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# A REVIEW OF THE "CUMULATIVE THREE STRIKES"

**Zsanett Dorang**[1]

**ABSZTRAKT** ■ Kutatásom során 43, a Kúria által felülvizsgálati eljárásban meghozott határozatot tekintettem át, csoportosítottam és kívánok bemutatni a tanulmányomban. Ezek a döntések a 23/2014. (VII. 15.) AB határozatot követően születtek, amelyben az Alkotmánybíróság megsemmisítette a korábbi és a jelenleg hatályos Büntető Törvénykönyv – a köznyelvben elhíresült megnevezéssel élve – halmazati három csapásra vonatkozó rendelkezését.

Kutatásom során olyan büntetőjogi és büntető eljárásjogi kérdésekkel foglalkoztam, mint hogy mely esetekben enyhítette a Kúria a büntetések tartamát és mikor tartott azokat indokoltnak, annak ellenére, hogy a büntetési tételkeretet az ügyekben eljáró bíróságok még a megsemmisített szakasz alapján állapították meg. Avagy, mely indokok és körülmények okán születtek ellentétes Kúriai döntések az alkalmazandó jogszabály tekintetében a felülvizsgálati eljárás során.

**ABSTRACT** ■ In my research, I reviewed and categorized 43 decisions made by the Curia in review proceedings. My findings are summarized in this study. These decisions were made after the Constitutional Court (in its decision 23/2014. (VII. 15.)) annulled the provisions related to cumulative three strikes in the Penal Code both in the previous and current versions.

This paper examines the following questions: when did the Curia reduce the duration of penalties? When did the Curia assess whether these penalties are justified, even though the penalty range had been determined by the lower courts based on the annulled provisions? The paper also examines the reasons and circumstances that led to conflicting decisions by the Curia regarding the applicable laws during the review proceedings.

**Kulcsszavak:** halmazati három csapás, halmazat, büntetéskiszabás, felülvizsgálati eljárás, Kúria, Alkotmánybíróság

## 1. Introduction

This study presents the concept of 'cumulative three strikes' introduced by Act LVI of 2010, amending Act IV of 1978 on the Criminal Code (in the following: amended law). The paper begins with discussing the circumstances and reasons

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for the introduction of this legal institution, as well as its brief judicial practice. Then, I will expound on the reasons for its annulment by the Constitutional Court and the subsequent review procedures. During my research, I analysed 43 review decisions found in the anonymized court decisions. The investigation is divided into two parts: the first part deals with criminal aspects. The examined judgments are categorized into eight different groups based on the decisions of the Curia.

1. The court that adjudicated the final decision imposed a life imprisonment sentence, but the Curia commuted it to a fixed-term imprisonment.
2. The court that adjudicated the final decision imposed a life imprisonment sentence, and the Curia deemed it proportionate, thus upholding the sentence.
3. The convicted are repeat offenders with a history of violence who committed at least three violent crimes against persons within an accumulation.[2]
4. The convicted are repeat offenders who committed at least three violent crimes against persons within an accumulation and the Curia found their punishment proportionate.
5. The convicted are repeat offenders who committed at least three violent crimes against persons within an accumulation and the Curia found their punishment unproportionate.
6. The court that adjudicated the final decision imposed a fixed-term imprisonment, and the Curia found the duration of the punishment proportionate, and thus upheld it.
7. The court that adjudicated the final decision imposed a fixed-term imprisonment, but the Curia found it to be severe and reduced the sentence.
8. The convicted individuals were juveniles.

The second part, related to the judgments, delves into criminal procedural issues. Specifically, I analyse why the practice of the Curia differed regarding the applicable legislation when –at the force of the examined judgments– the Act XIX of 1998 on the Code of Criminal Procedure (in the following: Criminal Procedure (1998)) clearly defined it.

My goal is to provide a detailed presentation about the entry into force, annulment, and subsequent review of the 'cumulative three strikes', thereby offering a comprehensive overview of its history in Hungary.

[2] Point 17. § 137 of Act IV. of 1978 on the Criminal Code and the Point 26. § 459(1) of Act C of 2012 on the Criminal Code specifies what violent crime against the person shall mean.

## 2. Circumstances of the legislation

According to the justification of the amended law, the legislator modified and tightened the rules due to the voters' preferences. Therefore, the National Assembly felt obligated to ensure that punitive measures supported by the voters in criminal policy were enacted as soon as possible. The law thus incorporated a significant tightening of penalties into the Hungarian criminal law system for repeat offenders who commit violent crimes against individuals, which in the most serious cases could lead to life imprisonment. At the same time, – for identical criminal policy considerations – the law reinstated the sentencing rules in place before March 2003, known as the 'median value penalty', which, as the legislative said, can guide the correct application of the Penal Code's sentencing system. Therefore, the law required that the median value of the penalty range be a starting point for the judges in the assessment of the crimes. However, this did not mean a narrowing of the penalty range or create a sentencing imperative. It also did not affect the provisions that provide possibilities for mitigating penalties like § 87. Act IV of 1978 on the Criminal Code (in the following: Criminal Code (1978)) or the § 82. Act C of 2012 on the Criminal Code (in the following: Criminal Code (2012)). According to the reasoning, the legislator wanted to provide only guidance for the courts. Moreover, it was emphasized after the amendment that "the possibility that the court will compare and evaluate individual circumstances at its discretion is not excluded, as the circumstances will not be exhaustively listed or weighted at the statutory level. Accordingly, the legislator merely creates a realistic reference point in the law for discussing the circumstances reflected in the court's assessment of the sentencing. In addition, the law also reflects the legislator's expectation that the court should provide a comprehensive reasoning for the use of the penalty range. The provisions of the law obviously do not affect the principled guidance of sentencing practice based on the experience of penalty imposition."[3]

