

Release from prison in Hungary and the European Court of Human Rights

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I. Introduction

The European Court of Human Rights has condemned Hungary because of its adoption of real (whole) life imprisonment.¹

The overcrowding of prisons is an often discussed issue in literature. An example of this problem is illustrated in Figure 1², which shows that Hungary falls in the middle in terms of its prison population.

Release from prison can occur in several ways:

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

In my study I analyse the conditional release and presidential pardon in Hungary.

II. Conditional release

One of the most effective tools of changing the attitudes of the convicts is the institution of conditional release. The essence of parole is that after serving a determined part of the punishment it renders the possibility to the convict to reintegrate into the society.

Early release in Hungary is based on discretionary decisions and is always conditional. The basic provision governing the early release of prisoners is Art. 38 (1) of the Penal Code³. According to this provision, prisoners can be conditionally released from determinate prison sentences after they have served two thirds of their sentence. A minimum of three months must be served since the 1998 amendments.

The conditional release aims at a possibly effective re-socialization of well-behaving prisoners, in whose case the aim of penalty can be achieved without serving the complete term of imprisonment. The decision about the release of a certain prison inmate on parole falls within the competence of the penal executive judge. There are objective criterion and subjective criterion on parole.

- a) The objective criterion for release on parole is that a certain proportion of the sentence must have already been served (two thirds of their sentence). According to Art. 38 (3), when the court imposes a term of imprisonment of no longer than five years, the court may, in circumstances deserving special consideration, grant conditional release after half of the sentence has been served. This option is not available in case of multiple recidivists.
- b) The subjective criterion is particularly good prognosis for the future. The deciding judge must be convinced that there is no danger that the offender will relapse into further crime. The penal judge primarily may take into account the opinion of the penal institution, while concerning the prospects of the future he shall examine the statement of the convict and other objective circumstances, such as the family circumstances of the convict, the possibilities of his employment, sources of his living. The penal institution supports it, if the prisoner has a lot of rewards. In prison, such rewards can be: praise, permission of extra opportunity to receive extra parcel, permission of extra opportunity to meet visitors, extension of amount of money allotted for personal needs, article reward, money reward, delating the record of executed disciplinary sanctions, short term absence of leave, authorised absence.

The competent authority for conditional release is always a penal judge (special chamber of the County Court). The penal judge acts as a single judge. The penal judge conducts the hearing of offenders, in case of presentation of evidence he holds trial, the prosecutor and the defender are permitted to be present at the hearing. The penal judge conducts the hearing and holds the trial within the parameters of the penal institution. The decision reached by the penal judge is appealable. If the penal judge has not released the prisoner on parole, he may review the possibility of release later.

The penal judge terminates the procedure if the motion has been withdrawn by the prosecution on the grounds of justifiable reason.

Appeals against the decision of the penal judge are decided by an appeal panel of county court.

III. The presidential pardon

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

Public pardon can be granted by the Parliament.⁴ According to this, amnesty applies to a certain group of either the accused or the imprisoned.

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¹ Case of *László Magyar v. Hungary* (ECHR, Judgment of 20.5.2014 – App. no. 73593/10), online available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109> [5.1.2016]). The case originated in an application (no. 73593/10) against the Republic of Hungary lodged with the Court under Art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr. László Magyar (“the applicant”), on 9 December 2010.

² Reference: World prison brief: <http://www.prisonstudies.org/> (5.1.2016).

³ Penal Code: The Act C. of 2012.

⁴ *Váczy*, *Tanulmányok a 70 éves Bihari Mihály tiszteletére*, 2013, p. 553.

Amnesty is primarily connected to symbolic or political events, for instance the commemoration of the death of Imre Nagy, when public pardon was granted to a number of prisoners in honour of his death. This article focuses on the system for individual presidential pardons in Hungary.

Why do we need to know about the procedure for individual pardon?

According to Hungarian Art. 9 (4) g of the Fundamental Law, the president of the republic has the right to grant individual pardons.⁵

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

The minister responsible for justice is responsible for the following:

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

There are two ways to initiate the pardon procedure; it can be requested or be initiated through official channels.⁶ In the case of application, the prisoner, the defence lawyer, the legal representative of a minor, or a relative of the accused or prisoner can apply for a pardon.⁷

The request for a pardon must be submitted to the court of first instance.⁸

Upon submission, the court gathers the necessary documents, for instance the opinion of the probation officer, environmental scanning, police reports, and the opinion of the penitentiary institution.

