 9 December 2010.

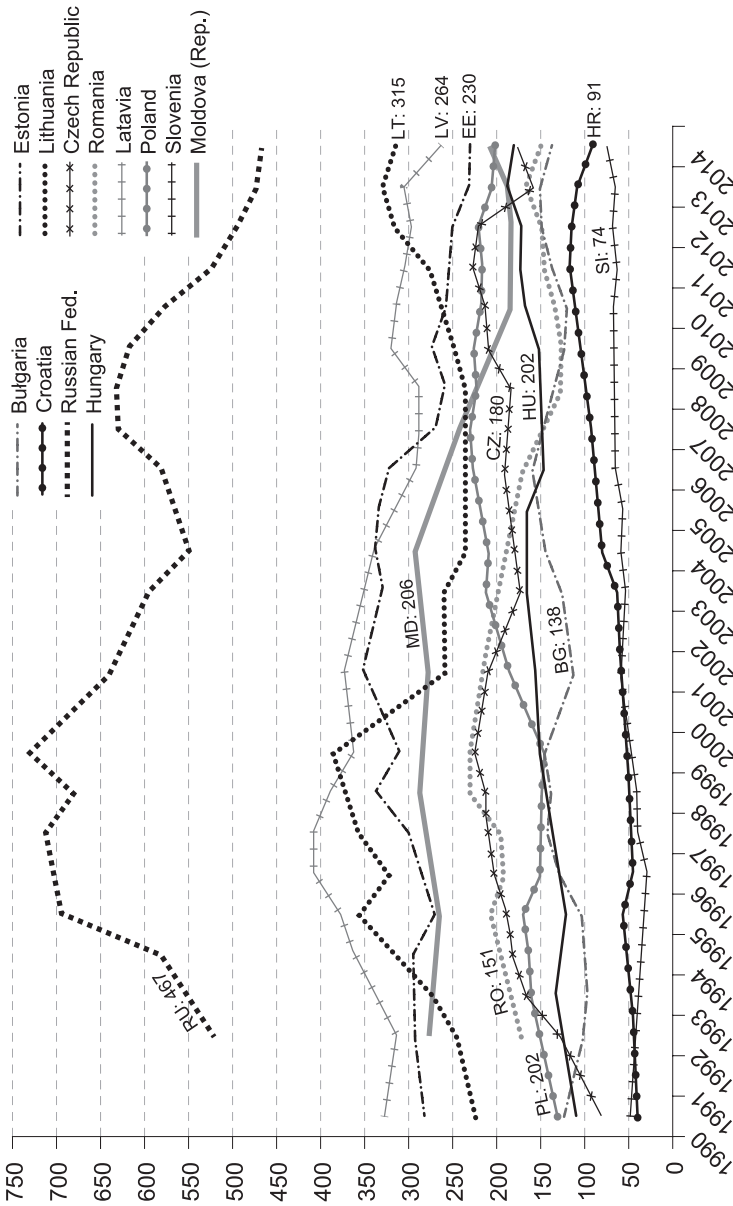


Figure 1. Comparison of prison population rates for Central and Eastern European nations, 1990–2014
Source: *World prison brief*, <http://www.prisonstudies.org/>, access: 16.03.2015.

As is now well understood, a connection exists between prison overcrowding and the available methods of release from prison. In Hungary release from prison can occur in several ways:

- completion of the term of imprisonment,
- conditional release,
- interruption of imprisonment (temporary),
- presidential pardon,
- reintegration custody (from 1 April 2015).

The presidential pardon is a discretionary power. There are two types of presidential pardon; a public pardon known as amnesty, and an individual pardon. Each of these can further be divided into two categories, procedural and enforcement pardons.

A public pardon can be granted by the Parliament² and applies to a certain group of either the accused or the imprisoned. Further, an amnesty is usually connected with observing symbolic or political events, for instance, in order to commemorate the death of Imre Nagy, a public pardon was granted to a number of prisoners in honour of his death. However, this article focuses on the system for individual presidential pardons in Hungary.