The concept of the median value penalty can also be understood as a form of tightening, albeit a mild one, as it does not provide specific rules but only offers guidance to redirect court thinking. This was originally introduced by the Act LXXXVII of 1998 on the amendment of criminal laws, which was also suited to the requirements of the Constitutional Court. Therefore, this legal institution did not represent an innovation, especially since it continued to exist in judicial practice even after it was repealed.[4]

[3] General reasoning, and § 1. of the reasoning of the amended law.

[4] § 18 of the Act LXXXVII of 1998 on the Amendment of Criminal Laws, István Kónya: A három csapás bírói szemmel. *Magyar Jog*, 3/2011, 129–132.

The § 2. of the amended law established the 'three strikes law' into Hungarian criminal law, and § 3-4. contained provisions for tightening penalties for recidivists, particularly habitual recidivists, repeat offenders and repeat offenders with a history of violence. However, the justification did not provide any specifics and essential information about the rules, or the circumstances of the rules just repeated them.[5]

## 3. 23/2014. (VII. 15.) Constitutional Court decision

### 3.1. The motion

The standpoint of the motioning judicial council is that the provisions of Section 85(4) of the Penal Code (1987) and Section 81(4) of the Penal Code are incompatible with the Fundamental Law in several respects. Firstly, it is argued that, based on Article B) (1) of the Fundamental Law, the conditions for the mandatory imposition of life imprisonment as a cumulative penalty, according to the contested sections—taking into account the rules of the Criminal Procedure Code—are not clear and precisely predictable, thus violating legal certainty.[6] Secondly, the petitioning council contends that it is inconsistent with the principle of equal treatment and the prohibition of discriminatory treatment outlined in Article XV of the Fundamental Law since some offenders may find themselves in a more favourable or disadvantageous position solely depending on their procedural situation. Thirdly, the challenged provisions were considered contrary to Article I (3) and Article II of the Fundamental Law since, in their view, it does not follow the requirement of proportionality expected from constitutional criminal law to impose mandatory life imprisonment on an offender who commits non-life imprisonment crimes for the first time in an accumulation. Finally, the motioning judicial council found the challenged provisions incompatible with Article 25(2) (a), Article 26, and Article 28 of the Fundamental Law since, in their opinion, the application of the contested provisions unjustifiably limits judicial discretion and does not allow for judicial individualization.[7]

It is worth noting that this same law was the one that, through its amendment, had to exclude repeat offenders from the possibility of conditional sentences. This is also part of the legislative policy that began around 2008 and aims to take more serious action against repeat offenders.

5 The justification of the amend. law. § 3-4.

6 Decision 23/2014. (VII. 15.) of the Constitutional Court [3] reasoning.

7 Ibid. [4]-[6] reasoning.

### 3.2. International outlook and issues discussed

The Constitutional Court has reviewed the 'three strikes law' in the United States of America and Slovakia. In both countries, the application of cumulative three strikes is conditional on multiple convictions, which means the rules apply to repeat offenders and cannot be applied solely in the case of a cumulative sentence.[8]

The Constitutional Court examined two questions based on the motions:[9]

1. Whether, based on the contested provisions, the imposition of penalties complies with the requirement of legal certainty arising from the rule of law, specifically the criteria of foreseeability and predictability.[10]

2. To what extent the mandatory application of life imprisonment contained in the contested provisions comply with the constitutional criteria related to a rule of law penal system derived from Article B) (1) of the Fundamental Law.[11]

### 3.3. The criteria of predictability and foreseeability

The Constitutional Court briefly described the legal history of the Hungarian legislation on the stricter sanctioning of repeat offenders, then compared the contested rules of the Criminal Code (1978) and the Criminal Code (2012). The Constitutional Court found that one of the conditions for the application of the provisions of § 85(4) of the Criminal Code (1978) was that violent crimes against at least three persons should be tried in one proceeding. While the application of § 81(4) of the Penal Code (2012) was narrowed. The application of this sanction was possible in the case of at least three *completed* offences of violence against a person committed on *different dates*. Furthermore, the provisions of the general part (§ 82) allowing unlimited mitigation were applicable.[12]

According to the opinion of the Criminal College 5/2013 (XII.11.), since one of the conditions was that the offence had to be committed at different times, the stricter rules could only be applied in the case of an accumulation. However, an accumulation is achieved even if a relatively short period elapses between the offences. If so, the fact that the offences were committed immediately after

8 Ibid. [17]-[19] reasoning.

9 The Constitutional Court examined the legal issue only in connection with legal certainty because it could already establish unconstitutionality based on this, rendering further examination of the violations of other fundamental rights unnecessary.