The court sends the documents (the charge, the sentence, medical reports, and a pardon form)⁹ to the minister within thirty days.

What happens when the minister does not support the application for a pardon?

Even in this case, the minister is required to send the documents to the president of the republic, as well as the minister's negative opinion. If there are medical reasons, it is possible for the minister to postpone or interrupt the punishment.

⁵ ECHR, Judgment of 20.5.2014 – App. no. 73593/10 (Case of László Magyar v. Hungary), para. 20.

⁶ Act no. XIX of 1998, Sec. 597 (1.) on the Code of Criminal Procedure provides: “Motions for pardon [...] in respect of suppressing or reducing sanctions not yet executed [...] shall be submitted – ex officio or on request – to the President of the Republic – by the Minister in charge of justice.”

⁷ Act no. XIX of 1998, Sec. 597 (3) on the Code of Criminal Procedure: „Such a request may be introduced by the defendant, his/her lawyer or [...] relative. [...]”

⁸ Act no. XIX of 1998, Sec. 597 (4) on the Code of Criminal Procedure: „A pardon request [...] concerning a sanction not yet executed must be introduced with the first-instance trial court.”

⁹ Decree of Ministry of Justice 11/2014 (XII. 13.), Sec. 123.

The process described above is illustrated in Figure 2¹⁰. See Figure 2, p. 203.

IV. If granted, what does a declaration of pardon include?

In the case of imprisonment, the text reads, for example, “the remainder of the punishment is suspended for three (3) years on probation.”

Features of the president's decision are:

- I. Above all, the president has discretionary power to decide,
- II. It is not mandatory that the decision be justified in any way,
- III. The opinion of the minister does not bind the president, and
- IV. The decision becomes effective only with the endorsement of the minister.

Measures taking place after the endorsement¹¹:

The court of first instance delivers the decision on the pardon to the prisoner.

While there is no legal remedy against the decision, it is possible to submit a new request for pardon.

Statistics on the presidential pardon procedure are given in Figure 3¹². According to the data issued by the Pardon Department for the period between January 1, 2002 and December 31, 2014, approximately 98 % of the requests for pardon were refused.¹³ See Figure 3, p. 203.

I would like to briefly give the results of an empirical study that was carried out with the permission of the Pardon Department of the Ministry of Justice.¹⁴

I analysed several dozen legal cases based on the following factors:

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

Let us examine a sample from the study (Research: XX-KEGY/44/1/2015¹⁵) in Table 1. See Table 1, p. 204.

¹⁰ Act no. CCXL of 2014, Sec. 45 on the Code of Criminal Enforcement.

¹¹ By the document of presidential pardon: <http://igazsagugyiinformaciok.kormany.hu/tajekoztato-az-altalanos-kegyelmi-eljarasrol> (5.1.2016).

¹² Ministry of Justice, Pardon Department: <http://www.kormany.hu/download/d/8d/30000/Statisztika%2020022014%20december%2031%20kegyelmi%20ugyek.pdf#!DocumentBrowse> (5.1.2016).

¹⁴ Nagy, Research about pardon procedure, Ministry of Justice, Pardon Department, XX-KEGY/44/1/2015.

¹⁵ Nagy, Research about pardon procedure, Ministry of Justice, Pardon Department, XX-KEGY/44/1/2015.

Figure 4 shows the distribution of the reasons for requesting pardon.¹⁶ See Figure 4, p. 205.

V. Compulsory presidential pardon

From March 1, 1999 we can talk about the sentence of “real life imprisonment”¹⁷ in Hungary.¹⁸

According to para. 44 (1) of the Penal Code of Hungary, real life imprisonment is applicable to a list of certain types of cases. In 18 cases the judge can use his/her judgement, including the following: genocide, crimes against humanity, apartheid etc.

In two cases, real life imprisonment is compulsory¹⁹:

- a) multiple recidivism with violence, or
- b) those who committed crimes from the list above participate in a criminal organisation.

One special case is when a person sentenced to life imprisonment commits another crime, and is sentenced to life imprisonment again: then the actual sentence must be real life imprisonment.²⁰

In *Magyar v. Hungary* (App. no. 73593/10, 20 May 2014) the European Court of Human Rights²¹ held that the sanction

¹⁶ “Other reasons” included fear, good behavior, and advanced age.

¹⁷ Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends: “[...], the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners.” Life-sentence prisoner is one serving a sentence of life imprisonment.