II. The procedure for an individual presidential pardon

According to Article 9, paragraph (4), section (g) of the Fundamental Law (constitution) of Hungary the President of the Republic has the right to grant individual pardons³.

“The President of the Republic shall (g) exercise the right to grant an individual pardon”.

The minister responsible for justice is responsible for the following:

1. preparing the case, with the help of the Pardon Department, and
2. endorsing or countersigning the decision made by the President.

² P. Váczy, ‘Kegyelem! A közkegyelem intézményéről és a semmisségi törvényekről’, [in:] *Tanulmányok a 70 éves Bihari Mihály tiszteletére*, Győr 2013, p. 553.

³ CASE OF LÁSZLÓ MAGYAR v. HUNGARY (Application no. 73593/10), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{“itemid”: \[“001-144109”\] }](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{“itemid”: [“001-144109”] }), [http://hudoc.echr.coe.int/eng?i=001-144109#{“itemid”: \[“001-144109”\] }](http://hudoc.echr.coe.int/eng?i=001-144109#{“itemid”: [“001-144109”] }) point 20.

There are two ways to initiate the pardon procedure: it can be requested, or it can be initiated through official channels. In the case of a petition the prisoner, the defence lawyer, the legal representative of a minor, or a relative of the accused or prisoner can apply for a pardon⁴. Under these circumstances the petition for a pardon must be submitted to the court of first instance⁵.

Upon submission, the court gathers the necessary documents, for instance the opinion of the probation officer, environment survey, police reports, and the opinion of the penitentiary institution. The court then sends the documents (the charge, the sentence, medical reports, and a pardon form⁶) to the minister within thirty days.

However, what happens when the minister does not support the application for a pardon? When this is the case, the minister is required to send the documents to the President of the Republic, together with the minister's negative opinion. If there are medical reasons, it is possible for the minister to postpone or interrupt the punishment.

Flow chart of the procedure for a presidential pardon is presented in Figure 2.

III. What does a declaration of pardon entail?

In the case of imprisonment, the text reads, for example, "the remainder of the punishment is suspended for X years on probation". Further, the President's decision consists of a number of different features:

1. Above all, the president has discretionary power to decide.
2. The President of the Republic shall not discuss the reasons for granting or denying a pardon.
3. The opinion of the minister does not bind the president, and
4. The decision becomes effective only with the endorsement of the minister.

⁴ Act no. XIX of 1998 Section 597. (3) on the Code of Criminal Procedure "Such a request may be introduced by the defendant, his/her lawyer or ... relative. ..."

⁵ Act no. XIX of 1998 Section 597. (4) on the Code of Criminal Procedure "A pardon request ... concerning a sanction not yet executed must be introduced with the first-instance trial court".

⁶ Decree of the Ministry of Justice 11/2014. (XII. 13.) Section 123.