10 Ibid. [43] reasoning.

11 Ibid. [55] reasoning.

12 Ibid. [46] reasoning.

each other would meet this requirement. On the other hand, the application of this section was excluded if the acts were part of a continuing offence, or if they constituted a multi-movement offence, or if they were partly formal aggregation, and partly accumulation.[13]

Overall, while the Criminal Code (2012) allowed the use of the aggravated cumulative penalties in a narrower range, there was no change in the fact that to use the contested provisions the crimes had to be judged in one procedure.[14] Several factors may influence whether offences are tried in one or separate proceedings. This may depend on whether law enforcement authorities or the courts are aware that all offences have been committed, or whether it is considered appropriate to group cases in criminal proceedings, as there are no binding rules on this. Furthermore, the possibility of joinder the cases at a later stage of the criminal proceedings is also available to the judge, which may thus create the possibility of applying stricter cumulative rules ex post.[15]

Thus, different procedural legal situations can lead to different penalties for those who commit three violent crimes against persons. The narrowing of the scope of the offences has not solved the problem, and it continues to lead to unpredictability in the application of the stricter cumulative rules. If the three offences of violence against persons were tried in a single proceeding, the punishment had to be determined based on the stricter cumulative sentencing provisions. On the other hand, if the same three offences were tried in separate proceedings and the offender had committed all the offences prior to the date when the first judgment was delivered, the sentence had to be imposed within the maximum of the penalty range of the Special Part of the Criminal Code, following the provisions on the merger sentences. This leads to different sentencing.[16] "The term of merged sentences shall be determined as if imposing a cumulative sentence. Nevertheless, the term of merged sentences shall be at least equal to the most severe sentence and the minimum penalty or one-third of all penalties combined, however, it may not exceed the combined duration of all sentences."[17]

In summary, the Constitutional Court found that the legislator had neglected to provide the substantive and procedural criteria to ensure that the conditions for imposing a sentence are the same regardless of the procedural status of the

13 5/2013. (XII. 11.) Criminal College opinion I.
14 Decision 23/2014. (VII. 15.) of the Constitutional Court [31], [50] reasoning.
15 Ibid. [47]-[48] reasoning.
16 Ibid. [50]-[53] reasoning.
17 Criminal Law (2012) § 94.

accused. So, there was a lack of consistency between the cumulative rules and the rules of merger sentences.[18]

### 3.4. Mandatory application of life imprisonment

The Constitutional Court has determined that the constitutional justification and even necessity of imposing more severe penalties for repeated offenders. Furthermore, it may be constitutional on its own when the law prescribes guiding or mandatory rules in the imposition of penalties. However, the condition for this is that it must occur in the interest of a constitutionally justifiable goal, respecting the criminal law guarantees specified in the Fundamental Law, as well as the fundamental principles of criminal law and basic rights.[19]

The Penal Code (2012) § 81(4), while narrowing the cases of applicability, does not change the instances where life imprisonment must be mandatorily applied. According to the Constitutional Court, the mandatory application of life imprisonment (in cases of different substantive criminal offenses) cannot be constitutionally justified even for repeat offenders, as the regulation does not allow the court to evaluate each committed act according to its actual gravity. Therefore, the court is unable to assess the crime, the danger the offender poses to society, the degree of guilt, and other aggravating and mitigating circumstances by the gravity of the offenses, thus disrupting the coherent unity of the current penal system.[20] The Constitutional Court also stated that the rules would have been constitutional if the legislator had provided for the possibility of judicial discretion between applying imprisonment for a term or life imprisonment, thereby allowing for the imposition of individualized penalties.[21]

Based on the reasons explained above, the Constitutional Court, under Article B) (1) of the Fundamental Law, established the unconstitutionality of Section 85(4) of the Penal Code (1978) and Section 81(4) of the Penal Code (2012). It annulled retroactively Section 81(4) of the Penal Code, declaring the provision null and void as of its inception, thus precluding its application. Furthermore, the Con-

18 Decision 23/2014. (VII. 15.) of the Constitutional Court [52], [54] reasoning.

19 Ibid. [58]-[60] reasoning.
According to the Penal Code (2012), under specified conditions, certain penalties (expulsion [§ 59(1)], deprivation of civil rights [§ 61(1)]) must be mandatorily imposed, or measures (suspension of a prison sentence or probation with mandatory supervision [§ 119]) must be applied.

