

## **Decision 18/2023 (VII. 3.) AB**

### **on establishing an omission connected to the implementation of unjustified confinement under the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System**

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasoning by Justice *dr. Zoltán Márki* and with dissenting opinions by Justices *dr. Attila Horváth*, *dr. Tamás Sulyok* and *dr. Mária Szívós* – adopted the following

decision:

1. The Constitutional Court establishes that the Parliament had caused a violation of the Fundamental Law by failing to regulate the rules of compensation for damages under Article IV (4) of the Fundamental Law in the case where the confinement under the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System is implemented without due ground after the execution of a sentence incorporated in a final court decision.

The Constitutional Court therefore calls upon the Parliament to meet its legislative duty by 31 December 2023.

2. The Constitutional Court rejects the constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling section 133/A (1) of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System.

3. The Constitutional Court rejects the constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling the ruling No. 56.Pf.636.847/2021/5 of the Budapest-Capital Regional Court.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

[1] 1 The petitioner, through its legal representative (Balázs T. Tóth, attorney-at-law), asked for the establishment of the violation of the Fundamental Law by – and the annulment of – the judgement No. 56.Pf.636.847/2021/5 of the Budapest-Capital Regional Court and the judgement No. 36.P.86. .109/2021/10/1 of the Central District Court of Pest, in accordance with section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) and asked for the establishment of the violation of the Fundamental Law by – and the annulment of – section 133/A (1) of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System (hereinafter: AO), in accordance with section 26 (1) of the ACC. According to the petitioner, the contested final decision and the challenged statutory provision violate Article IV (4) and Article XV (2) of the Fundamental Law.

[2] 2 The background to the case is that the petitioner, having failed to register the acquisition of ownership of a passenger vehicle, was fined by the Siklós Police Station Offence Authority for violation of road traffic rules by decision No. 02805/33-I/2019. The deadline for the payment of the fine was 14 March 2019, and the deadline available for the petitioner to initiate the exchange of the fine to community service was 22 March 2019.

[3] 2.1 In due time, on 14 February 2019, the petitioner appeared for community service at the Sellye District Office of the Baranya County Government Office and then at the Siklós District Office on 15 April 2019 for the same purpose. On the latter occasion, the Municipality of Gordisa was appointed as the petitioner's employer. Between 6 May and 25 June 2019, the petitioner carried out 72 hours of community service, in exchange of the fine imposed.

[4] 2.2 On 2 January 2020, the Employment Department of the Siklós District Office of the Baranya County Government Office contacted the Municipality of Gordisa and the employment service of Sellye by telephone which at that time provided the information that the petitioner had not performed any community service.

[5] On 6 January 2020, the Employment Department of the Siklós District Office of the Baranya County Government Office notified the Siklós Police Department's Offence Authority that the petitioner had failed to fulfil his community service obligation. On this basis, the Siklós Police Department Offence Authority filed a motion before the Pécs District Court to change the unpaid fine to confinement for an offence. On the basis of this, the Pécs District Court changed the fine imposed to 12 days' confinement for an offence by its ruling No. 22.Szpá.241/2020/4 of 13 February 2020, and at the same time called upon the petitioner that if he provides proof of payment of the fine within 8 days, the court will dispense with the change.

[6] The petitioner did not voluntarily appear for the execution of the confinement, therefore the Siklós Police Department Offence Authority issued a ruling of summons

against the petitioner on 13 May 2020, which was sent to the Sellye Police Station on 18 May 2020 for the purpose of enforcing the summons. The enforcement of the summons took effect on 3 June 2020. In the course of the enforcement, the petitioner indicated to the police officers that he had complied with the community service order. The petitioner served the confinement in the Baranya County Penal Institution from 3 to 14 June 2020.

[7] 2.3 On 9 July 2020, after the petitioner had served the confinement, the Employment Department of the Siklós District Office of the Baranya County Government Office sent a note to the Siklós Police Department Offence Authority, informing the offence authority that the certificate on completing the community service had been found by the district office administrator "while cleaning the office cabinet". The Siklós Police Department notified the Mohács District Prosecutor's Office, which on 20 October 2020 filed a request for a retrial in favour of the petitioner, as the decision of exchange to confinement for an offence was unlawful.

[8] On the basis of the retrial application, the Pécs District Court, by its ruling No. 24.Szpá.6599/2020/2, annulled its ruling No. 22.Szpá.241/2020/4 on the exchange to confinement, and set aside the exchange on the basis of section 141 (7) of the AO.

[9] 2.4 The petitioner brought an action for damages before the Pécs District Court on the basis of section 133/A (1) and (4) of the AO for the grave violation of his personality rights. The Central District Court of Pest dismissed the action by its judgement No. 36.P.86.109/2021/10/1. According to its reasoning, there is no place for compensation under section 133/A (1) of the AO, as the proceedings against the petitioner were not terminated by the court in the course of the retrial. The court had not ordered the proceedings to be terminated because none of the circumstances listed in section 83 (1) of the AO existed. "There was no logical obstacle to the termination of the proceedings, since if a confinement ordered and already served can be set aside, the termination of a completed proceedings is not excluded either." The court referred to the fact that, according to section 263 (2) of Act CXXX of 2016 on the Civil Procedure (hereinafter: ACiP), it was not bound by the decision of other authorities or by the facts established therein in making its decision – except for a final decision on the commission of a criminal offence and the lawfulness of an administrative activity –, and therefore the court was not bound by the ruling annulling the ruling on exchanging to confinement and the ruling on setting aside confinement, nor by the reasoning of the ruling; the only decision that would have been binding on the court was a decision on terminating the offence proceedings. The court also argued that, at the time of the ruling on exchange, namely 13 February 2020, the conditions for exchange were met on the basis of the available documents, and that the completion of the community service was not proven.

[10] The court of first instance also found that the compensation conditional upon the court's order with a specific content did not raise a constitutional problem: in its view, the law-maker did not intend to compensate for the situation where the offender is disadvantaged by the irregular handling of documents by the employing authority. The court pointed out that the consequence of unlawful and wrongful conduct can be examined in an action for damages.

