Hungarian Helsinki Committee

HUNGARIAN HELSINKI COMMITTEE

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Budapest, 20 April 2020

Council of Europe
DGI – Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments
of the European Court of Human Rights

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Subject: Communication from the Hungarian Helsinki Committee concerning the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary
(Application nos. 15707/10, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13)

Dear Madams and Sirs,

The **Hungarian Helsinki Committee (HHC)** is a leading human rights organisation in Hungary and in Central Europe. The HHC monitors the enforcement of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC's main areas of activities are centred on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention and the effective enforcement of the right to defence and equality before the law.

The HHC ran a detention-monitoring program for over two decades between 1995 and 2017. In this period, the organization carried out 1237 monitoring visits at police jails, 48 visits at penitentiary institutions and made 51 inspections at places of immigration detention. The HHC submitted numerous communications to various international forums (CPT, UNWGAD, CPT, SPT, UPR, etc.) in related subject matters. The HHC lawyers have litigated cases related to the conditions of and treatment in detention in Hungarian prisons before domestic forums and the European Court of Human Rights (see e.g. the cases *Engel v. Hungary*, Application no.: 46857/06, and *Csüllög v. Hungary*, Application no.: 30042/08), and three out of the six applicants in the Varga and Others v. Hungary case were also represented by HHC's lawyers.

With reference to the judgments of the European Court of Human Rights (ECtHR) **in the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary**, and the action plan on the implementation of these judgements submitted by the Government of Hungary, **the HHC respectfully submits the following observations** under Rule 9 (2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements".

What makes the present submission especially topical and timely is that at the beginning of 2020, the Hungarian Government took alarming steps that threaten with **hamstringing the compensation system** aimed at remedying the violations of inmates' rights under Article 3 of the Convention. Consequently, we are of the strong view that **the case should remain under enhanced supervision and the Hungarian Government should be under strict scrutiny while carrying out the announced review of the system of compensations for prison overcrowding**.

In this regard, we would like to recall that HHC submitted on 20 and 21 January 2020 two communications concerning **the freshly introduced restrictions on detainees' right to claim compensation for**

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inhuman and degrading detention conditions.[1] Moreover, on 29 February 2020, the HHC informed the Department for the Execution of Judgments of the Committee of Ministers about **the law adopted by the Hungarian Parliament to suspend until 15 June 2020 the payment of compensations for the violation of inmates' Article 3 rights.**

The present submission is structured as follows:

- Summary of the **most important issues**
- Information on **prison population and physical conditions**
- Information on **contacts with the outside world**
- Information on the **preventive remedy** for overcrowding
- Information on the **compensatory remedy** for overcrowding
- **Recent developments** regarding the regulation of compensation procedures
- **Recommendations**

Summary of the most important issues

- While the occupancy rates have undeniably decreased, **the actual degree of the improvement is difficult to fully assess in the absence of certain crucial data**. By way of example, in response to HHC's FOI request, the National Prison Administration (NPA) claimed that it had no information on the number of inmates held in cells providing less than three square meters of moving space (Section 1.1).
- Evidence gathered by the HHC shows that **despite the overall improvement certain individual penitentiaries can still be extremely overcrowded**. On a randomly selected day in 2019, the occupancy rate exceeded 160% in one of the penitentiaries, while almost half of them had 30% or higher rates of overcrowding (Section 1.2.1).
- The Government's Action Plan foresees the opening of five new prisons each accommodating 500 inmates in 2020-2021, while according to the original plans new prisons would have started to operate from 2018/2019. However, **until now not even one new prison has been built, which illustrates well the limitations that prison construction schemes have in combatting overcrowding** (Section 1.2.1).
- **Resorting to alternative measures for the administration of criminal sanctions is still not sufficiently wide-spread**. For instance, reintegration custody is still significantly underused (Section 1.2.1).
- **Factors of physical detention conditions other than personal space are largely disregarded in the Hungarian system** as reflected in the fact that such factors are hardly mentioned by the Action Plan. While they still had access to the Hungarian penitentiaries within the HHC's prison monitoring programme, the HHC's monitors found serious problems regarding these additional factors such as the lack of proper ventilation, natural air and lighting, invasion of bedbugs, the problem of understaffing resulting in the

[1] The HHC prepared two Rule 9 communications with regards to the execution of the judgements of the European Court of Human Rights in the cases of Varga and Others v. Hungary and István Gábor Kovács v. Hungary (Application no. 14097/12 and 15707/10)These were submitted on 20 January 2020 and on 21 January 2020 and are available here: https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Varga_and_Others_v_Hungary_20200120.pdf and https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Varga_and_Others_v_Hungary_20200121.pdf

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provision of less than the required open-air time, and the lack of meaningful opportunities of recreational activities (Section 1.2.2).