20 Ibid. [62] reasoning.

21 Ibid. [63] reasoning.

stitutional Court ordered the review of final and binding criminal proceedings conducted with the application of the provisions deemed unconstitutional.[22]

### 3.5. Dissenting opinion

There was a dissenting opinion written by Egon Dienes-Oehm. According to the constitutional judge's standpoint, retroactive annulment was not justified; instead, the constitutional violation, manifesting as an omission, could have been remedied by establishing it without retroactive effect. The legislator should have been urged to eliminate the lack of harmony in cumulative and merger penalties and create the statutory conditions for uniform punishment. Constitutional Judge Béla Pokol also joined in the dissenting opinion.[23]

## 4. Review of cumulative sentences

A total of 49 references or mentions were made on the three strikes rules of the ones that I found. Out of these, in 7 cases, the defendant submitted the motion, relying on either the previous Penal Code § 416(1) a) or b), or the currently effective Penal Code § 648 a) or b). That is, for violation of substantive criminal law rules or procedural rule violations. However, both the previous and currently valid Penal Codes provide the possibility to initiate a review procedure based on a Constitutional Court decision.[24] The motions based on the other provisions of the Criminal Procedure Act – not under the previous Criminal Procedure Act § 416(1) e) or the current Criminal Procedure Act § 648 c) – were unfounded. The courts did not impose the penalties using the annulled section in those decisions, therefore, I exclude them from the classification.[25]

Thus, in the remaining 43 judgments examined, the applicants submitted their motions for review because the Constitutional Court ordered the review of the respective criminal proceedings.[26] In five cases of these decisions, the Curia conducted the proceedings in favour of both perpetrators, and in one case, in

[22] Ibid. [65]-[70] reasoning.

[23] Ibid. [72]-[75] reasoning.

[24] The previous Criminal Procedure Act § 416(1) e) paragraph and the currently effective Criminal Procedure Act § 648 c) paragraph.

[25] Curia Bfv.I.113/2018/5., Bfv.III.1776/2017/11., Bfv.II.737/2021/5., Bfv.I.1698/2016/5., Bfv.I.1235/2021/11., Bfv.II.33/2019/7., Bfv.II.9/2015/6.

[26] That is, the motion was based on either the previous Criminal Procedure Act § 416(1) e) paragraph or the currently valid Criminal Procedure Act § 648 c) paragraph.

favour of all three perpetrators. Since different decisions were made in several cases regarding the defendants, it will occur that one judgment will appear in multiple groups. Therefore, in the following, I present the results of decisions affecting 49 defendants.

### 4.1. Group 1. – Disproportionate life imprisonment

The first group includes judgments where life imprisonment was imposed solely based on the previous Penal Code § 85(4) or the current Penal Code § 81(4). Due to the annulment of these provisions, the Curia examined in the review procedure whether penalties can be considered legal and proportionate based on the previous Penal Code § 85(3) or the new Penal Code § 81(3). In a total of five judgments – involving six defendants – the decision was made that the originally imposed life imprisonment without the weighing required in the second part of the annulled section is disproportionately severe within the legal range, and therefore, they were reduced to fixed-term imprisonments. Additionally, the reference to the unconstitutional section was omitted from the judgment by the Curia.[27]

### 4.2. Group 2. – Proportionate life imprisonment

One judgment in the second group includes where the court –that rendered the final judgment – imposed a life imprisonment, referring to the previous Penal Code § 85(4) paragraph. However, the imposition of this sentence is possible independently of the annulled provision. Because the most serious crime committed by the convict was a qualified homicide, which is already punishable by life imprisonment on its own. The Curia considered the exceptional gravity of the criminal acts and the identified aggravating and mitigating circumstances and based on these, deemed the penalty proportionate in the review procedure.[28]

[27] Curia Bfv.I.1270/2014/6. (2 defendants), Bfv.III.1275/2014/4., Bfv.II.1349/2014/5., Bfv. III.1350/2014/4., Bfv.I.1705/2014/4.

[28] Curia Bfv.I.22/2015/5.

### 4.3. Group 3. – Repeat offenders with a history of violence

The following group belongs the repeat offenders with a history of violence. However, the Constitutional Court's decision did not affect the rules concerning repeat offenders with a history of violence, which means that "the minimum sentence for violent crimes against the person, if committed by repeat offenders with a history of violence and if carrying a higher sentence, the maximum penalty prescribed for such crimes, if punishable by imprisonment, shall be doubled. If the maximum penalty increased as per the above would exceed twenty years, or if either of the said offenses carry a maximum sentence of life imprisonment, the perpetrator in question must be sentenced to life imprisonment."[29] Therefore, for these offenders, the penalty range unchanged even after the annulled section. The Curia only examined whether the imposed sentences were disproportionately severe. In all five verdicts, where one imposed life imprisonment and the others fixed-term imprisonments, the Curia determined that the punishments were proportionate and thus upheld them.[30]

Let me highlight a decision where also a repeat offender with a history of violence committed three violent crimes against individuals in aggregate. However, due to the quality of being a repeat offender with a history of violence, the courts imposed the sentence solely based on 97/A(1) of the Penal Code (1978). During the review process, the Curia examined whether the provision applied by the lower courts was the section that the Constitutional Court later annulled. The Curia answered this question negatively, as the penalty range was altered by the perpetrator's status as a repeat offender with a history of violence. Therefore, the Curia deemed the motion by the Supreme Prosecution unfounded.[31]

### 4.4. Group 5. – habitual and repeat offenders, unproportionate punishment

In the fourth group, I placed habitual recidivists and repeat offenders. The rules are also stricter for repeat offenders. In that case, the upper limit of the penalty for the most serious crime in an accumulation must be increased by half.[32] Compared

[29] Current Penal Code § 90(2), 23/2014. (VII. 15.) Constitutional Court decision. It was regulated in the previous Penal Code § 97/A.(1) with the same content.