[11] 2.5 The judgement No. 56.Pf.636.847/2021/5 – challenged by the petition – of the Budapest-Capital Regional Court that proceeded on the basis of the petitioner's appeal, upheld the judgement of the court of first instance. At the same time, it ordered to disregard several statements of the legal reasoning of the first instance court's judgement and found that in the course of the adjudication of the petitioner's action for compensation for offence, the well-founded nature of the plaintiff's action for compensation for offence under section 133/A of the AO should be examined on the basis of the ruling No. 24.Szpá.6599/2020/2 of the Pécs District Court as the Central Court for Offences and the reasoning of that ruling.

[12] The court of second instance found that the court of first instance was well-founded in its finding that the proceedings against the plaintiff had not been terminated by the retrial and that, therefore, the condition for compensation under section 133/A (1) of the AO did not exist. The court of second instance argued that the finding of the petitioner's liability for the offence was not affected by the retrial; in the retrial, the court set aside the decision to exchange the fine into confinement and dispensed with the exchange. Therefore, according to the court of second instance, the conditions laid down in section 133/A (1) of the AO were not fulfilled and therefore the petitioner was not entitled to compensation for offence.

[13] The court of second instance agreed with the court of first instance that it was not justified to interpret in the broad sense section 133/A (1) of the AO. According to the AO., compensation for offence is conditional on the termination of the proceedings. The court of second instance further held that "it was clear beyond doubt from the explanation of the Grand Commentary to the AO attached to section 133/A that compensation is a legal institution reinforcing the principle of the lawfulness of proceedings, which is linked to the rule of law, and is intended to compensate for confinement or community service served or suffered innocently (on the basis of an unlawfully established liability for an offence)".

[14] The court of second instance also considered that the problem raised by the petitioner was not a constitutional problem, and therefore did not consider it justified to initiate proceedings before the Constitutional Court. In the view of the court of second instance, section 133/A (1) of the AO allows compensation in a narrower scope than compensation in criminal proceedings, only in the context of a review of a final

decision in the context of an extraordinary remedy, when the reviewing authority issues a decision to terminate the proceedings, instead of a decision on establishing liability and imposing a sanction. This regulatory solution is not, according to the court, contrary to the European Convention on Human Rights.

[15] 3 Subsequently the petitioner filed a constitutional complaint.

[16] 3.1 In the complaint, the petitioner explained that Article IV (4) of the Fundamental Law does not limit the enforcement of the compensation requirement contained therein to criminal proceedings, therefore, according to the petitioner, in light of the findings of the Decision 3142/2013 (VII.16.) AB, it should also be applied to the confinement imposed in offence proceedings and to confinement exchanged from fine for an offence. According to the petitioner, section 133/A of the AO is the implementing rule of Article IV (4) of the Fundamental Law with regard to unlawful confinement in offence proceedings. In the petitioner's view, this rule is similar to the repayment of financial sanctions paid under criminal law but found to be unfounded, which was introduced by the Act XCIII of 2013 amending certain Acts of Parliament in the field of policing.

[17] The petitioner also referred to the fact that the cases of compensation in criminal proceedings regulated in section 845 (4)(b) and (c) of the Act XC of 2017 on Criminal Procedure (hereinafter: ACrP) expressly open up the right to compensation also in cases where the legal remedy leads to the imposition of a lighter sentence than the final sentence or to the non-imposition of a sentence restricting personal liberty, without affecting the guilt of the accused.

[18] The petitioner explained that the compensation for the confinement for offence is limited to the case of the termination of the proceedings by extraordinary remedy, i.e. it can be granted in the absence of a finding of liability for the offence. The courts hearing the case consider only this case to be covered by the rules. However, the applicant submits that there is no reason in principle for that restrictive interpretation, since, in his view, the fact that the victim has a fundamental right to compensation for damage caused by any unlawful restriction of liberty justifies a wider scope of the right to compensation, just as in the case of criminal proceedings.

[19] The petitioner pointed out that both judgements in his case had held that he was entitled to compensation for his damage under the general rules of civil law, instead of compensation which the courts had held was not available in the case. According to the petitioner, however, compensation under the general rules is inappropriate in this case for the enforcement of the fundamental right claim under Article IV (4) of the Fundamental Law. In that context, the petitioner submitted that he was not in a position to determine to what extent the local government, the two district offices and the two offence authorities which had acted in his case were culpably responsible for the State's

failure, in a manner contrary to the law, to properly administer his completion of the community service, and that the causal link between the procedural failures, the precise content of which was not known, and the extent of the damage could be effectively challenged by any respondent. According to the petitioner, the rules on compensation are not a kind of *ex gratia* benefit, but rather the essence of the fundamental rights guarantee: that the State will always compensate the citizen in the exceptional case where it has failed to ensure that the deprivation of liberty is carried out in accordance with the law. The minimum fundamental rights expectation deriving from Article IV (4) of the Fundamental Law is, according to the petitioner, that compensation for unlawful detention shall be paid. The challenged judgement appeal restricted the applicant's claim for compensation in a manner contrary to that and is therefore in conflict with the Fundamental Law.

[20] 3.2 With regard to the infringement of Article XV (2) of the Fundamental Law, the petitioner claimed that he had committed an offence not punishable by confinement, where the conversion of the fine imposed to confinement under the system of the AO is not an independent punishment in itself, but only a guarantee of unconditional enforcement, just as the conversion into imprisonment in the case of a fine imposed in criminal proceedings or the recovering of an administrative fine the same way as taxes. It is contrary to the principle of non-discrimination laid down in Article XV (2) of the Fundamental Law to provide for compensation only if the proceedings are terminated, but not otherwise. In his view, an interpretation of the rule which makes compensation for unlawful detention conditional on the procedural outcome of the judicial decision establishing it (termination of the proceedings or a decision of another content) leads to an unnecessary and disproportionate restriction.