- **Termination of HHC's long-standing lay prison-monitoring scheme resulted in the definite weakening of the protection of detainees' rights** and the chances of revealing systematic problems. It also diminished the Hungarian monitoring system's capacity to deal with serious human rights violations within the penitentiary system (Section 1.2.3).
- **The NPA introduced a very restrictive policy regarding visits** in 2017-2018: any physical contact between inmates and visitors was gradually prohibited. Restriction on visitation was taken even further in 2019 when high transparent plastic screens were installed in the visitation rooms of all penitentiaries thus eliminating the possibility of any physical contact between inmates and family irrespective of the actual risk level of the individual inmates. **Deposit for penitentiary administered mobile phones constitute a serious financial difficulty to most inmates. Phone rates are fixed and are around 5-10 times higher than the tariffs available at any outside service provider**, making the maintaining of contacts with the outside world increasingly difficult (Section 2).
- As a preventive remedy against substandard detention conditions, the detainee may file a complaint with the prison governor about the conditions of detention. Based on the complaint, the governor shall take measures to place the inmate in a non-overcrowded cell or prison. The fact that a claim of financial compensation can only be submitted if a complaint has been filed beforehand has proven to be problematic, since the complaint itself as a remedy is ineffective due to the lack of sufficient prison-capacity. At present, **there is still no possibility to provide satisfactory placement for a significant proportion of the inmates, so the situation inevitably leads to thousands of inmates submitting – mostly futile – complaints about their placement** (Section 3.2).
- **Compensation procedures before penitentiary judges are not adversarial. Judges do not hold hearings**, even in cases where the detainee or the lawyer expressly requests so. **Detainees and their lawyers frequently do not have access to detainees' files**. If the prosecutor appeals against the first instance decision, the detainee and his/her lawyer are only informed about the appeal's contents in the second instance decision which obviously deprives them from the possibility to meaningfully argue against the prosecution's stance, which is a clear violation of the equality of arms principle (Section 4.1).
- **If the required amount of personal space is provided, detainees are not entitled to be compensated even if otherwise the physical conditions** (access to air and natural light, partitioning of toilettes, bedbugs) **are severely substandard** (Section 4.2).
- Evidence gathered by the HHC suggests that **the complicated, highly technical and often ambiguous legal framework of the compensation procedure results in diverging jurisprudence and contradicting judicial decisions in identical situations** (Section 4.3). For instance, there is inconsistent jurisprudence regarding the compensation of inmates whose ECtHR applications had been registered (Section 4.3.2), there are discrepancies in the judicial practice of the various regional courts regarding inadmissible claims (Section 4.3.4.) and substantial regional differences cane be traced in the number of pending cases (Section 4.4).
- Restrictive jurisprudence regarding the compensation procedure holds that **health care units and prison hospital wards are excluded from the scope of the compensation scheme, i.e. if someone is held under degrading conditions in a health care unit or prison hospital ward he/she will not be entitled to compensation**. This creates an unjustifiable distinction between detainees, to the detriment of the more vulnerable group (Section 4.3.3).
- The period between January 2017 and December 2019 can be described as a period of efforts to properly implement the ECtHR's judgments regarding prison overcrowding. While it was not unproblematic and the solutions chosen were not always ideal, the direction of the measures taken by the Hungarian authorities was definitely oriented towards compliance. However, **at the beginning of January 2020, the issue of**

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prison overcrowding became the focus of political communication characterised by intensive penal populism, and the Government's approach took a serious turn with a clear intent to restrict prisoners' right to compensation, thus reversing many years of progress. Resolution 1004/2020. (I. 21.) of the Government sets out that the amount of the compensation awarded by the court shall only be transferred to the claimants on the last day of the 60-day deadline for payment. According to Act IV of 2020 passed in February 2020, the payment of **any compensation for prison overcrowding will be suspended until 15 June and the Government will draft new regulations in line with the outcome of a national consultation asking people whether they agree with** – as government officials keep phrasing it – **"criminals" getting compensation for inhuman detention conditions**. Furthermore, counsels have been deprived of the possibility to collect the compensations granted to their clients on their depository accounts, which will eventually make it more difficult for inmates to secure legal counselling for their compensation claims. These alarming political and legislative developments give rise to concerns that the review will be aimed at restricting inmates' access to the remedy system (Section 5).

- **The Government plans to meet the target of a 100% occupancy rate by building mobile container prisons at ten different premises with an aggregate capacity of ca. 1700 persons**. While the objective is to be welcomed, HHC is concerned that this solution – that is used throughout the world as a temporary option – will remain in place for a longer period of time creating new types of issues of non-compliance with Article 3 requirements.

1. The prison population

1.1. New calculation method of the space per inmate

In order to be able to present a reliable overview of the Hungarian prison situation, the HHC gathered the publicly available data provided by the National Prison Administration (NPA) and submitted numerous freedom of information requests to the NPA. While the NPA did respond to these requests, due to certain inconsistencies in the numbers and information included in its responses (see below in more detail), we must conclude that the **data provided are not always reliable**. The HHC has repeatedly tried to clarify these inconsistencies by requesting meetings with the representatives of the NPA, but these requests have been rejected by the NPA.

One of the main reasons of the uncertainties is that on 1 January 2017 a **new calculation method of the space per inmate entered into force**. As a consequence of the new calculation method, **more inmates can be lawfully placed in cells of the same size.** In its response to a freedom of information request on 17 January 2020,[2] the NPA informed the HHC that on 31 December 2016, i.e. on the day before the new regulation entered into force, the average operational capacity of the penitentiary system was 13,922. The next day as the new regulation applied, the average occupancy rate rose to 14,325, thus an extra 403 places were created by simply changing the method of calculation without any practical changes in the physical conditions or in the number of inmates.

Before 1 January 2017, the text of the pertaining provision of Decree 16/2014. (XII.19.) of the Minister of Justice "on the detailed rules of the imprisonment, confinement, pre-trial detention and confinement replacing fines" ran as follows:

- Article 121 Paragraph (1): The number of inmates placed in a cell or a living unit shall be determined so that each inmate would have at least six cubic metres air, and in the case of male inmates at least three square metres, in the case of female and juvenile inmates at least three and a half square meters moving

[2] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.

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space [*mozgástér*]. [For pre-trial detainees – both males and females – the required moving space was four square meters.]
- Article 121 Paragraph (2): In calculating the moving space to be afforded to an inmate, the area occupied by any furniture of equipment shall be deducted from the ground space of the cell or living unit.

As of 1 January 2017, the provision runs as follows:
- Article 121 Paragraph (1): The number of inmates placed in a cell or a living unit shall be determined so that each inmate would have at least six cubic metres air, and at least six square metres *living space* [*élettér*], for a single-occupancy cell, or four square metres living space, for a multiple-occupancy cell.
- Article 121 Paragraph (2): In calculating the living space to be afforded to an inmate, the area occupied by the toilet and the sanitary unit should not be included, irrespective of whether they are or are not partitioned.