[30] Curia Bfv.II.1349/2014/5., Bfv.III.488/2014/6., Bfv.II.1487/2014/3., Bfv.I.1558/2014/8., Bfv. II.1677/2014/5.

[31] BH2015.145. (Curia Bfv. I.1751/2014/7.).

[32] Current Penal Code § 80-81, 89., previous Penal Code § 83, 85, 97.

to the penalty range established by the annulled provision, this was a reduction. Thus, the Curia examined whether the imposed penalties could still be considered severe under the changed penalty range. There were six decisions where not only were the reduced penalty range followed, but even within the range of median value, a proportionate punishment was handed down.[33] Therefore, the Curia upheld these decisions. In one decision, although the imposed imprisonment fell into the changed penalty range, the Curia reduced the punishment to align better with the median value of the penalty range due to a larger number and weight of mitigating circumstances.[34]

### 4.5. Group 6. – Fixed-term imprisonment, and the Curia upheld the punishment

The sixth can be the largest group, where courts imposed fixed-term imprisonments on offenders using the unconstitutional provision, but even ignoring this section, the Curia did not find the penalties excessive and, thus, upheld them. There is a total of 21 such decisions, out of which in 7 cases, the imposed penalties remain below the median value within the reduced penalty range.[35]

### 4.6. Group 7. – Fixed-term imprisonment, and the Curia mitigated the punishments

The judgments that belong to this category are those where in the final judgment, the court imposed a fix-term imprisonment using the annulled sections. In the review procedure, the Curia disregarded these sections and, thus, considered

[33] Curia Bfv.II.1580/2014/4., Bfv.I.1679/2014/3., Bfv.I.1324/2014/3., Bfv.I.1318/2014/7., Bfv.II.1553/2014/3., Bfv.I.1432/2014/4.

[34] Curia Bfv.II.1433/2014/7.

[35] Curia Bfv.II.1473/2014/7., Bfv.II.1583/2014/11. (contained a decision for three defendants, and each one is belonging to this group), Bfv.I.1516/2014/8., Bfv.III.1176/2014/6., Bfv.III.1551/2014/4., Bfv.II.1538/2014/4., Bfv.II.1271/2014/8., Bfv.III.1557/2014/5., Bfv.I.1465/2014/5., Bfv.III.2010/2015/4., Bfv.I.19/2015/8. (contained a decision for two defendants, and each one is belonging to this group).
The verdicts in this group where the imposed penalties remain below the median value within the reduced penalty range: Curia Bfv.III.1286/2014/4., Bfv.III.1410/2014/7., Bfv.I.1525/2014/3., Bfv.III.1554/2014/3., Bfv.II.1595/2014/4., Bfv.III.1608/2014/4., BH2015.270.

the imposed penalty to be unlawful or excessive in the reduced penalty range, and therefore mitigated them.[36]

### 4.7. Group 8. – Juveniles

The eighth group pertains to juveniles. Different provisions are found for juveniles in terms of the aggregate rules, however, as clarified by the Curia, it was not excluded that the annulled section could be applied to juveniles by the courts.[37] However, for crimes punishable by imprisonment exceeding five but not exceeding ten years, a maximum of five years of imprisonment can be imposed on a juvenile, and in the case of aggregate penalties, it is limited at seven years and six months. However, for example, the penalty range for an armed robbery is from five to ten years of imprisonment according to the current Criminal Code. Applying the unconstitutional provision, the upper limit of this penalty range would be twenty years. On the other hand, in the case of a juvenile, only seven years and six months can be imposed in this scenario, making it impossible to apply this provision to them. But there were possibilities to apply it, under the previous Penal Code if the upper limit of the most serious crime's penalty among the accumulated crimes not exceeding three years of imprisonment, or under the current Criminal Code, it is not exceeding two years of imprisonment.[38]

That being said, in the other two cases, the Curia found the prosecutor's motion justified. In both cases, a qualified form of robbery had occurred, which crime's penalty range is five to fifteen years of imprisonment under the previous Penal Code.[39] In cases where the punishment for the crime exceeded ten years of imprisonment, a maximum of ten years of imprisonment could be imposed on juveniles, which could be raised to fifteen years in the case of cumulative penalties. Therefore, the courts could not apply the annulled section because if they doubled the fifteen years, it would have exceeded twenty years, and a life sentence would have to be imposed. So, in my opinion, the motions for review were also excluded by the law for juveniles in these two cases. In the last case, where the most serious offense was aggravated battery, the special rules could

[36] Curia Bfv.II.1340/2014.5., Bfv.II.1544/2014/6., Bfv.III.1416/2014/6., Bfv.II.1409/2014/5., Bfv.III.1518/2014/4.

[37] Previous Criminal Code § 108, 110, 120. Current Criminal Code § 109, 123.