[21] Discrimination also takes place, according to the petitioner, in the context of considering as a homogeneous group the persons who have been subject to a wrong conversion for administrative reasons. The AO provides for the reimbursement of an unlawfully paid fine for offence even if the proceedings have not been terminated. The petitioner, who was unable to pay the fine for offence, was treated differently by the contested judgement. If the petitioner had been able to pay the fine, he could have also claimed repayment of the fine paid under section 133/B of the AO, for which it would have been sufficient to revoke or amend the conversion decision under paragraph (1) of the provision. Thus, the final judgement is contrary to the prohibition of discrimination laid down in Article XV (2) of the Fundamental Law because it excluded the petitioner from financial compensation within the group of persons in the same procedural situation as the petitioner (those affected by the conversion). That disadvantage therefore constitutes discrimination contrary to the Fundamental Law on the basis of other status.

[22] The petitioner sought the annulment of section 133/A (1) of the AO on the basis of section 26 (1) of the ACC on the grounds of the constitutionality aspects set out in the petition based on section 27 of the ACC.

[23] 4 The Minister of the Interior explained his position on the petition as follows. Compensation is a legal instrument linked to the rule of law, which reinforces the principle of the legality of proceedings and is intended to compensate for confinement or community service served or performed innocently (on the basis of an unlawfully established liability for an offence). In the Minister's view, the current legislation does not raise any constitutional concerns in this context. According to his position, there is a problem of application of the law, not of legislation, in the case underlying the petition. As the Minister's position puts it: "According to the available data, in the underlying case the public employment service failed to fulfil its obligation to communicate data to the offence registration system and wrongly informed the offence registration authority that the offender had not performed the community service."

[24] The Minister of the Interior is of the opinion that the implementation of Article IV (4) of the Fundamental Law in the petitioner's case can be ensured by way of compensation for damages caused in the scope of administrative powers, since the violation in the petitioner's case is attributable to the failure of the public employment service, rather than on the basis of section 133/A (1) of the AO. As argued in the position of the Minister of the Interior: "In view of the failure of the public employment service, the petitioner is entitled to compensation for damage caused by administrative authority pursuant to section 6:548 (1) to (2) of the Act V of 2013 on the Civil Code."

[25] In connection with the petition claiming a violation of Article XV (2) of the Fundamental Law, the Minister's position argued that, the fact that under section 133/B (1) of the AO – unlike under section 133/A – the offender may claim restitution not only in the case of termination of the proceedings, but also in the case of revocation or amendment of the decision, does not lead to a violation of equal rights. The purpose of this provision is, in the view of the Minister, indeed identical to the legal institution of compensation, but it has a specific feature which ensures that the amount of the fine (costs of the offence) is also refunded in cases where the offender's liability for the offence has been established in whole or in part as a result of the review, but the amount of the fine (costs of the offence) applied is unlawful. The compensation is therefore intended to make good the fine imposed or the costs assessed on the basis of the offence liability established in an unlawful manner, even if the fine (costs) has been adjusted in proportion to the liability during the review.

[26] Finally, the Minister also referred to the fact that the annulment of section 133/A (1) of the AO initiated by the petitioner would deprive the persons deprived of their

personal liberty of their right to compensation. As the position of the Minister of the Interior puts it: "It should be stressed that the currently applicable legislation is appropriate, since if the bodies concerned act on the basis of the above-mentioned legislation and apply it correctly, a case such as the one in the underlying case cannot arise, given that the present case is merely the result of an anomaly due to inadequate procedure."

## II

[27] 1 The provisions of the Fundamental Law referred to in the petition: "Article IV (4) Everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation." "XV (2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

[28] 2 The provision of the AO challenged by the petition: "Section 133/A (1) Compensation shall be paid for the offender for the punishment of confinement for offence served on the basis of a final decision of a court, for the punishment of community service performed on the basis of a final decision of a court or an administrative authority, and for the enforcement of the conversion of unpaid fines and on-the-spot fines into confinement for offence, or for the exchange of the fine to community service, if the proceedings against the offender have been terminated due to the decision of the Constitutional Court, the retrial, the call or motion made by the public prosecutor or the review of the on-the-spot fine (hereinafter together referred to as: review following a final decision)."

## III

[29] 1 The Constitutional Court examined whether the petitions based on section 26 (1) and section 27 (1) of the ACC meet the conditions for admission under the ACC and the Rules of Procedure. Pursuant to section 30 (1) of the Rules of Procedure, if the conditions for rejecting the complaint cannot be established, the complaint shall be admitted. Section 31 (6) of the Rules of Procedure allows that instead of the decision on admitting the complaint the judge rapporteur may submit to the body a draft containing the decision on the merits of the complaint.

[30] 2 The Constitutional Court found that the complaint complies with the statutory requirement of containing an explicit request as laid down in section 52 (1b) of the ACC. The petition indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [section 51 (1) and section 52 (1b) a)



of the ACC]; the procedure of the Constitutional Court was requested in the competences laid down in section 26 (1) and section 27 of the ACC. The petitioner indicated the judicial decision and the statutory provision to be reviewed by the Constitutional Court [section 52 (1b) (c) of the ACC], and the violated provisions of the Fundamental Law [section 52 (1b) (d) of the ACC]. The petitioner explained the essence of the violation of the provisions of the Fundamental Law referred to in the petition [section 52 (1b) (b) of the ACC], provided reasons for the complaint, why the challenged judicial decision and the provisions of the law are contrary to the quoted provisions of the Fundamental Law [section 52 (1b) (e)]. The petitioner submitted an explicit request for establishing the violation of the Fundamental Law and the annulment of the challenged judicial decision and statutory provisions [Section 52 (1b) (f)].