¹⁸ Act no. IV of 1978, Sec. 45 on the Criminal Code, as in force since 1 March 1999, provided as follows: “(1) If a life sentence is imposed, the court shall define in the judgment the earliest date of the release on parole or it shall exclude eligibility for parole. (2) If eligibility for parole is not excluded, its date shall be defined at no earlier than 20 years. If the life sentence is imposed for an offence punishable without any limitation period, the above-mentioned date shall be defined at no earlier than 30 years.”

As in force at the material time and until 30 June 2013 when it was replaced by Act no. C of 2012 on the Criminal Code provided as follows: “Imprisonment shall last for life or a definite time.”

¹⁹ Act no. C of 2012 on the Criminal Code, Sec. 44 (2).

²⁰ Act no. C of 2012 on the Criminal Code, Sec. 45 (7).

²¹ *Kafkaris v. Cyprus*, (ECHR, Judgment of 2008 – App. No 21906/04). A life sentence does not become “irreducible” by the mere fact that in practice it may be served in full. It is enough for the purposes of Art. 3 that a life sentence is de jure and de facto reducible. *Iorgov (II.) v. Bulgaria* (ECHR, Judgment of 2010 – App. no 36295/02). Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, notwithstanding the non-judicial character of the procedures to be followed, this will be sufficient to satisfy Art. 3.

of life imprisonment as regulated by the respondent state, which is de jure and de facto irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as regulated by Art. 3 ECHR.

The judgment was challenged by the Hungarian government, but the request to the Grand Chamber referral was rejected. The judgment became final in October 2014.

The court reinstated its previous case law and as a point of departure emphasised that the imposition of life sentences on adult offenders for especially serious crimes, such as murder, is not in itself prohibited by or incompatible with the ECHR (para. 47). The Court reminded that there were two particular but related aspects to be analysed. First, the ECHR will check whether a life sentence was de iure and de facto reducible. If so, no issues under the Convention arise (para. 48-49). Second, in determining whether a life sentence was reducible, the Court will ascertain whether a life prisoner convict had any prospect of release. Where national law affords the possibility of review of a life sentence, this will be sufficient to satisfy Art. 3, irrespectively of the form of the review.²² Prisoners are entitled to know at the outset of their sentence what they must do to be considered for release and under what conditions, including the earliest time of review (para. 53).

The government tried to argue that the possibility of presidential pardon made the execution of the sentence in practice reducible, but the ECHR did not accept this argument.²³

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

In Hungary today there are 275 people sentenced to life imprisonment, and of these only 40 have been sentenced to real life imprisonment (not all of these are final decisions).²⁴

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

²³ The Government submitted that the applicant’s life sentence was reducible both de iure and de facto; he had not been deprived of all hope of being released from prison one day. They argued that his sentence was therefore compatible with Art. 3 of the Convention. ECHR, Judgment of 20.5.2014 – App. no. 73593/10 (Case of László Magyar v. Hungary), para. 35.

²⁴ <http://www.jogiforum.hu/hirek/32833> (5.1.2016).

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

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

Table 2 guides us through what the mandatory pardon procedure actually means. See Table 2, p. 205.

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

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

VI. Conclusion

However, it can be argued that these measures are not sufficient to meet the requirements, because the requirement for the endorsement of the minister responsible for justice means that there is a political element in the decision to grant a pardon. This reduces the impartiality and independence of the court.