[38] Curia Bfv.III.1410/2014/7. 10., Bfv.III.1434/2014/7. 6.

[39] Curia Bfv.II.1595/2014/4., Bfv.I.1516/2014/8.

not prevent the upper limit of the penalty range from doubling. Thus, the three-year upper limit could be raised to six years, so it remained within the maximum penalty range of 7 years and 6 months.[40]

### 4.9. Conclusion

Of course, the Curia modified each verdict which it found justified, and omitted references to the annulled section. However, it can be stated that out of the total of 43 reviewed verdicts, encompassing decisions for 49 offenders, in 37 cases, the Curia did not find the imposed penalties severe or in violation of the law, even with the changed and reduced penalty range in effect. It can be stated that though the courts imposed penalties with this later annulled section and in 75.5% of the cases, the penalties were lawful and proportional even when the Curia disregarded the annulled section. When examining this percentage, it must also be considered that the annulled section's second part mandated, without discretion, the imposition of a life sentence under certain circumstances. It can be stated that the rules which lack judicial discretion in criminal law, especially in the sentencing most of the time, are not advisable.

## 5. The applicable law

In the next part of the paper, I discuss the issue of the Criminal Code to be applied in the review procedure. Moreover, I summarize the experiences from 42 judgments.[41] In this classification, each judgment will appear only once considering that it does not matter if a verdict contained decisions for multiple offenders, as the Curia determined the applicable law only once in each case.

Both, the Criminal Procedure Code (1998) and the Act XC of 2017 on the Code of Criminal Procedure (in the following: Criminal Procedure Code/Law [2017]) stipulate that if a request for review is submitted because of the annulment of a legal provision by the Constitutional Court and the review of the relevant criminal proceedings has been ordered, then the review request

[40] Curia Bfv.III.1434/2014/7.

[41] Of the 43 decisions, one was an order because the application was unfounded. Thus, the question of the law to be applied did not arise in that decision either, therefore I will take 42 judgments as a basis for the following.

must be adjudicated in accordance with the law in force at the time of the review.[42]

Out of the 42 verdicts, the Curia applied the Criminal Code in effect at the time of review in 10 cases, as prescribed by the Criminal Procedure Code.[43] Among these, in 3 cases, since the court established guilt based on the previous Criminal Code in the contested decision, but the law in effect at the time of review contained the same or milder rules for the convicted person, the Curia reclassified the crimes according to the new law, based on the temporal scope of the law. [44] In 31 cases, the Curia proceeded with the application of the law that the court used in the challenged decision.[45] However, out of these in one verdict the Curia also examined whether the court, which adjudicated the final decision, chose the applicable Criminal Code properly.[46] Naturally, the Curia in every case ignored the annulled provision.

## 5.1. The relevant legal provisions

It is important to note that the previous Criminal Procedure Act (1998) and the effective Criminal Procedure Act (2017) – in terms of the provisions relevant to the study – have the same content. However, at the time when all the examined judgments were rendered, the previous Criminal Procedure Act (1998) was in effect. Therefore, although the provisions of both laws apply to what is stated below, I still want to refer to the provisions of the previous law. However, in this paper, I quoted the sections of the Criminal Procedure Act (2017) because this law has an official English translation, so I can present the provisions most

[42] Previous Criminal Procedure Law § 423(2), Current Criminal Procedure Law § 659(2) With the exceptions specified in paragraphs (3) to (4), a motion for review shall be adjudicated based on laws in effect at the time when the challenged decision was passed.

[43] Curia Bfv.I.22/2015/5., Bfv.I.1318/2014/7., Bfv.I.1324/2014/3., Bfv.I.1432/2014/4., Bfv.I.1516/2014/8., Bfv.I.1558/2014/8., Bfv.I.1679/2014/3., Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[44] Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[45] Curia Bfv.III.1176/2014/6., Bfv.II.1271/2014/8., Bfv.III.1275/2014/4., Bfv.III.1286/2014/4., Bfv.II.1340/2014/5., Bfv.II.1349/2014/5., Bfv.III.1350/2014/4., Bfv.II.1409/3014/5., Bfv. III.1410/2014/7., Bfv.III.1416/2014/6., Bfv.II.1433/2014/7., Bfv.III.1434/2014/7., Bfv. II.1473/2014/7., Bfv.II.1487/2014/3., Bfv.III.1488/2014/6., Bfv.III.1518/2014/4., Bfv. II.1538/2014/4., Bvf.II.1544/2014/6., Bfv.III.1551/2014/4., Bfv.II.1553/2014/3., Bfv. III.1554/2014/3., Bfv.III.1557/2014/5., Bfv.II.1580/2014/4., Bfv.II.1583/2014/11., Bfv.II.1595/2014/4., Bfv.III.1608/2014/4., Bfv.II.1677/2014/5., Bfv.I.1705/2014/4., Bfv.I.19/2015/8., Bfv.III.210/2015/4., BH2015.270.