[31] In accordance with section 26 (1) and section 27 of the ACC, the constitutional complaint may be filed, in line with section 30 (1) of ACC, within sixty days of receipt of the contested decision, addressed to the court that proceeded with the case on first instance as regulated in section 53 (2) of the ACC. On 8 March 2022, the legal representative of the petitioner received the judgement No. 56.Pf.636.847/2021/5 of the Budapest-Capital Regional Court. The petitioner's constitutional complaint was received by the court of first instance on 6 May 2022, within the time limit specified in section 30 (1) of the ACC. The petitioner qualifies as an entitled person under section 51 (1) of the ACC and is clearly an affected person as a litigant party in the challenged court decisions. The applicant has exhausted the legal remedies available to him.

[32] 3 As a further condition for the substantive examination of the constitutional complaint pursuant to section 29 of the ACC, it should refer to a violation of fundamental law or a question of fundamental constitutional significance that has a substantial impact on the judicial decision. The Constitutional Court examined whether the complaint submitted under section 26 (1) of the ACC and section 27 of the ACC meets the requirements laid down in section 29 of the ACC.

[33] The complaint submitted under section 26 (1) of the ACC sought a declaration that section 133/A of the AO was contrary to the Fundamental Law on the basis of Article IV (4) and Article XV (2) of the Fundamental Law. The constitutional complaint submitted under section 27 of the ACC also sought an examination of the constitutionality of the challenged court decision on the basis of Article IV (4) and Article XV (2) of the Fundamental Law.

[34] According to section 29 of the ACC, the Constitutional Court shall admit the constitutional complaint if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. The court's decision to reject the claim for compensation for unlawful deprivation of liberty was substantially influenced by the rule on compensation under section 133/A

of the AO and its interpretation in the court decision challenged in the complaint. The petition also raises a question of fundamental constitutional significance, since the Constitutional Court has not yet examined the compatibility of the compensation rule in section 133/A of the AO with Article IV (4) and Article XV of the Fundamental Law, or the constitutional context of the unlawful deprivation of liberty in general in the context of the law of offences.

[35] Based on the foregoing, the Constitutional Court admitted and adjudicated on the merits the constitutional complaint under section 26 (1) and section 27 (1) of the ACC.

#### IV

[36] The petition is unfounded.

[37] 1 In its examination of the constitutionality of the provisions of the AO on compensation, the Constitutional Court started from the fact that the law on offences – as it has pointed out in several decisions – is related to criminal law, as it applies solutions of criminal law and criminal procedure, and thus the requirements of constitutional criminal law are also applicable to the law on offences.

[38] The Constitutional Court has been consistent from the very beginning of its existence in extending the requirements of constitutional criminal law (such as the presumption of innocence or the principle of *nullum crimen sine lege*) to so-called proceedings of criminal nature, including offence-law. [See Decision 41/1991 (VII. 3.) AB, (ABH 1991, 195, 195); Decision 1284/1990 AB, (ABH 1991, 562, 563)]

[39] In its Decision 63/1997 (XII. 12.) AB, in connection with the constitutionality examination of certain provisions of the Act I of 1968 on Offences in force at the time, the Constitutional Court held that “liability for offences – whether the offences committed are of an administrative or criminal nature – is essentially a “culpable responsibility”, i.e. it responds to an injury committed by a natural person in the past and foresees a specific legal sanction – of repressive nature – determined on the basis of culpability. As a corollary, in its examination of the constitutionality of certain provisions of the AO, it takes the principles of constitutional criminal law as a starting point and applies them accordingly.” (ABH 1997, 365, 371) Based on this relationship between the law of offences and criminal law, the Constitutional Court held that the presumption of innocence extends to the law of offences and that the law-maker must ensure that the decisions of the offence authority may be challenged by the courts as a general rule. This requirement was also confirmed in connection with the Act LXIX of 1999 on Offences by the Decision 29/2000 (X.11.) AB, which also required that the principle of *nullum crimen sine lege* and the less stringent rule at the time of the assessment be applied in the law of offences as well (ABH 2000, 193). The Decision

1/2008 (I. 11.) AB derived on the basis of the principles of constitutional criminal law, from the right to a fair trial, the right to a hearing or trial of the offender in the case where the court decides to exchange a fine to confinement (ABH 2008, 51, 64 to 68).

[40] The Decision 38/2012 (XI. 14.) AB pointed out the following in relation to the AO: "Compared to this [i.e. to the rules on offences previously in force], the AO regulates offences solely as a means of combating "criminal acts". The preamble of the Act defines the purpose of the legislation as ensuring "effective action against criminal acts which violate or endanger the generally accepted rules of social coexistence, but which do not present the risks and dangerousness necessary to be punished as offences under criminal law". [...] The AO applies criminal law and criminal procedural law solutions both in its liability doctrine and in its procedural regulation. [...] Since the AO assesses the offence as a criminal act, its regulation has shifted towards the "trivial" criminal law." (Reasoning [23]}, [25] to [26])

[41] 2 The Constitutional Court's case-law on unlawful deprivation of liberty is largely made up of decisions handed down when the Constitution was in force. The decisions of the Constitutional Court on unlawful deprivation of liberty handed down after the entry into force of the Fundamental Law have, in many respects, been maintained by the Constitutional Court, taking into account the specific aspect of compensation for unlawful deprivation of liberty.

[42] 2.1 The Constitutional Court started from the fact that according to Article 55 (3) of the Constitution: "Any individual subject to illegal arrest or detainment is entitled to compensation."

[43] The case-law of the Constitutional Court can be summarised as follows. As stated in the Decision 66/1991. (XII. 21.) AB: "Deprivation of personal liberty is unlawful (illegal, arbitrary) for the purposes of the application of the provisions of the Constitution if it is not taking place for the reasons and under the procedure provided by law. This violation of a fundamental constitutional right [Article 55 (1)] therefore gives rise to a claim for damages [Article 55 (3)] arising from a provision of the Constitution, which may be enforced before a court (Article 70/K). The substantive rules governing the enforcement of this claim for damages can be found in the provisions of the Civil Code on non-contractual liability.

If the unlawful deprivation of liberty occurred in the exercise of public authority, including the criminal authority of the State, liability for damages is governed by the provisions of section 349 of the Civil Code.