Thus, while before 1 January 2017, the space occupied by the beds, table, lockers and chairs had to be deducted from the floor space, this is not the case anymore, so **even if an inmate has much less actual net moving space than three square meters, it can now be said that he/she has the four square meters of living space as required by the law.**

The picture below (taken in the framework of the HHC's prison monitoring program in the Baranya County Penitentiary Institution) illustrates aptly how much space beds can take up of the actual moving space. These beds would however not be taken into account when counting the living space under the new regulations (whereas under the old regulation the space taken up by them was deducted when counting the actual net moving space).

An example of what this means is provided by a lawsuit launched for damages by a client of HHC against the Ministry of Justice and a penitentiary institution for not complying with the assurance provided by the Hungarian state in an extradition procedure. The facts of the case as established by the Hungarian court are the following: the complainant was placed in two different cells during his detention. The gross surface of both cells was 16.2 square meters, and the complainant was placed in the cells with three other inmates. The net

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moving space (space remaining after the deduction of the space taken up by furniture and equipment, such as beds, chairs, table, etc.) in both cells was 10.71 square meters, whereas the net *living space* (gross surface minus the space taken up by the toilette) was 14.45 square meters. The net *moving space* per inmate was therefore 2.68 square meters, while the net *living space* was 3.61 square meters. The case clearly shows that **the new method of calculating the required space is more beneficial to the state therefore could be one of the reasons behind the decrease of the overcrowding rates**.

The documentation provided in another inmate's case shows that the net floor space of the inmate's cell was calculated to be 8.2 square metres on 31 December 2016 and 11.8 square metres on 1 January 2017, although he remained in the very same cell, only the way of calculating the space was changed by the new legislation.

Since the NPA does not provide the details of the calculation method, nor have they released data to the HHC on how many inmates are held in overcrowded cells, we can only presume that the relation between the occupancy rates and the number of inmates in overcrowded cells is not straightforward. If the occupancy rate is calculated by setting the overall number of inmates in an individual prison against the overall size of the cells' surfaces (which might be presumed), then the calculation will ignore certain factors, such as the need to separate inmates according to the crimes committed, their smoking habits, the risk level, etc. Inmates are hardly ever evenly accommodated in the cells placement of the inmates. Therefore, if the overall size of the living space in all of the cells in a prison is 400 square meters and 100 inmates are placed in the prison, then the occupancy rate will be 100%, and no overcrowding will be detected, but in practice, as a consequence of the placement it might happen that a substantial number of inmates are placed in overcrowded cells. This assumption is supported by high number of compensation claims by the inmates. However, it would require the provision of up to date data by the authorities on the number of inmates in overcrowded cells and on the degree of overcrowding in those cells to have a clear picture on the actual dimensions of the problem.

1.2. Detention conditions

1.2.1 Overcrowding rates

Overall, the Government's claim that the overall prison population and the **occupancy rate of individual prisons have been decreasing** in the past years is correct, however, due to the above-mentioned problems (inconsistency of information and the uncertainties concerning how the method of calculation has affected the ratios) **the extent of this improvement is difficult to assess accurately**.

An example for the data that are difficult to interpret is the recent significant decrease in the occupancy rate of the Budapest Remand Prison. According to the data provided by the NPA,[3] the average annual rate of occupancy was 119% in 2018 (an average of 1,411 inmates for an official capacity of 1,183). However, by 8 April 2019, the official capacity had increased to 1,353, so the 1,268 inmates meant a 94% occupancy rate. Surprisingly the website of the NPA does not contain readily accessible information about the construction of new places in the Budapest Remand Prison and the Government's Action Plan does not contain information about the construction of new places either. In response to HHC's request for information on this increase, the NPA wrote on 17 January 2020[4] that the additional 170 new places are not the result of actual (re)construction, but the new places are the result of "modernization", renovation and recalculation of the official capacity. We do not know what part of the increase results from recalculation and what part from renovation (or what kind of renovation), but we can conclude that the actual situation of the inmates has not improved to the extent that the numbers would suggest.

[3] Source: Response no. 30500/4884/2019 issued by the NPA to the HHC's FOI request, 9 May 2019.
[4] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.

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It must also be pointed out that the average occupancy rates – although indeed decreasing – show a less favourable picture than the data taken on the last days of the years. The Government's Action Plan (p. 12) mentions that on 31 December 2018, the occupancy level was 113%, but fails to give the average occupancy rate for the year, only provides the actual numbers (in the graph presented on the same page): 14,149 places, 17,251 inmates and 3,102 missing places, which amounts to an average annual occupancy rate of 122%. While this is a significant improvement compared to the year 2014, when this ratio was 143% (see the table below), it is still far from ideal and has a significant impact on the effectiveness of the remedies for overcrowding (as it will be explained in more detail below).

Table no. 1 – Average annual number of inmates, average annual operational capacity, and average annual occupancy rates of penitentiary institutions, 2013-2019[5]

	2013	**2014**	**2015**	**2016**	**2017**	**2018**	**2019***
Average annual number of inmates	17 517	18 042	17 792	18 023	17 944	17 000	16 676
Average annual operational capacity	12 573	12 584	13 209	13 774	13 922	14 149	14 870
Average annual occupancy rate	**139%**	**143%**	**135%**	**131%**	**129%**	**120%**	**112%**

**Data for 2019 is not the average of the full year but the average of the period between 1 January and 30 November 2019.*

Furthermore, despite the decrease of the overall population **certain individual penitentiaries have remained severely overcrowded**.