[46] Curia Bfv.II.1580/2014/4.

accurately. Furthermore, because the Criminal Procedure Act (1889) is no longer effective, in a similar legal situation – in connection with another Constitutional Court decision – the legal question will have to be decided by the Criminal Procedure Act (2017), therefore, the analysis of the provisions of this law may be more useful for the future.

The currently effective Criminal Procedure Code (2017):

*Section 649 (1) A motion for review may be filed for violating the rules of substantive criminal law if a court*

*c) suspended the enforcement of a sentence despite a ground for exclusion specified in section 86 (1) of the Criminal Code.*

*(3) A motion for review may be filed based on a decision of the Constitutional Court if the Constitutional Court ordered the review of a criminal proceeding to conclude with a final and binding conclusive decision.*

*Section 659 (1) In a review proceeding, pieces of evidence may not be compared again or assessed differently, and evidence may not be taken; the facts established in the final and binding conclusive decision shall be observed when adjudicating a motion for review.*

*(2) With the exceptions specified in paragraphs (3) to (4), a motion for review shall be adjudicated based on laws in effect at the time when the challenged decision was passed.*

*(3) In a situation specified in section 649 (3), a motion for review shall be adjudicated by not applying the law that conflicts with the Fundamental Law or relying on the decision passed by the Constitutional Court.*

*(4) In a situation specified in section 649 (5), a motion for review shall be adjudicated by not applying the law that is inconsistent with an international treaty promulgated by an Act or relying on the decision passed by the international human rights organisation.*

*(5) With the exception specified in paragraph (6), the Curia shall review a final and binding conclusive decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review.*[47]

The main rule, as also stated in § 659 (2), is that the review procedure is conducted by the Curia based on the laws in effect at the time the contested decision was made. This means that even if the law has changed in favour of the accused after a final decision has been reached, or the legislator has eliminated the possibility of punishing the specific act, a review request cannot be based on that. Therefore, § 2 of the Criminal Code is not applicable in the review process. This is because the purpose of the review is to rectify substantive and procedural legal violations after the decision has become final.[48]

[47] These provisions are found in Criminal Procedure Act (1998) §416(1) e), §416(1)-(4).

[48] Tibor Bodor – Zsolt Csák – Erzsébet Máziné Szepesi – Gábor Somogyi – Gábor Szokolai – Zoltán Varga (eds.): *Commentary on Act XIX of 1998 on the Code of Criminal Procedure.* Budapest, Wolters Kluwer, 2016 (§ 423(2) of the Act).However, this exclusionary provision

However, there is an exception to these rules in cases where the review is based on a decision by the Constitutional Court in cases affected by the decision (§ 649 (3)).[49] According to the explanation of the law, in such cases, the Curia decides on the review request based on the laws in effect at the time of the review. In this situation, the Curia determines that the final decision was made in violation of the later declared unconstitutional law and makes its decision based on the law in effect at the time of the review.[50] The law also adds that if there is a basis for review according to a decision of the Constitutional Court, then the review motion must be considered based on the disregard of the law declared unconstitutional under the Fundamental Law, based on a decision of the Constitutional Court.[51]

It is worth emphasizing that § 659(5) determines the scope of the review procedure when it states that the "Curia shall review a final and binding conclusive decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review."[52]

## 5.2. The law in effect at the time of the review

In some of the judgments, the Curia – and I emphasize that the Prosecutor General's Office as well – proceeded from the premise that the Criminal Procedure Law clearly determines that, in this case, the review must be conducted under the law in force at the time of the review.[53] However, this provision does not affect Section 2 of the Criminal Code, which states that the criminal law in effect at the time of the offense should be applied. Except if, when applying the new criminal law in effect at the time of review, the act is no longer considered a crime or

only applies to the decision made in the review procedure. In cases where the Curia decides to annul the contested decision and instructs a previously acted court to conduct a new proceeding, the application of § 2 of the Criminal Code is possible in this new proceeding.

49 Also, an exception when the motion for review may be filed based on a decision passed by a human rights organisation established by an international treaty. § 649(4) Criminal Procedure Act (2017).

50 Bodor et al. 2016, 29.

51 Criminal Procedure Act § 659(3), ibid.

52 Criminal Procedure Act § 659(5).

To be complete, it should be noted that the Curia examines procedural irregularities that justify the review even if the motion does not include them. Péter Polt – Barna Miskolczi – József Vida – Zsanett Karner (eds.): *Nagykommentár a büntetőeljárási törvényhez – Nagykommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez*. Budapest, Wolters Kluwer, 2022, at §659.

53 Criminal Procedure Act (1998) § 423(2).

should be judged more leniently, then the new criminal law should be applied. Accordingly, the Curia stated in one part of the judgments that it must compare the material legal provisions in force at the time of the defendant's commission of the crimes for which they are charged and at the time of reviewing the review request, disregarding the provisions annulled by the Constitutional Court. Thus, it must apply the law that provides more lenient rules for the perpetrator. The judicial practice has developed the following principles for assessing whether, at the time of the offense or at the time of judgment, the criminal code in effect is more favourable to the defendant:

1. First, it must be considered whether the actions to be judged are punishable under both laws and whether either law excludes the criminality of the action or the defendant's liability under any circumstances.