This claim may be asserted independently of the compensation rules of the Act on Criminal Procedure. [...]

The fundamental constitutional right of personal liberty may be restricted by an Act of Parliament – the criminal law – by virtue of a permitting provision of the Constitution [Article 55 (1)]. The lawful («statutory») deprivation of personal liberty may also cause unjustified harm. Certain restrictive provisions are accepted as ones being constitutional only if the restriction is necessary and proportionate to the constitutionally recognised aim they seek to achieve. Considering whether there are guarantees for the adequate mitigation of the unavoidable injuries that might be caused by the restriction is part of the evaluation of proportionality. (ABH 1991, 342, 347)

[44] In the Decision 41/2003. (VII. 2.) AB, the Constitutional Court has established that "there is no connection between Article 55 (3) of the Constitution and the rules on compensation, and therefore the provisions on excluding compensation cannot result in a violation of that constitutional provision" (ABH 2003, 430, 436.). The Constitutional Court emphasises that Article 55 (3) of the Constitution provides for the liability of the State for damages in cases of explicitly unlawful pre-trial detention or other forms of confinement (not ordered or performed on a statutory basis or in a statutorily defined procedure) either based on the punitive power of the State or applied by the police or a medical institution, the detailed rules, conditions and limitations of which are regulated in civil law. On the other hand, the institution of compensation (reimbursement) serves the purpose of remedying the mistakes made when exercising the punitive power of the State; its conditions and limitations are prescribed in the laws on criminal procedure (ABH 2003, 430, 436 to 437.).

[45] The Constitutional Court further explained in the above-mentioned decision: "The institution of compensation can, in the most general manner, [...] be traced back to the rule of law declared with a normative content under Article 2 (1) of the Constitution. The State's obligation of compensation is based not upon the unlawful nature of the procedural coercive measure (or the punishment), but upon the responsibility of the State under the rule of law following from the exercise of its punitive power in cases where, during the administration of justice under criminal law, the sanction suffered by someone has been formally lawful, but actually unfounded.

In the case of procedural coercive measures (or punishments) involving the deprivation of liberty, the institution of compensation also follows – in addition to the rule of law – from the constitutional requirements that can be determined through the mutual interpretation of Article 55 (1) and Article 8 (1) and (2) of the Constitution. [...] Therefore, ensuring, in the realm of the State's liability for damages, the adequate elimination of the injuries caused in the case of an error by the court is a necessary element of the proportionality of the deprivation of liberty related to the exercise of punitive power." (ABH 2003, 430, 445)

The Constitutional Court considered it to be a violation of the proportionate restriction criterion under Article 2 (1), Article 55 (1) and Article 8 (1) to (2) of the Constitution if the legislation prevents compensation as a means of remedying the violation of the fundamental right to personal liberty from being effective.

[46] The same aspect was invoked in Decision 104/2009 (X.30.) AB, in which the Constitutional Court held that it does not follow from Article 55 (3) of the Constitution that the State is under an obligation to compensate, in the context of a form of liability for damages without an assessment of fault, all victims of coercive measures of criminal procedure and criminal sanctions involving deprivation of liberty or restriction of freedom taken by the bodies acting in the course of the enforcement of the State's punitive power, which subsequently proved to be unjustified because of the absence or lesser degree of criminal liability. At the same time, it laid down a constitutional obligation on the law-maker to establish rules for the effective enforcement of the right to compensation. It also found an unconstitutional omission, since the legislator had not provided for the prosecutor's and the court's obligation to provide information on the compensation.

[47] 2.2 Article IV (4) of the Fundamental Law provides for the right to compensation for damage caused by the deprivation of liberty in a different way than Article 55 (3) of the Constitution. The current legislation provides for compensation for unlawful deprivation of liberty with a broader scope than Article 55 (3) of the Constitution and explicitly protects the right to compensation for unjustified and unlawful deprivation of liberty in the chapter on fundamental rights. The significance of the regulatory divergence between Article 55 of the Constitution and Article IV of the Fundamental Law was underlined by the Decision 7/2022 (IV.26) AB, which dealt with the fundamental rights significance of the obligation to provide information on the enforcement of the right to compensation under section 583 (5) of Act XIX of 1998 on Criminal Procedure (hereinafter: "old Act on Criminal Procedure"). In relation to the difference between Article 55 (3) of the Constitution and Article IV (4) of the Fundamental Law, the Constitutional Court pointed out the following:

[48] "The right to liberty and security of person was regulated by the Fundamental Law in a manner very similar to the provisions of the Constitution. However, in addition to the partially similar content of the provisions, Article IV (4) of the Fundamental Law differs from the corresponding provision of the Constitution, supplementing it in its content. The most significant difference from the point of view of the present constitutional complaint is that the Fundamental Law allows for compensation not only in the case of unlawful, but also in the case of unjustified restriction of freedom.

Article 55 (3) of the Constitution mentions unlawful pre-trial detention and confinement as grounds for compensation. The Fundamental Law, however, speaks of

unjustified or unlawful restriction of liberty. [...] According to the case-law of the Constitutional Court, the State is also liable to pay compensation for arrest or deprivation of liberty that is unlawful in substantive law, but the Constitutional Court did not base this claim on Article 55 of the Constitution, but on Article 8 (2), the rule of law clause and the right to apply to the courts under Article 57 (1). [...] By contrast, however, the Fundamental Law expressly provides, in addition to unlawfulness, for unfoundedness as a legal basis for entitlement to compensation for damage. In this context, being without a well-founded reason means detention without any basis in fact, as compared with unlawful detention. [...] In view of the fact that the rule laid down in Article 55 (3) of the Constitution is also covered by Article IV (4) of the Fundamental Law, there is no obstacle to the Constitutional Court using its reasoning in relation to Article 55 (3) of the Constitution in cases involving Article IV (4) of the Fundamental Law" (Reasoning [33] to [35]).