The below chart shows the fresher data and also reveals that even in 2019, there were **four penitentiaries where** (up until 30 November 2019) **the average occupancy rate was still higher than 130% and five other prisons where it was between 120 and 130%.**

[5] Source: Hungarian Prison Service (2018): Yearbook 2017, p. 14. Available at: https://bv.gov.hu/sites/default/files/Yearbook%202017.pdf

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Table no. 2 – Average operational capacity, average number of inmates and average occupancy rates per penitentiary institution, between 1 January 2019 and 30 November 2019[6]

Institution	Average operational capacity	Average number of inmates	Average occupancy rate (%)
Bács-Kiskun Megyei Bv. Intézet	225	250	111%
Baranya Megyei Bv. Intézet	177	190	107%
Békés Megyei Bv. Intézet	108	123	**114%**
Borsod-Abaúj-Zemplén Megyei Bv. Intézet	348	431	**124%**
Fővárosi Bv. Intézet	1300	1249	96%
Győr-Moson-Sopron Megyei Bv. Intézet	157	177	**113%**
Hajdú-Bihar Megyei Bv. Intézet	180	213	**118%**
Heves Megyei Bv. Intézet	148	171	**116%**
Jász-Nagykun-Szolnok Megyei Bv. Intézet	134	171	**128%**
Közép-dunántúli Orsz. Bv. Int. II. (Székesfehérvár)	133	150	**113%**
Somogy Megyei Bv. Intézet	138	133	96%
Szabolcs-Szatmár-Bereg Megyei Bv. Intézet	164	196	**120%**
Tolna Megyei Bv. Intézet	91	104	**114%**
Veszprém Megyei Bv. Intézet	182	190	104%
Zala Megyei Bv. Intézet	83	90	108%
Állampusztai Országos Bv. Intézet	1082	1134	105%
Balassagyarmati Fegyház és Börtön	326	423	**130%**
Budapesti Fegyház és Börtön	1032	1184	**115%**
Fiatalkorúak Bv. Intézete	219	136	62%
Kalocsai Fegyház és Börtön	265	263	99%
Kiskunhalasi Országos Bv. Intézet	472	368	78%
Közép-dunántúli Orsz. Bv. Int. I. (Baracska)	768	958	**125%**
Márianosztrai Fegyház és Börtön	505	639	**127%**
Pálhalmai Országos Bv. Intézet	1182	1228	104%
Sátoraljaújhelyi Fegyház és Börtön	292	379	**130%**
Sopronkőhidai Fegyház és Börtön	433	567	**131%**
Szegedi Fegyház és Börtön	1284	1577	**123%**
Szombathelyi Országos Bv. Intézet	1476	1457	99%
Tiszalöki Országos Bv. Intézet	700	771	110%
Tököli Országos Bv. Intézet	621	679	109%
Váci Fegyház és Börtön	645	836	**130%**
Central Hospital		22	7%
Forensic Observation and Mental Institution		217	70%
TOTAL:	**14870**	**16676**	**112%**

Based on the experience that the daily occupational rates are often higher than average ones (which also reflect certain periods of the year with generally fewer inmates), the HHC also requested the daily rates for 30 November 2019 and received the below information from the NPA.

[6] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.

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Table no. 3 – The number of detainees and rate of occupancy on 30 November 2019[7]

Institution	Av. no. of inmates between 1/1/2019-30/11/2019	Number of inmates on 30/11/2019	*Difference* in no. of inmates	Av. occupancy rate (%) between 1/1/2019-30/11/2019	Occupancy rate (%) on 30/11/2019	*Difference in occupancy rates (percentage points)*
Bács-Kiskun Megyei Bv. Intézet	250	260	*10*	111%	116%	*5pp*
Baranya Megyei Bv. Intézet	190	206	*16*	107%	116%	*9pp*
Békés Megyei Bv. Intézet	123	147	*24*	114%	**136%**	*22pp*
Borsod-Abaúj-Zemplén M. Bv. I.	431	470	*39*	124%	**135%**	*11pp*
Fővárosi Bv. Intézet	1249	1262	*13*	96%	99%	*3pp*
Győr-Moson-Sopron Megyei Bv. I.	177	188	*11*	113%	120%	*7pp*
Hajdú-Bihar Megyei Bv. Intézet	213	298	*85*	118%	**166%**	*48pp*
Heves Megyei Bv. Intézet	171	212	*41*	116%	**143%**	*27pp*
Jász-Nagykun-Szolnok Megyei Bv. I.	171	170	*-1*	128%	127%	*-1pp*
Közép-dunántúli Orsz. Bv. I. II. (Székesfehérvár)	150	158	*8*	113%	119%	*6pp*
Somogy Megyei Bv. Intézet	133	145	*12*	96%	105%	*9pp*
Szabolcs-Szatmár-Bereg M. Bv. I.	196	239	*43*	120%	**146%**	*26pp*
Tolna Megyei Bv. Intézet	104	121	*17*	114%	**133%**	*19pp*
Veszprém Megyei Bv. Intézet	190	213	*23*	104%	117%	*13pp*
Zala Megyei Bv. Intézet	90	121	*31*	108%	**146%**	*38pp*
Állampusztai Országos Bv. Intézet	1134	1098	*-36*	105%	102%	*-3pp*
Balassagyarmati F. és B.	423	447	*24*	130%	**137%**	*7pp*
Budapesti Fegyház és Börtön	1184	1123	*-61*	115%	109%	*-6pp*
Fiatalkorúak Bv. Intézete	136	59	*-77*	62%	59%	*-3pp*
Kalocsai Fegyház és Börtön	263	347	*84*	99%	**131%**	*32pp*
Kiskunhalasi Országos Bv. Intézet	368	448	*80*	78%	95%	*17pp*
Közép-dunántúli Orsz. Bv. Int. I. (Baracska)	958	991	*33*	125%	129%	*4pp*
Márianosztrai Fegyház és Börtön	639	556	*-83*	127%	110%	*-17pp*
Pálhalmai Országos Bv. Intézet	1228	1127	*-101*	104%	95%	*-9pp*
Sátoraljaújhelyi F. és B.	379	407	*28*	130%	**139%**	*9pp*
Sopronkőhidai Fegyház és Börtön	567	565	*-2*	131%	**130%**	*-1pp*
Szegedi Fegyház és Börtön	1577	1475	*-102*	123%	115%	*-8pp*
Szombathelyi Országos Bv. Intézet	1457	1374	*-83*	99%	93%	*-6pp*
Tiszalöki Országos Bv. Intézet	771	783	*12*	110%	112%	*2pp*
Tököli Országos Bv. Intézet	679	650	*-29*	109%	88%	*-21pp*
Váci Fegyház és Börtön	836	772	*-64*	130%	120%	*-10pp*
TOTAL:	**16676**	**16685**	***9***	**112%**	**113%**	***1pp***

[7] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.