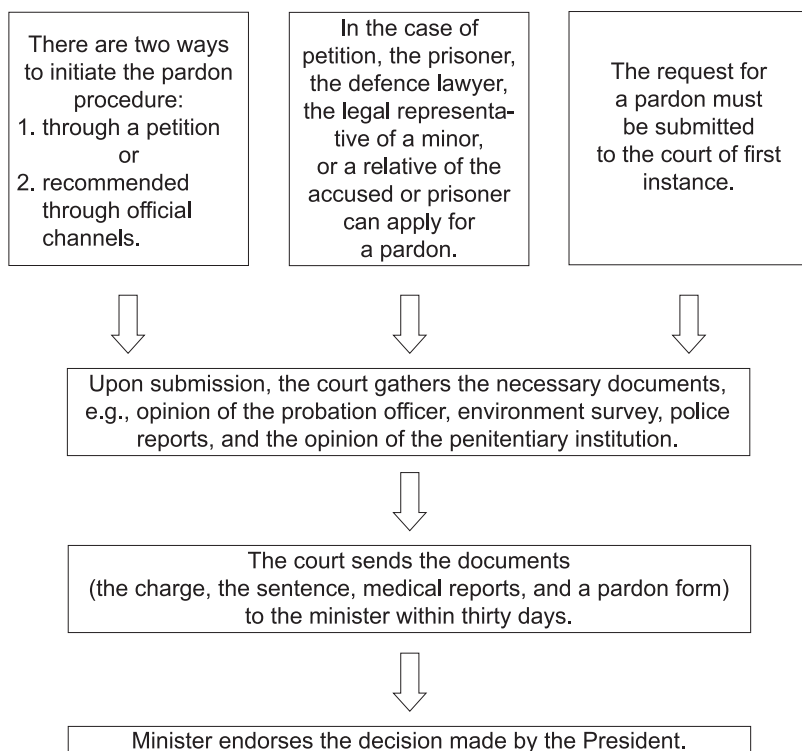


Figure 2. The procedure for a presidential pardon

Source: Act no. CCXL of 2014 Section 45. on the Code of Criminal Enforcement.

Measures taking place after the endorsement⁷:

The court of first instance delivers the decision on the pardon to the prisoner. While there is no legal remedy against the decision, it is possible to submit a new request for pardon. According to the data issued by the Pardon Department for the period between January 1, 2002 and March 31, 2015 approximately 98% of the requests for pardon were refused.

⁷ The document of presidential pardon, <http://igazsagugyiinformaciok.kormany.hu/tajekoztato-az-altalanos-kegyelmi-eljarasrol>.

Table 1. Pardon decisions for the period between January 1, 2002 and March 31, 2015

Year	Granting a pardon (+)	Denying a pardon (–)	Total	Percent (%)
2002	24	1126	1150	2.09
2003	36	1187	1223	2.94
2004	41	1225	1266	3.24
2005	23	1316	1339	1.72
2006	23	1146	1169	1.97
2007	23	1355	1378	1.67
2008	27	772	799	3.38
2009	17	894	911	1.87
2010	5	866	871	0.57
2011	16	935	951	1.68
2012	8	548	556	1.44
2013	12	976	988	1.21
2014	4	749	753	0.53
2015	8	171	179	4.47
Total	139	987	1126	1.97

Source: <http://igazsagugyiinformaciok.kormany.hu/admin/download/9/48/21000/Kegyel-mi%20%C3%BCgyek%20statiztika%2020020101-20150930.pdf> (access: 28.10.2015).

Having laid out the procedural aspects of an individual presidential pardon, what follows looks at the results of an empirical study that was carried out with the permission of the Pardon Department of the Ministry of Justice⁸.

Several dozen legal cases were analysed based on the following factors:

- the crime committed,
- the sentence,
- the reason for the request,
- the opinions from the relevant sources,
- whether the request was recommended for a presidential pardon.

Let us examine a sample case from the study⁹ in Table 1.

⁸ Research number: Igazságügyi Minisztérium Kegyelmi Főosztály, (Ministry of Justice, Pardon Department) number: XX-KEGY/44/1/2015, 2015.January.

⁹ Research number: Igazságügyi Minisztérium Kegyelmi Főosztály (Ministry of Justice, Pardon Department), number: XX-KEGY/44/1/2015, 2015.January.

Table 2. Factors examined in the study of presidential pardon petition

Type of crime	Sentence	Reason for request	Attached opinions	Recommendation
Multiple cases of fraud	3 years 10 months imprisonment	Medical reason — paralysis due to a serious accident	Opinion of hospital: he saved the life of a person. Opinion of prison: good behaviour, frequently rewarded.	Approval

Figure 3 shows the distribution of the reasons for requesting pardon¹⁰. As we can see, the most frequent reasons given are medical reasons and family reasons.