[49] The case-law of the Constitutional Court is also consistent – irrespective of the difference in the rules between the Constitution and the Fundamental Law on the claim for compensation for unlawful deprivation of liberty – in that the requirements of the rule of law in relation to the State's monopoly on the exercise of punitive power determine the limits of the lawfulness of the deprivation of liberty. As pointed out in the Decision 10/2021 (IV.7.) AB: "According to the consistent case-law of the Constitutional Court, the monopoly of the State's punitive authority clearly implies the obligation to enforce criminal claims and to operate law enforcement and criminal justice under constitutional conditions. This constitutional obligation justifies that the bodies exercising the State's punitive authority are given effective means to perform their tasks, even if these means are severely restrictive of rights in their essence {Decision 61/1992. (XI. 20.) AB, ABH 1992, 280, 281; Decision 31/1998. (VI. 25.) AB, ABH 1998, 240, 247; Decision 13/2002. (III. 20.) AB; reinforced by: Decision 23/2014. (VII. 15.) AB, Reasoning [39]}." (Reasoning [20]) As the fundamental rights' side of this, "Article IV (1) of the Fundamental Law declares as a general principle the right to personal liberty, which – according to paragraph (2) – may be deprived only for a reason defined by an Act of Parliament and according to a procedure defined by an Act of Parliament" {Decision 3025/2014. (II. 17.) AB, Reasoning [49] and [51]}.

[50] In this context, the Decision 7/2022. (IV. 26.) AB found that "the criteria for the restriction of the right to liberty are therefore determined on the one hand by the provisions of Article I (3) of the Fundamental Law, which apply to restrictions of fundamental rights in general, and on the other hand by the specific rules on the conditions for the deprivation of liberty laid down in Article IV (2) of the Fundamental Law. Article IV of the Fundamental Law focuses on legality in relation to restrictions on or deprivation of liberty, requiring that deprivation may only be carried out for a reason and in accordance with a procedure laid down by an Act of Parliament. However, it

cannot be ruled out that an individual is deprived of his or her liberty unjustifiably or unlawfully, and therefore Article IV (4) of the Fundamental Law stipulates as a strict guarantee requirement that in such cases the individual has the right to redress for the harm suffered. The criterion against a restriction of the fundamental right to liberty is therefore the possibility of effective legal redress for any claim for damages in accordance with the procedure laid down by law {Decision 3142/2013. (VII.16.) AB, Reasoning [18]; Decision 7/2022. (IV.26.) AB, Reasoning [38]}.

[51] In the context of the present case, the Constitutional Court also points out that the regulation of the claim for compensation guaranteed by Article IV (4) of the Fundamental Law is also subject to the requirement of necessity and proportionality against the restriction of a fundamental right, as laid down in Article I (3) of the Fundamental Law. This imposes on the law-maker, in the context of the rules on compensation and damages for unlawful deprivation of liberty, the requirement that the right to claim – that is to say, the definition of the entitlement to compensation and damages and the exceptions to it – may be restricted for reasons of unavoidable necessity in the interests of another fundamental right or constitutional objective. As regards the proportionality of the restriction, the Fundamental Law places a primary requirement on the law-maker as regards the rules governing the enforcement of the claim, requiring, in particular, that the rules should not hinder the effective enforcement of the claim.

[52] 3 In the context of the examination of the petition, the Constitutional Court reviewed the legal context of the provision challenged in the petition, primarily the rules on compensation for damages (reparation and claim for damages) for unlawful deprivation of liberty.

[53] 3.1 Historically, reparation meant compensation for pre-trial detention, remand and punishment suffered by innocently, which was only paid to an actually (materially) innocent person. Over the course of the twentieth century, legislation has gradually moved beyond this interpretation, mainly as a result of international conventions, and has broadened the scope of the grounds for compensation. The grounds for exclusion from compensation followed a similar path: while the original grounds were those relating to the conduct of the factually innocent person which led to his arrest or conviction, subsequent legislation has left more room for judicial discretion. However, the limits to the further extension of the grounds for exclusion were set by the content of the right of defence. This process was illustrated in the Decision 41/2003 (VII.2.), pointing out that: “The expansion of the titles of compensation has led to covering more and more cases where criminal liability is excluded on the basis of the principles of the criminal procedure (lack of evidence, prohibition of more procedures for the same act), or where the commission of a punishable act has been proven, but the

application of punishment is prevented by a cause of a criminal law nature (causes excluding punishability, expiry of the period of limitation).” (ABH 2003, 430, 442)

[54] Section 845 of the Act on Criminal Procedure regulates the legal titles of compensation in a differentiated manner. According to the legal basis for compensation, four categories can be distinguished. The first group includes cases in which the legal basis for compensation is the subsequent termination of the proceedings by the investigating authority or the prosecution after the imposition of a coercive measure against the accused person for a reason specified in the Act on Criminal Procedure.

[55] The second category includes, with the exceptions provided for by the Act, cases where, following the imposition of a coercive measure, the court acquits the accused with final effect.

[56] The third category consists of cases where the court finds the accused guilty by a final decision, but the duration of the coercive measure previously imposed exceeds the duration or the number of the sentence imposed by a final decision or the duration of the measure imposed by a final decision. The reason for compensation is, unlike the titles of compensation claims in the first two categories, the unjustified level of the coercive measure in relation to the sanction imposed or applied by the court.

[57] The fourth category includes cases in which, following the enforcement of a custodial sentence, confinement, reformatory education or compulsory medical treatment under a final judgement, the court acquits the person concerned with final force, on the basis of an extraordinary legal remedy.

[58] 3.2 Partly on the basis of the case-law of the Constitutional Court and partly in order to ensure consistency with international conventions, the rules on compensation for unlawful deprivation of liberty have been amended several times in the current Criminal Procedure Act. At the same time – despite the fact that the decisions of the Constitutional Court have clearly established that the principles of criminal law and criminal procedure apply to the procedure for offences in many respects, precisely because of the criminal nature of the sanctions for offences – the rules on compensation and restitution have not been introduced in the law on offences for a long time.