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The assessment of the daily occupancy rates shows that even if the daily average rates show a relatively favourable picture and an improving trend, Hungarian prisons can still be very crowded. **In the Hajdú-Bihar Penitentiary Institution the overcrowding rate was 166%,** and in three other county remand houses (Heves, Szabolcs-Szatmár-Bereg and Zala) around 45% more inmates were held than the official operational capacity. This corresponds to approximately 2.4 and 2.75 square meters of moving space.

The Government's Action Plan foresees the opening of five new prisons each accommodating 500 inmates in 2020-2021. In this regard, it must be noted that according to the original plans, the new prisons would have started to operate from 2018/2019. However, **until now not one single new prison has been built** (the only new penitentiary was established by transforming a former refugee-processing centre into a prison in 2019). The NPA had to withdraw the call for public procurement procedure twice in 2018 because even the lowest bid was higher than the budget earmarked for the construction.[8] Therefore, it is far from certain that the new undertaking will be complied with within the time frame indicated in the Action Plan.

The Action Plan emphasizes as a noteworthy achievement that at the time of its submission 384 persons were in reintegration custody. While the HHC welcomes the introduction of reintegration custody and the subsequent extension of its application, it still must be noted that on 1 January 2019 16,053 persons were held in detention. **384 prisoners in reintegration custody amount to only 2.4% of the overall population, which is evidently not a significant proportion.** The NPA informed the HHC[9] that between 1 January 2017 and 30 November 2020, the inmates' request for reintegration custody was rejected in 28% of the cases, but they had no data on the reasons for the rejections.

1.2.2 Physical conditions

In the Mursic v Croatia judgment,[10] the ECtHR pointed out that its "assessment whether there has been a violation of Article 3 cannot be reduced to a numerical calculation of square metres allocated to a detainee. Such an approach would […] disregard the fact that, in practical terms, only a comprehensive approach to the particular conditions of detention can provide an accurate picture of the reality for detainees" (§ 123). Furthermore, the ECtHR concluded that in cases where a prison cell measures in the range of 3 to 4 sq. m of personal space per inmate "a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements" (§ 139).

The physical conditions were also mentioned in the Varga judgment (e.g. in § 99: "detainees suffered inhuman and degrading treatment on account of an acute lack of personal space in their cells, restriction on access to shower facilities and outdoor activities and lack of privacy when using the sanitary facilities"). However, the Action Plan almost exclusively focuses on the issue of personal space and fails to address the problems of other physical conditions (the only exception may be a reference to the walling up of sanitary facilities on p. 11).

This is why it is important that while they still had access to the Hungarian penitentiaries within the HHC's prison monitoring programme, the HHC's monitors found serious problems regarding these additional factors that are to be taken into account when assessing the treatment of prisoners in Hungary.

[8] http://www.kozbeszerzes.hu/ertesito/2018/0/targy/portal_403/megtekint/portal_1779_2018/
[9] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.
[10] Application no. 7334/13, GC Judgment of 20/10/2016

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1.2.2.1 Toilettes

As a general experience it can be stated that in large cells accommodating 12-16 prisoners, the toilets are partitioned but they often **lack proper ventilation**. Furthermore, it is very important to point out that a single toilet and only one washbasin are generally not sufficient for so many inmates.

For instance, during their 2016 visit to the Márianosztra Penitentiary the HHC found that only in 36 out of the 101 cells was the toilet partitioned, but insular ventilation was not solved in these cells either. The monitors visited a cell where 18 inmates were placed but they could only use one single toilet. One of the walled up toilettes had a broken door that obviously defeats the purpose of partitioning (see the picture on the right).[11]

It must also be pointed out that in an April 2018 response to a freedom of information request submitted by HHC, the NPA claimed that it had no information on what percentage of toilettes within the Hungarian prison system were partitioned by a brick wall (or similar method), wooden planks (or similar method) or textile curtains.

1.2.2.2 Out of cell activities

Although there is a clear intention within the prison system to **provide work for inmates**, several detainees are qualified by the admissions committee as unsuitable for work. By way of example, in 2016, more than 8,000 inmates were not obliged to work, 2,200 out of that number were found unsuitable for work due to health reasons.[12]

Compliance with the required open-air time can be problematic due to the lack of enough personnel to meet the security regulations. In line with this, during monitoring visits the HHC's monitors often received complaints that the 60-minute length is not respected and the whole process (getting out of the cells, being searched, marching to the yard, and the same backwards) takes one hour and inmates actually spend only around 45 minutes at the yard.

Also due to the severe understaffing of the prison system, the personnel are overburdened and do not have sufficient time to organize **recreational activities**. For example, in certain penitentiaries the number of inmates belonging to one sole staff member responsible for reintegration, education and social matter amounts up to 120[13] and in several institutions monitored by the HHC in the past years the average number of inmates were higher than 50.[14]

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[11] The report is available in Hungarian language at
https://www.helsinki.hu/wp-content/uploads/MHB_jelentes_Marianosztrai-fegyhaz_2016_vegleges.pdf
[12] See the Review of Hungarian Prison Statistics, 2016/2, issued by the Hungarian Prison Service Headquarters, p.26. at
https://bv.gov.hu/sites/default/files/Review%20of%20Hungarian%20Prison%20Statistics%202016%202_0.pdf
[13] See the report on the Márianosztra Penitentiary, p. 6.
https://www.helsinki.hu/wp-content/uploads/MHB_jelentes_Marianosztrai-fegyhaz_2016_vegleges.pdf
[14] See for example the monitoring reports on the Szabolcs-Szatmár County Penitentiary at
https://www.helsinki.hu/wp-content/uploads/MHB_jelentes_Sz-Sz-B_Megyei_Bv_Intezet_2016.pdf p.6.
and the Borsod-Abaúj-Zemplén County Penitentiary at
https://www.helsinki.hu/wp-content/uploads/MHB_jelentes_foto_BAZMBVI_fin_BVI_BVOPeszrevetelekkel.pdf p.4.