2. In the absence of the above, the court must then compare the provisions of the two laws regarding the punishment for the criminal act, determining which of the two laws contains the more severe provisions.

3. In addition, the court must take into account the legal institutions regulated in the general part of the criminal code that are significant in the assessment of the specific case. In these cases, this means comparing the rules of cumulative punishment, as well as the stricter legal institutions related to habitual and repeat offenders.

4. After considering these factors, further circumstances can be examined, such as the possibility of conditional release or the question of exclusion from it.

Following this analysis, in 7 cases,[54] the Curia concluded that the law in effect at the time of the offense, which was also applied in the challenged decision, which was the earlier Criminal Code, contained more lenient rules, and thus, they continued the review procedure according to its provisions.[55] However, in one case,[56] the upper limit of the penalty range for the committed crime was lower according to the new Criminal Code, and in two cases,[57] the rules for conditional imprisonment were more favourable according to the new law. Therefore, the Curia reclassified the defendant's guilt based on the new Criminal

[54] Curia Bfv.I.22/2015/5., Bfv.I.1318/2014/7., Bfv.I.1324/2014/3., Bfv.I.1432/2014/4., Bfv.I.1516/2014/8., Bfv.I.1558/2014/8., Bfv.I.1679/2014/3., Curia Bfv.I.1270/2014/6., Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

[55] I note that in the two compared Criminal Codes the punishment for the given offences was the same, – except in one case Curia Bfv.I.1324/2014/3 – while the new Criminal Code contained stricter rules for habitual and repeat offenders. For example, Curia Bfv.1679/2014/3., Bfv.1432/2014/4., 1318/2014/7.

[56] Curia Bfv.I.1270/2014/6.

[57] Curia Bfv.I.1465/2014/5., Bfv.I.1525/2014/3.

Code for the crimes that were originally determined according to the provisions of the previous Criminal Code.

### 5.3. The application of the law applied by the court which has given final judgment

The Curia, however, did not accept this interpretation in its other 30 judgments due to the requirement of the review application. This is because even when the Curia reviews criminal proceedings based on the decision of the Constitutional Court, the general rules of the review process must be adhered to, such as the fact that the Curia shall review a final and binding challenged decision only to the extent challenged in the motion for review and on the grounds stated in the motion for review.[58] The jurisdiction of the Curia aligns with its review authority and cannot extend beyond that. In all cases, the prosecutor referred solely to the invalidated provision in their application and did not dispute the correctness of the criminal code applied by the court. Therefore, the examination of it is not possible, even if the law applied at the time of judgment contains milder provisions. Without reclassifying the criminal offenses under the current criminal code, a combined law would have to be applied, which is also not permissible.

Furthermore, in these cases, according to the Curia the legislature by applying the Criminal Procedure Act (1998) § 423(2) second sentence – "a motion for review shall be adjudicated based onthe laws in effect at the time when the challenged decision was passed" – just wanted to refer that the legal provision that the Constitutional Court invalidated during the review cannot be applied, as its application would not lead to a different outcome.

## 6. Closing thoughts

In my opinion, the latter approach is more accurate as it aligns better with the general rules of the review proceeding. However, I cannot agree that this viewpoint could be derived from the legislator's intent, so from the Criminal Procedure Act (1998) § 423(2) or the Criminal Procedure Act (2017) § 659(2). In fact, in my opinion, a contrary interpretation can be reached linguistically. Furthermore, I cannot agree that the second sentence of § 423(2) was merely meant to indicate that which legal provision invalidated by the Constitutional Court

[58] Criminal Procedure Act (2017) § 659(5).

during the review cannot be applied anymore, because the legislator explicitly states this in the following paragraph. It would have been unnecessary to enforce the same meaning in successive paragraphs.[59]

Furthermore, as I see, the requirement imposed by the Criminal Procedure Act (2017) § 659(5) contradicts § 659(2), which determines the applicable law during the review procedure based on the Constitutional Court's decisions. This is because, regardless of whether the Curia adopts the first or the second interpretation, it cannot fully adhere to the statutory provisions. If the Curia applies the law in effect during the review procedure, it exceeds the review request and the scope of its jurisdiction, and if it applies the law in effect at the time of the challenged decision, it acts contrary to the provision of § 659(2) of the Criminal Procedure Act (2017).[60]

It is also possible that the legislator, during the review procedure ordered by the Constitutional Court, started from the premise of completely nullifying the applicable law. This is also why it belongs to the exceptions according to which the challenged decision must not be judged based on the legislation in force at the time of its adjudication.

Furthermore, regardless of grammatical interpretation, it cannot be concluded that the legislator wanted to apply the law adjudicated in the challenged decision in the review procedure because when the current Criminal Procedure Code (2017) was legislated, they could have clarified this intention in the wording of the law or explained it in the reasoning. However, this was not done; instead, the same wording of the law was adopted.

## Literature

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[59] Criminal Procedure Act (1998) § 423(3), Criminal Procedure Act (2017) § 659(3).

[60] The same is the case with the Criminal Procedure Act (1998) with the following provisions: § 423(2) and (5).