[59] The institution of compensation and repayment in relation to offences was first regulated by the Act XCIII of 2013 amending certain laws on policing, which entered into force on 1 September 2013. The reasoning of the Act cites two decisions of the Constitutional Court – Decision 38/2012 (XI.14.) AB and Decision 39/2012 (XII.6.) AB – as the reasons for the amendment. Section 133/A of the AO – in parallel with sections 580 to 585 of the old Act on Criminal Procedure in force at the time – only allowed the



submission of a claim for compensation if the proceedings against the offender were terminated following a review after a final decision. The proceedings may be terminated in the cases specified in section 83 of the AO. The cases of termination usually follow the cases of termination provided for in the Act on Criminal Procedure. In terms of its legal effect, a termination decision closes the offence proceedings and, with certain exceptions, precludes the reopening of the proceedings. In principle, it can take place for two reasons: if the statutory conditions for liability are not met or if there are no grounds for imposing a punishment in the case in question.

[60] Section 133/A of the AO on compensation – although in the meantime the rules of the old Act on Criminal Procedure and later the Act on Criminal Procedure have continuously extended the scope of compensation claims – has remained unchanged.

[61] 3.3 The regulation on compensation for unlawful restriction of freedom is dichotomous in nature, insofar as the Act on Criminal Procedure and the AO regulate the legal titles of compensation, while further rules on compensation can be found in the Act V of 2013 on the Civil Code (hereinafter: Civil Code).

[62] In view of the fact that the petitioner did not bring an action for damages under the Civil Code, but an action for compensation under section 133/A of the AO, and accordingly did not initiate an examination of the constitutionality of the compensation rules in its petition, the Constitutional Court only discusses the regulation and judicial practice relating to compensation for damages caused by the violation of personality rights and the exercise of public authority in the context necessary for ruling on the petition.

[63] The general rules on compensation are set out in Book VI of the Civil Code, in the section on liability for non-contractual damages. The law-maker distinguishes between the institutions of payment of damages and compensation along the lines of unlawfulness/lawfulness. Accordingly, if the party who causes the damage by conduct permitted by law and is required by law to pay compensation, that is not a case of payment of damages. Another example of the exception from damage caused by conduct permitted by law, as unlawful damage, is where the conduct of the party causing the damage does not at the same time harm the protected interests of another person.

[64] According to section 6:564 of the Civil Code, the rules on damages are to be applied as appropriate with regard to the manner and amount of compensation.

[65] In addition to Book VI of the Civil Code, Book II also provides for certain special cases of compensation in connection with personality rights.

Sections 2:42 to 2:50 of the Civil Code define certain personality rights and their content, while sections 2:51 to 2:54 of the Civil Code provide for special rules on

compensation for damages caused by the infringement of these personality rights. Pursuant to Section 2:43 (b) of the Civil Code, an action may be brought for infringement of a personality right in the case of infringement of personal liberty. Section 2:51 of the Civil Code provides for sanctions irrespective of imputability, and section 2:52 provides for aggravated damages. According to section 2:52 (2) of the Civil Code, aggravated damages are conditional on proof of the infringement.

V

[66] 1 In the case underlying the petition, the petitioner brought an action for damages under section 133/A of the AO, claiming that the court had found – based on the extraordinary remedy initiated by the prosecution – that the court decision on the conversion to confinement was based on a violation of the law by the employment agency. The final decision of the court hearing the action for damages dismissed the petitioner's action on the ground that, under section 133/A of the AO, an action for compensation may be brought only if the court has terminated the offence proceedings.

[67] In the case underlying petition, the punishment was executed twice on the petitioner, in one case the petitioner exchanged the fine for community service pursuant to section 13 of the AO, and subsequently the court decided to convert the fine into confinement. In view of the community service performed, there was no longer any actual liability for the offence and no longer any claim for a state penalty behind the execution of the sentence of imprisonment.

[68] 2 On the basis of the above-mentioned statutory provisions, it can be established that the AO – as pointed out by the court judgement challenged in the petition – does not provide for a compensation claim for the deprivation of liberty in the case underlying the petition. The petitioner's liability for the offence was not disputed and there was no room for terminating the proceedings on the basis of the retrial. The provisions of the Civil Code presented above – both Book II and Book VI – provide for damages, according to which the condition for compensation for damage is unlawfulness.

[69] 3 With regard to the claim for compensation for the damage protected by fundamental rights, the Constitutional Court examined whether the event of manifestly unlawful deprivation of liberty in the case underlying the petition was unfounded or unlawful – in the light of Article IV (4) of the Fundamental Law.

[70] In the case underlying the petition, the liability of the petitioner was finally and conclusively established by the offence authority, and the petitioner himself did not contest his liability. However, by way of extraordinary remedy, the court found, in

substance, that the total duration of the confinement imposed exceeded the number of daily items of fine imposed and the duration of the community service actually served. The case underlying the petition is related to the compensation case provided for in section 845 (3) of the Act on Criminal Procedure. Pursuant to section 845 (3) of the Act on Criminal Procedure, notwithstanding a finding of guilt, the accused person is entitled to compensation if the duration of the custodial sentence, confinement, community service, reformatory education or the number of days of the fine imposed by the final judgement exceeds the duration of the pre-trial detention, preliminary compulsory medical treatment, criminal supervision or detention ordered before the imposition of such measures. It is in common in these cases that they are intended to compensate for deprivation of liberty executed without due ground, without prejudice to the well-foundedness of the court decision finding the offender guilty.