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1.2.2.3 Other issues concerning physical conditions

A general problem in the prison system is that **bedbugs** are widespread and the prison system is admittedly helpless and unable to extinct the insects. Inmates regularly make complaints about the disturbing phenomenon and the aching bites. (Photo on the right taken in the Miskolc Penitentiary in 2017)

An additional and frequently raised problem is that many of the cell windows are equipped with **view inhibitors, which hinder ventilation and obstruct access to natural air and lighting**. In many cells located in old prison buildings, the lamp is always on, as the natural light is insufficient even during the day. (The Miskolc Penitentiary's view inhibitors are seen on the photo on the left.)

1.2.3 Termination of the HHC's prison monitoring program

The HHC operated the only lay prison-monitoring scheme in Hungary. It was based on an agreement of cooperation between the NPA and the HHC, which was concluded in 1999 and subsequently prolonged on a number of occasions. **It was terminated unilaterally by the NPA** after almost two decades, on 24 August 2017 (effective of 1 October 2017). The reasoning of the termination was that the enforcement of the right of detainees can be ensured "also without keeping the present agreement in force".

The agreement entitled the HHC (1) to enter penitentiary institutions upon prior notification, (2) to monitor conditions systematically, (3) to talk to detainees without the presence of the personnel, and (4) to manage individual cases upon complaints received from the detainees. The HHC conducted altogether 77 monitoring visits to penitentiary institutions on the basis of the agreement. The HHC addressed recommendations to the affected institutions and the NPA, revealed systematic problems, and provided assistance in cases of individual complaints. The HHC published the reports with findings of the monitoring visits. The reports were submitted to the heads of the penitentiary institutions and the NPA who could communicate their comments on the findings to the HHC. For all the 18 years of the agreement, cooperation between the parties was smooth and effective.

In our view, **the reasoning behind the termination of the agreement is not well founded**. Those international and domestic control mechanisms that are available for inmates (and that might be seen as sufficient by the NPA to ensure the protection of detainees' rights) were already in place when the violations leading to the ECtHR's Varga and Others versus Hungary judgment were committed by the Hungarian

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authorities. However, these mechanisms were unable to prevent the Hungarian authorities from continuing to disrespect the inmates' right to Article 3 compliant placement in Hungarian prisons.

The only novelty in the **system of controls is the National Preventive Mechanism** (NPM, the role of which is fulfilled by the Ombudsman) under the Optional Protocol to the UN Convention against Torture. It is true that the Ombudsman as NPM regularly examines the treatment of persons deprived of their liberty in places of detention, however, this means that this monitoring extends to not only penitentiary institutions, but also other detention facilities, such as police jails, alien policing jails, psychiatric institutions, juvenile reformatories and all other places where persons are prevented from leaving on their own initiative.

Compared to the hundreds of "places of detention" (interpreted in the above outlined wide sense) in Hungary, the NPM is understaffed. Since the formation of the NPM unit of the Ombudsman's Office in January 2015, 36 reports about visits have been published until now, out of which only 10 concerned penitentiary institutions, including the Forensic Observation and Mental Institution, the Central Hospital and the After-Care Department of the penitentiary system. As opposed to this, between 2015 and the summer of 2017 (when its agreement of cooperation with the NPA was terminated), the Hungarian Helsinki Committee carried out 11 reported visits into penitentiary institutions.

Furthermore, while the Ombudsman can primarily issue recommendations that the authorities may or may not comply with, the HHC was able in some important cases to provide through its attorneys legal assistance to detainees whose fundamental rights had been violated, enabling these inmates to enforce their rights in courts [see for instance the ECtHR judgments Engel v. Hungary (46857/06) and Csüllög v. Hungary (30042/08)]. The most important such case was exactly the Varga and Others versus Hungary case, where three out of the six applicants were clients of the HHC. This case shows how the NPA's decision to terminate the agreement of cooperation with the HHC has diminished the Hungarian monitoring system's capacity to deal with serious human rights violations within the penitentiary system. The HHC's litigation significantly contributed to the pilot judgment that obliged the Hungarian state to start to address the issue of overcrowding.

The HHC's ability to conduct comprehensive, multi-day monitoring visits to prisons has been terminated, as have been the authorization of its monitors to consult with inmates out of hearing of the prison personnel and HHC staff's ability to pay ad hoc visits to inmates in urgent cases, such as when claims of ill-treatment by prison personnel were put forth. In addition, inmates are prevented from sending letters to the HHC from certain penitentiaries (though there are still some prisons that allow correspondence between the detainees and the HHC). We are of the view that due to the termination of the agreement, the protection of the rights of detainees and the chances of the revelation of systematic problems has definitely been weakened in Hungary.

2. Contacts with the outside world

Starting on page 33, the Action Plan discusses in detail what rights inmates have concerning their contacts with the outside world and what remedies there are if these rights are violated. The description of the legal framework needs to be augmented with the unfavourable developments of the practice though. The NPA introduced a very restrictive policy regarding **visits** in 2017-2018: any physical contact between the inmates and the visitors is prohibited. In the past, for those inmates not assigned to high-security booths, it was possible to hug and kiss the visitors prior to and at the end of the visit. Now not even children can be hugged, kissed or seated in the inmate’s lap. At a visit paid in September 2017 to the Heves County Penitentiary Institution (Eger) where many women are held, inmates told the monitors of the HHC that they refused visits by the family because young children kept crying, as they did not understand why they could not touch their parents or relatives. The inmates claim that such an environment has an especially negative impact on the children, who are often shocked and traumatized by this deprivation of contact with their parent. Moreover, some inmates feel that this kind of treatment is humiliating.