Figure 1

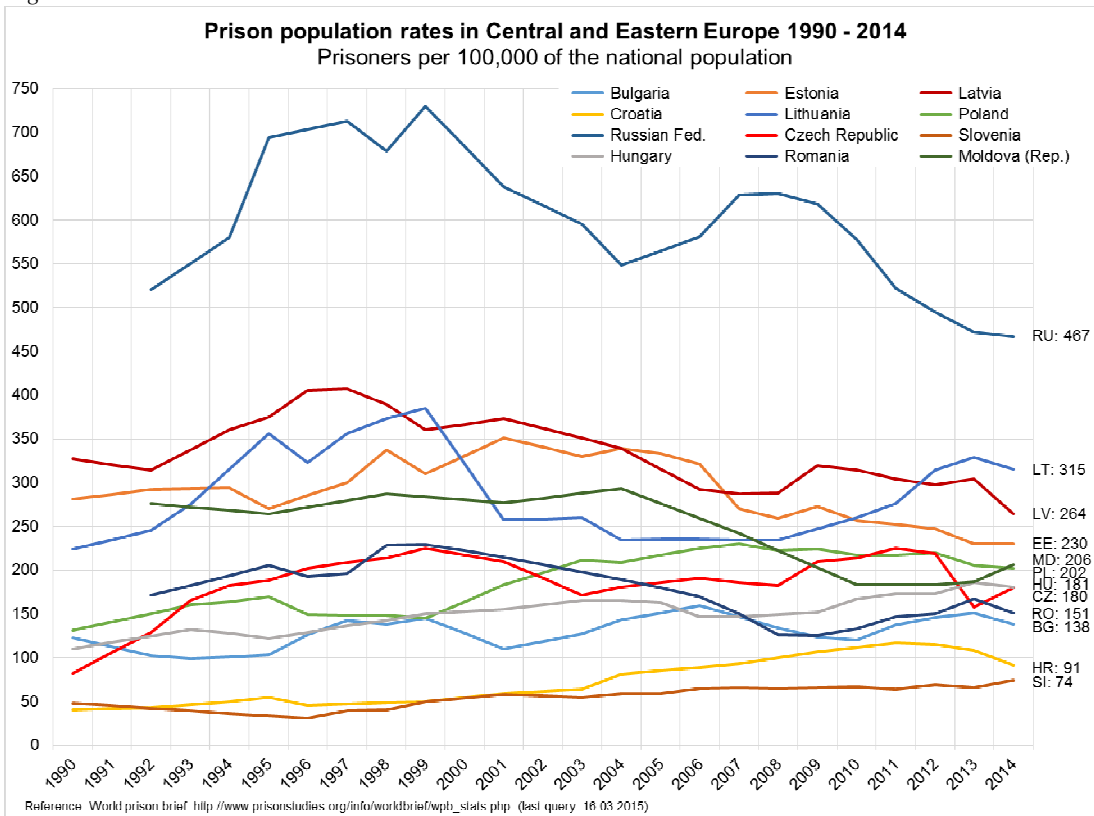


Figure 2

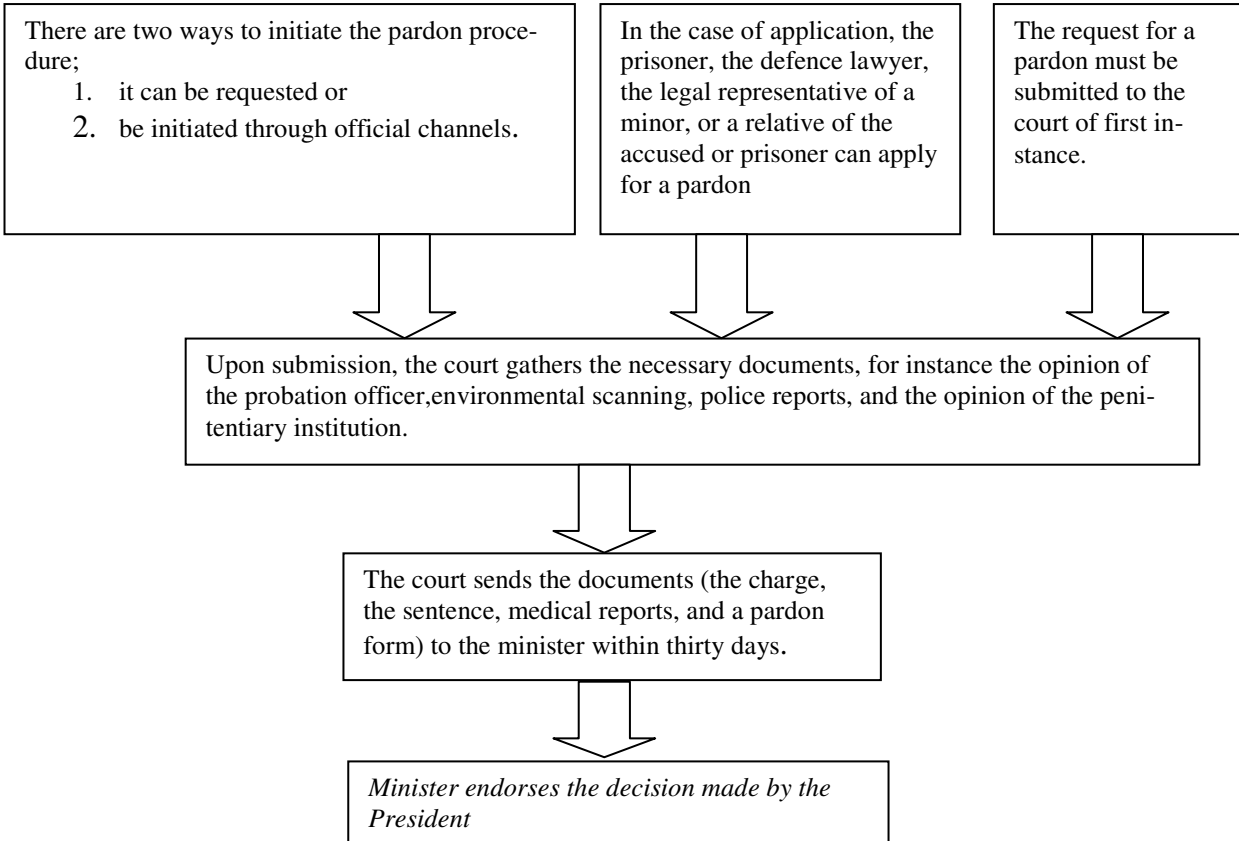


Figure 3: Requests for presidential pardon¹, 2002-2014

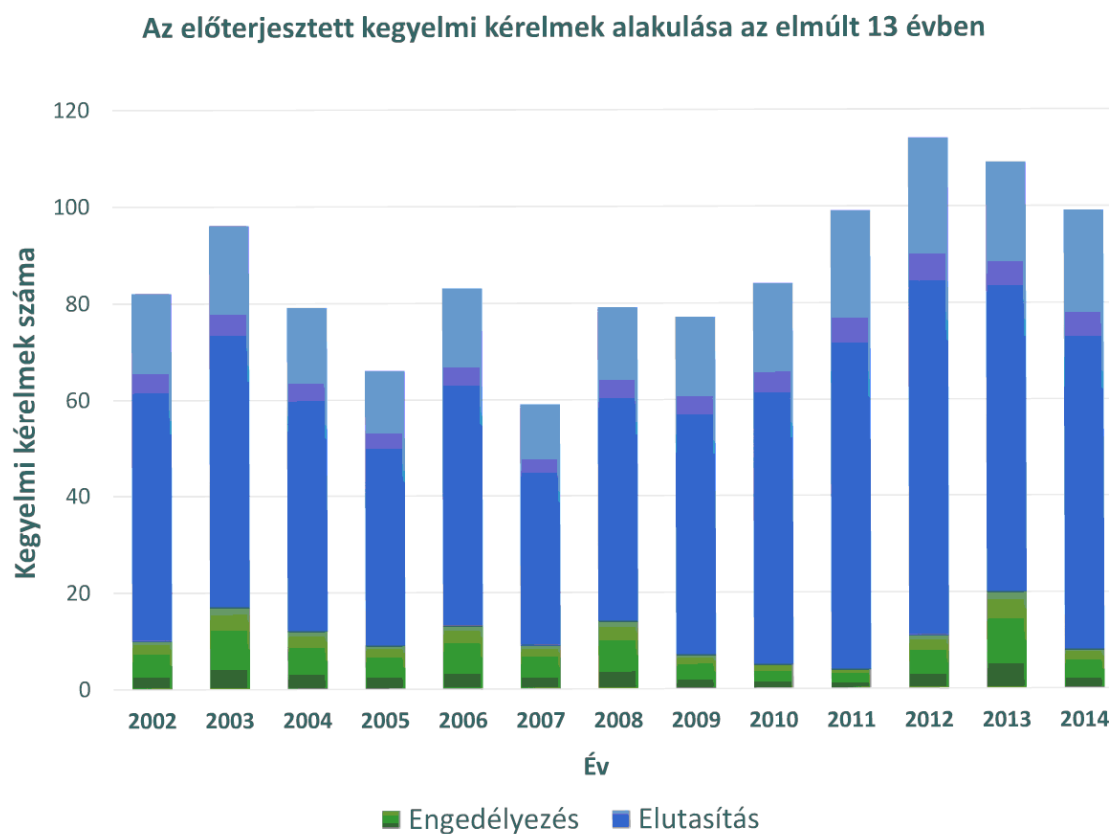


Table 1

Type of crime	Sentence	Reason for request	Attached opinions	Recommended for approval/rejection
Multiple cases of fraud	3 years 10 months imprisonment	medical reason – paralysis due to a serious accident	opinion of hospital treating him: he saved the life of a person; opinion of prison: good behavior, frequently rewarded	for approval

¹ Explanation: engedélyezés: approval , elutasítás: refusal; kegyelmi kérelmek száma: number of pardon requests.