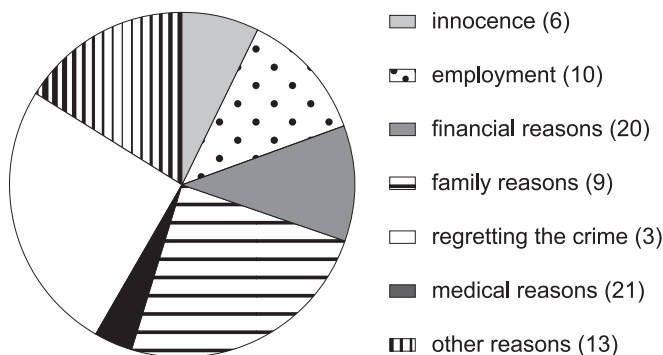


Figure 3. The distribution of the reasons for requesting pardon

Source: Made by Dr. NAGY ANITA Associate Professor, Institute of Criminal Sciences, Faculty of Law, 12. June 2015. Miskolc MAB, in Memory of Prof. Dr. Tibor Horváth Conference.

¹⁰ Other reasons included fear, good behavior, and advanced age.

IV. Compulsory presidential pardon

On March 1, 1999 the sentence of “real life imprisonment”¹¹ came into force in Hungary¹². According to paragraph 44 (1) of the Penal Code of Hungary, real life imprisonment is applicable to a list of certain types of cases. In eighteen cases the judge can use his/her judgement, including the following: genocide, crimes against humanity, apartheid, etc. In two cases, real life imprisonment is compulsory¹³: a) multiple recidivism with violence, or (b) those who committed the crimes from the list above in a criminal organization. In another case when a person sentenced to life imprisonment commits a further crime, they are sentenced to life imprisonment again. In this case the actual sentence must be real life imprisonment¹⁴.

In Hungary today there are two hundred and seventy-five people sentenced to life imprisonment, and of these only forty have been sentenced to real life imprisonment (not all of these are final decisions)¹⁵.

In *Magyar v Hungary* (Application no. 73593/10, 20 May 2014) the European Court of Human Rights¹⁶ held that the sanction of life imprisonment as regulated by the respondent state, which is *de iure* and *de*

¹¹ Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends: “..., the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners”. A life-sentence prisoner is one serving a sentence of life imprisonment.

¹² Act no. IV of 1978 Section 45. on the Criminal Code, as in force since 1 March 1999, provided as follows: “(1) If a life sentence is imposed, the court shall define in the judgment the earliest date of the release on parole or it shall exclude eligibility for parole. (2) If eligibility for parole is not excluded, its date shall be defined at no earlier than 20 years. If the life sentence is imposed for an offence punishable without any limitation period, the above-mentioned date shall be defined at no earlier than 30 years”. As in force at the material time and until 30 June 2013 when it was replaced by Act no. C of 2012 on the Criminal Code: “Imprisonment shall last for life or a definite time”.

¹³ Act no. C of 2012 on the Criminal Code Section 44 (2).

¹⁴ Act no. C of 2012 on the Criminal Code Section 45 (7).

¹⁵ <http://www.jogiforum.hu/hirek/32833> (as of 11.11.2014).

¹⁶ *Kafkaris v. Cyprus*, [GC], no 21906/04, ECHR 2008). A life sentence does not become “irreducible” by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible.

Iorgov (II.) v. Bulgaria, no 36295/02, ECHR 2010) Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termi-

facto irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as prohibited by Article 3 ECHR. This is because it denies the convict any hope of being released in the future.

The judgment was challenged by the Hungarian government, but the request for referral to the Grand Chamber was rejected. The judgment became final in October 2014. The Court reinstated its previous case law and as a point of departure emphasized that the imposition of life sentences on adult offenders for especially serious crimes such as murder is not in itself prohibited by or incompatible with the ECHR (paragraph 47). The Court pointed out that there were two particular but related aspects to be analyzed. First, the ECHR will check whether a life sentence was *de iure* and *de facto* reducible. If so, no issues under the Convention arise (paragraphs 48–49). Second, in determining whether a life sentence was reducible, the Court will ascertain whether a life prisoner had any prospect of release. Where national law affords the possibility of review of a life sentence, this will be sufficient to satisfy Article 3, irrespective of the form of the review¹⁷. Prisoners are entitled to know at the start of their sentence what they must do to be considered for release and under what conditions, including the earliest time of review (paragraph 53).