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Furthermore, **high transparent plastic screens separating the inmates from the visitors have been installed** in all the penitentiaries – including the hospital type institutions like the Forensic Observation and Mental Institution and the Central Hospital, physically separating inmates and their visitors. The internal regulation making it mandatory for every institution to install such screens came into effect on 29 April 2019.[15] Despite the prohibition of physical contact and the plastic screens, the systemic search of the inmates before and after the visits including undressing and squatting half-naked is continued in search for illegal items.

A program of "family friendly visits" was started in 2016 to create a child-friendlier environment for visits. Today this is practically the only remaining visitation form that exceptionally allows inmates to sit together with and touch their family members during the visits. The HHC requested data from the NPA on the number of **family friendly visits** carried out since 2017, but in its response,[16] the NPA informed us that they did not have data on the number of family visits, on the number of detainees requesting this type of visit and the number of relatives participating in such visits. According to a news item on the NPA's website, in the Pálhalma Penitentiary Institution, altogether 23 such visits took place between March 2018 and 31 January 2019.[17]

In December 2018, the HHC turned to the Chief Public Prosecutor's Office criticising the general practice of depriving inmates of the possibility of physical contact with their visitors without any individualised risk assessment and requesting the Prosecutor's Office to look into the matter and take the necessary measures in order to reinstate the previous practice, whereby physical contact was the main rule, which could be put aside only if an inmate individual circumstances required so. In the submission, the HHC expressly referred to the relevant CPT standards and the ECtHR's Moiseyev judgment,[18] in which the Court stated that "it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family" (§ 246) and that "although physical separation of a detainee from his visitors may be justified by security considerations in certain cases […], the measure cannot be considered necessary in the absence of any established security risk" (§ 258). The HHC also invoked Article 83(6) of Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement (hereafter: Penitentiary Code), according to which convicted inmates may only be separated from the members of society to the extent that it is absolutely necessary for achieving the objectives of the punishment and inmates shall be provided with the possibility of establishing, maintaining and developing those family, personal and societal contacts that are not contradictory to the objectives of the punishment and the security and order of the penitentiary.

However, in its response of January 2019, the Prosecutor's Office refused to look into the matter on the basis that under Article 177 of the Penitentiary Code, it may be ordered for the sake of the penitentiary institution's security that the inmate may exercise his/her contact rights indirectly (e.g. through a plastic screen). The problem with this argument is exactly that it would require the individualised examination of whether having a visit without this security measure would actually endanger the security of the prison, which is not happening when there is a general policy that all visits should take place in this manner. However, the Chief Public Prosecutor's Office failed to realise this contradiction nor did it reflect in any way on the arguments invoking the standards of the CPT or the ECtHR.

There are serious problems with **phone calls** too. Each detainee can have his/her own mobile phone provided by the prison service. If they wish to have such a phone, detainees are required to deposit a HUF 35,000 (approximately EUR 100) bail serving as a guarantee for potential damages during usage. For many inmates the payment of this amount constitutes a serious financial difficulty. Those who cannot afford to pay the bail,

[15] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.
[16] Source: Response no. 30500/490/2020 issued by the NPA to the HHC's FOI request, 17 January 2020.
[17] https://bv.gov.hu/hu/intezetek/palhalma/hirek/2410
[18] Application no. 62936/00, Judgment of 09/10/2008

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can only occasionally make phone calls, using the phone installed in the reintegration officer's office or at the corridor in limited times suitable for the staff. On the other hand, those inmates who can afford to have their "prison-mobile" complain that there is no separate room or space ensured for phone calls, therefore they can only call from the often overcrowded cells leading to problems of privacy.

The **phone rates are fixed and are much (even around 5-10 times) higher** than any tariffs available otherwise at any service provider. For example, the lowest minute rate of an ordinary call within Hungary initiated from a prison phone was HUF 81-93 (approximately 0.24-0.27 EUR) between 2015 and 2020 and was lowered a bit in February 2020 to approximately HUF 75, whereas a call in the outside world would be around HUF 20, but calls can be also effected from HUF 3 if somebody is a member of a fleet. It must be noted that phone calls are not only expensive compared to outside rates, but also compared to certain rates that were applied in the prison system previously, before 2015.

3. The preventive remedy

3.1. Outline of the system

The October 2016 amendment of the Penitentiary Code introduced a special type of complaint into detention conditions. Under the new Article 144/B of the Code, the detainee may **file a complaint with the prison governor about the conditions of detention**.

Based on the complaint, the governor shall take measures within 15 days to improve the conditions by **placing the inmate in a non-overcrowded cell**. If this is not possible due to the general occupancy rates in the given prison, the governor shall contact the NPA National Headquarters to initiate the **transfer of the inmate into a non-overcrowded prison**. If this is possible, a transfer will be ordered by the Headquarters within 8 days from receiving the governor's notification. (According to the law, when the decision is made, account must be taken of whether the transfer might have a detrimental impact on the inmate's family ties. If the inmate concerned believes that the transfer would adversely impact their family ties, they may appeal against the transfer order to the penitentiary judge).

If it is not possible to identify a less crowded prison to which the complainant could be transferred without negatively impacting their family ties, the Headquarters must refer the case back to the prison governor, who – in such cases – shall consider the **granting of certain entitlements** mitigating the effects of overcrowding (such as, additional open-air time, additional visits, etc.).

While in itself the above mechanism would be unproblematic and its introduction a measure to be welcomed, there is one element of the system that generates conflicts and problems: the filing of an Article 144/B complaint is a precondition for claiming compensation. In terms of Article 10/A Paragraph (6) of the Penitentiary Code, **a compensation claim may only be submitted if a complaint under Article 144/B has been filed beforehand**. This precondition does not prevail if the placement in overcrowded circumstances has been in place for less than 30 days. Furthermore, if the conditions violating fundamental rights prevail for a longer period of time (and the Article 144/B complaint yields no improvement), the complainant is not required to submit a new complaint within three months. This means in practice that **if they want to be compensated for substandard detention conditions, inmates must submit new Article 144/B complaints every three months**.