Figure 4

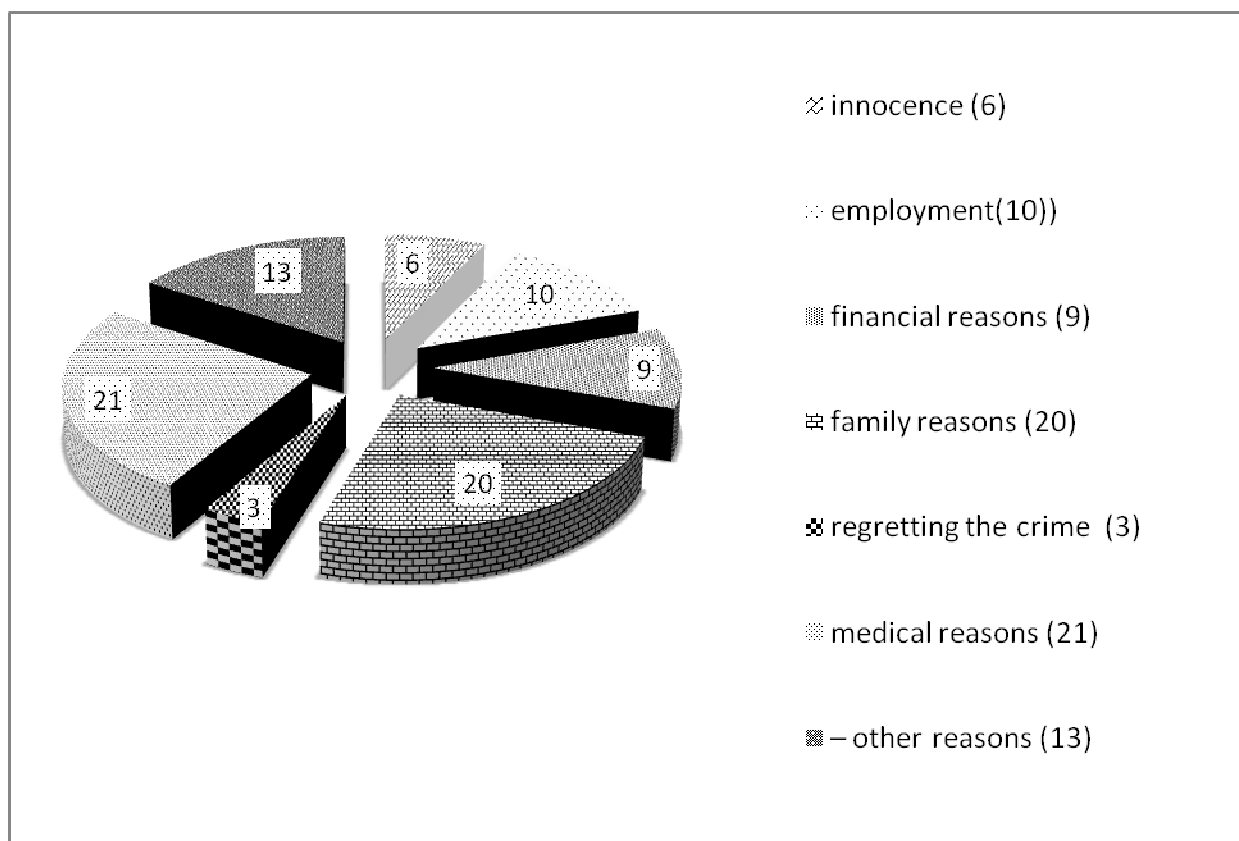


Table 2

1. Has served 40 years of the sentence (if he has declared that he wishes to request the procedure)²
2. The minister must carry out the procedure within 60 days
3. The minister informs the leader of the Curia, who appoints the five members of the Pardon Committee.³
4. The majority opinion must be made within 90 days⁴ in an oral hearing (examining medical status, behavior, risk ranking, etc.).
5. The opinion must be sent to the President within 15 days, who decides whether to grant the pardon. The final step is the endorsement of the minister responsible for justice.
6. If a pardon is not granted at this time, the procedure must be repeated in two years.⁵

² Act no. CCXL of 2014 on the Code of Criminal Enforcement, Sec. 46/B.

³ Act no. CCXL of 2014 on the Code of Criminal Enforcement, Sec. 46/D.

⁴ Act no. CCXL of 2014 on the Code of Criminal Enforcement, Sec. 46/F.

⁵ Act no. CCXL of 2014 on the Code of Criminal Enforcement, Sec. 46/H.