[71] In the offence case underlying the petition, it is the deprivation of liberty itself, and not the final decision establishing the offender's liability, which is unfounded, without prejudice to the liability of the petitioner. The petitioner's liberty was restricted by the court's decision on confinement established by way of exchange. However, the court's decision was based on the information it had received from the employment service enforcing the offence. The court ruled on the question of conversion to confinement on the basis of the information available to it at the time of the decision, in the light of section 12 of the AO. On the basis of the information available to it and in the light of the provisions of the AO, the court would have acted unlawfully if it had not ordered the exchange. Therefore, the court's decision to exchange to confinement could not be, at the time it was made, conceptually against the law. The violation of the law – as the Minister's position correctly represents this interpretation – did not occur in the proceedings of the court, but in the proceedings of the employment agency. Consequently, a violation of the law – and therefore a corresponding claim for damages – can only be raised in connection with the procedure of the employment agency. However, it was not the employment service that decided on the restriction of liberty (confinement), but the court.

[72] This places the petitioner in the impossible situation of being able to bring an action for damages against the employment agency only for the unlawful processing of data. The court's decision on the deprivation of liberty – since it was not unlawful – cannot, under the rules in force, serve as a basis for an action for damages or compensation. An action for damages is precluded by the fact that the court decision on the deprivation of liberty was not unlawful, and an action for damages cannot be brought because the AO's chapter on damages does not allow for the payment of damages if the offence proceedings cannot be terminated, even though the decision of the court on the deprivation of liberty (or its duration) was unjustified. Thus, under the legislation in force, the resulting situation is constitutionally unjustifiable, whereby

an offender who is deprived of his liberty by an unjustified decision of the court while the sentence imposed by a final decision has already been executed once, cannot receive any compensation.

[73] 4 Article IV (1) and (2) of the Fundamental Law establishes the right to personal liberty and authorises its restriction by law. Article IV (4) of the Fundamental Law also provides for protection at the level of fundamental rights for the claim of compensation for damages in cases where the restriction of liberty is unjustified. It follows from this, and from the principle of the rule of law in general, that the State may not discharge the responsibility arising from the exercise of punitive power in cases where a person suffers a deprivation of liberty which is formally lawful but unjustified in substance. According to the case-law of the Constitutional Court, "the institution of compensation (reimbursement) serves the purpose of remedying the mistakes made when exercising the punitive power of the State; its conditions and limitations are prescribed in the laws on criminal procedure" (Decision 41/2003. (VII.2.) AB, ABH 2003, 430, 436–437.), and "the State under the rule of law may not discharge the responsibility following from the exercise of its punitive power in cases where, during the administration of justice under criminal law, the sanction suffered by someone has been formally lawful, but actually unfounded" [Decision 41/2003 (VII.2.) AB, ABH 2003, 430, 445].

[74] It follows from the protection of the claim for compensation for damages at the level of fundamental rights – and also on the basis of the consistent case-law of the Constitutional Court – that law-maker has to lay down rules and, in the application of the law, to interpret those rules in such a way that compensation, as a means of remedying the damage to the fundamental right to personal liberty caused by a coercive procedural act, is suitable for the intended purpose and is effectively enforced.

In the case underlying the constitutional complaint, the petitioner is not able to assert a claim for compensation for the unjustified restriction of liberty imposed on him as a result of the undifferentiated rules of the AO. In his case, the restriction of liberty was imposed despite the fact that the State's punitive claim had been extinguished by the execution of the sentence imposed by the final judgement. Taking into account the simple criminal nature of the Offences Act and the constitutional requirements against the fundamental rights content and the restriction of Article IV (4) of the Fundamental Law, the Constitutional Court found that the essential content – as derived from the Fundamental Law – of the provisions of the Offences Act concerning compensation is incomplete.

[76] According to section 46 (1) of the ACC, if the Constitutional Court, in its proceedings conducted in the exercise of its powers, establishes an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the body that committed the omission to perform its task and set a time-limit for that.

In order to establish an unconstitutionality manifested in an omission, two conditions must be met: existence of the omission of the law-maker and the resulting unconstitutional situation.

[77] In the present case, the Constitutional Court concluded that the absence of a statutory provision in the AO on a claim for compensation against the State for unjustified restrictions of freedom is a failure of the law-maker to act in a manner that is contrary to the right to personal freedom under Article IV (1) of the Fundamental Law and to Article IV (4) of the Fundamental Law. In view of this, the Constitutional Court, on the basis of section 46 (1) and (2) (c) of the ACC, established in the holdings of its decision an unconstitutionality manifested in an omission, and, by setting a time limit, called on the Parliament to remedy this.

[78] 5 The Constitutional Court draws the attention of the law-maker to the fact that the omission indicated in the holdings of the decision may be remedied by a uniform regulation of the different cases of differential compensation for unjustified confinement in excess of the sentence set out the final judgement. This should include appropriate regulation of the cases of exclusion from compensation in the context of the definition of the various categories of compensation, in accordance with the requirements laid down by the Constitutional Court in its previous decisions on the subject.

[79] 6 Having established that the challenged legislative provision is contrary to the Fundamental Law in the form of an omission, the Constitutional Court rejected the constitutional complaint based on section 26 (1) of the ACC, which claims that Article IV (4) of the Fundamental Law has been violated and which seeks the annulment of section 133/A of the AO. With regard to the finding of an infringement of the Fundamental Law by omission, the Constitutional Court, in accordance with its established case-law, did not examine the further infringement of the Fundamental Law alleged by the petitioner – the infringement of the prohibition of discrimination {see for example: Decision 12/2017. (VI.19.) AB, Reasoning [69]; Decision 4/2018. (IV.27.) AB, Reasoning [57]}.

[80] 7 In its complaint pursuant to section 27 of the ACC, the petitioner initiated the declaration that the judgement No. 56.Pf.636.847/2021/5 of the Budapest-Capital Regional Court was contrary to the Fundamental Law and its annulment on the same grounds as those stated in the constitutional complaint pursuant to section 26 (1) of the ACC. In view of the fact that the Constitutional Court had already established the violation of the Fundamental Law on the grounds of an unconstitutional omission in the AO on the same grounds as those set out in the motion under section 27 of the ACC, rejected the motion under section 27 of the ACC.

VI

[81] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of section 44 (1) of the ACC.

Budapest, 27 June 2023.

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unable to sign

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