The government tried to argue that the possibility of Presidential pardon made the execution of the sentence in practice reducible, but the ECHR did not accept this argument¹⁸. The Court also noted that the

nation or the conditional release of the prisoner, notwithstanding the non-judicial character of the procedures to be followed, this will be sufficient to satisfy Article 3.

¹⁷ Life-sentence prisoners should not be deprived of the hope to be granted release. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of persons who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behaviour, the delivery of personal development programmes, the organisation of sentence-plans and security. Countries whose legislation provides for real life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures. In: Explanatory Memorandum on Recommendation (2003)22 on conditional release (parole).

¹⁸ The Government submitted that the applicant's life sentence was reducible both *de iure* and *de facto*; he had not been deprived of all hope of being released from prison one day. They argued that his sentence was therefore compatible with Article 3 of the

human rights violation was caused by a systemic problem, which may give rise to similar applications, and therefore suggested a legislative reform of the review system for whole life sentences.

Hungary took two important steps in its response to the ECHR judgment:

1. It introduced a mandatory pardon procedure, when a convict has spent 40 years of his sentence.
2. It established a Pardon Committee.

Table 3 guides us through what the compulsory pardon procedure actually entails step by step.

Table 3. Compulsory pardon procedure

1. The convict has served 40 years of his/her sentence (and has declared that he/she wishes to request the compulsory pardon procedure) ¹⁹ .
2. The minister must carry out the procedure within 60 days.
3. The minister informs the leader of the Curia, who appoints the five members of the Pardon Committee ²⁰ .
4. The majority opinion must be made within 90 days ²¹ in an oral hearing (examining medical status, behaviour, risk ranking, etc.).
5. The opinion must be sent to the President within 15 days, and the President then decides whether to grant the pardon. The final step is the endorsement of the minister responsible for justice.
6. If a pardon is not granted at this time, the procedure must be repeated in two years ²² .

Source: Made by Anita Nagy, Associate Professor, Institute of Criminal Sciences, Faculty of Law, 12 June 2015. Miskolc MAB in Memory of Prof. Dr. Tibor Horváth Conference.

Regarding the declaration of the ECHR, the Hungarian Constitutional Court made a declaration on April 17, 2014 (No. III/00833/2014) and a council of the Curia (Büntető Jogegységi Tanácsa) issued a declaration on July 1, 2015 (No. 3/2015. BJE).

Convention. CASE OF LÁSZLÓ MAGYAR v. HUNGARY (Application no. 73593/10) point 35 [http://hudoc.echr.coe.int/eng?i=001-144109#{"itemid":\["001-144109"\]}](http://hudoc.echr.coe.int/eng?i=001-144109#{).

¹⁹ Act no. CCXL of 2014 on the Code of Criminal Enforcement Section 46/B.

²⁰ Act no. CCXL of 2014 on the Code of Criminal Enforcement Section 46/D.

²¹ Act no. CCXL of 2014 on the Code of Criminal Enforcement Section 46/F.

²² Act no. CCXL of 2014 on the Code of Criminal Enforcement Section 46/H.

Regarding the compulsory Presidential pardon procedure, these declarations stated that the Hungarian legal system now was in compliance with the requirements set forth by the European Court of Human Rights.

V. Conclusion

A new system for a compulsory presidential pardon procedure has been put into place to comply with the ECHR requirements. However, it can be argued that these measures are not sufficient to meet the requirements of the ECHR, because the requirement for the endorsement of the minister responsible for justice introduces a political element into the decision to grant a pardon. This reduces the impartiality and independence of the court.

Summary

This article introduces the Hungarian Presidential pardon and new compulsory Presidential pardon system. It is based on research carried out in the Ministry of Justice at the Pardon Department, where several dozen petition pardons were analysed.

In connection with the compulsory Presidential pardon the article examines the judgment of the European Court of Human Rights, which has condemned Hungary for its adoption of real (whole) life imprisonment. Results from a study of petitions for pardon are given.

Keywords: pardon, conditional release, ECHR, life imprisonment, empirical research.