Until recently, the jurisprudence of Hungarian courts did not require the repeated submission of complaints in order for a compensation for overcrowding to be granted. However, according to anecdotal information from lawyers representing inmates in compensation cases, starting from the end of 2018, more and more

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judgments have been handed down in which the **courts grant compensation only for the last three months** preceding the submission of the complaint based on which the compensation claim is submitted.

3.2. The remedy is ineffective due to the lack of sufficient prison-capacity

The main problem with the preventive remedy scheme is that while in principle the prison system must obviously be provided with a possibility to remedy the violations stemming from substandard conditions before a financial compensation is claimed, in the present situation **it is unreasonable to make the claiming of financial compensation conditional on the submission of a complaint.**

As presented in Section 1.2 above, the average operational capacity of penal institutions between 1 January and 30 November 2019 amounted to 14,870 places, and the average number of inmates was 16,676. This means **that at present, there is still no possibility to provide satisfactory placement for a significant proportion of the inmates, so the situation inevitably leads to thousands of inmates submitting – mostly futile – complaints about their placement** (if the jurisprudence does not change, then on a quarterly basis), thus creating a substantial administrative burden for the already overworked penitentiary personnel.

This assessment is supported by the data the NPA provided in May 2019 in response to the HHC's FOI request[19]. According to the issued data, between 1 January 2017 and 17 April 2019, altogether 17,856 complaints were submitted due to substandard detention conditions. In 12,280 cases, amounting **almost to 70%, the governors could not take measures to remedy the situation within the prison concerned**, so the complaint was forwarded to the national headquarters. Out of these, only in 284 instances (2.3%) could the complaining detainee be transferred into another prison, in the remaining **over 95% of the cases, there was no less crowded prison into which the complainant could have been transferred**, so the case had to be referred back to the prison governor. It must be also pointed out that many inmates only submit their complaint at the very end of their sentence in order to avoid repercussions. Therefore, it must be assumed that the over 5,000 difference between the number of complaints and the number of cases forwarded to the NPA does not mean that in all of these over 5,000 cases the governors could solve the problem of overcrowding within their own prison, it might be possible that the complainant has already been released for example and this was the reason why the claim had not been transferred to the NPA.

Thus, the data clearly show that the **prison system's capacity is still not sufficient for the preventive remedy to be truly and fully effective**, and due to the delays in building prisons, this will remain so for at least two more years.

4. Issues concerning the compensation procedure

4.1. Lack of an adversarial procedure

Under of the Penitentiary Code,[20] the compensation claim must be submitted to the penitentiary institution where the person is held, or from which they were released. In terms of these rules,[21] the penitentiary institution forwards the claim within 15 or 30 days to the penitentiary judge along with the observations and the documentation that is regarded as relevant to the case.

[19] Source: Response no. 30500/4884/2019 issued by the NPA for the HHC's FOI request, 9 May 2019.
[20] Article 10/A Paragraph (5)
[21] Article 70/A Paragraph (2)

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According to the Penitentiary Code,[22] the penitentiary judge may decide not to hold a hearing in relation to compensation claims and decide solely on the basis of the available documentation. According to lawyers providing representation in such cases, the practice is that **penitentiary judges do not hold hearings, even in cases where the detainee or the lawyer expressly requests a hearing**.

Furthermore, the penitentiary institutions do not provide the detainees or their lawyer with their observations and the attached documentation, nor do the penitentiary judges notify them about the arrival of the documentation at the court. Hence, unless the lawyer keeps record of approximately when the case file may arrive at the court, and unless he/she keeps inquiring about whether it has arrived, he/she **will not have a possibility to inspect the file**, familiarize themselves with the penitentiary institution's observations and reflect on them, or request the hearing of the detainee if need be. Detainees who do not have a lawyer are in an even more disadvantaged situation in this regard for obvious reasons.

With regard to the access to case files, a lawyer reported to the HHC in August 2017 that he requested an electronic version of the penitentiary institution's observations and the prosecutor's opinion from the regional court, but the electronic versions of these files were never sent to him. The **problem with the access to case files** has not been solved since then; in fact, the HHC has received more complaints concerning this issue. For instance, another lawyer reported in September 2019 that before the first instance court delivered a decision in her client's case, neither she nor the client had been provided with the penitentiary institution's opinion and the client's penitentiary documentation. In her appeal she expressly requested access, but she received a demonstrably insufficient file (e.g. only eight pages of medical documentation were sent to her, whilst the detainee spent five years in prison while suffering from a brain tumour, which makes it highly unlikely that the medical documentation was indeed so brief), and the institution's observations concerning the compensation claim were not included in the material sent to her. Eventually she managed to inspect the observations only immediately before the second instance court's hearing of the case.

In addition to the problems concerning access to case files, there have been difficulties regarding access to the relevant NPA rules and regulations. The Director General of the NPA issues **Standing Orders that contain mandatory instructions and requirements regarding the daily operation of penitentiary institutions**. Although these are not legally binding documents, they can have significant impact on the rights of inmates. Standing Order no. 60/2017. (IX.20.) of the Director General of the NPA on the Rules of Complaints and Compensation Procedures for Inhuman or Degrading Detention Conditions interprets the provisions of the Penitentiary Code and regulates the data transfer between different penitentiary institutions and towards the National Office of the Judiciary and the Ministry of Justice in such cases.

For a long time, Standing Orders were published on the official website of the NPA before they were suddenly deleted in October 2018. The HHC sent an FOI request to the NPA, which was rejected on the ground that the publicity of these documents would pose serious security risks. Therefore, the HHC sued the NPA for access. In the course of the procedure in September 2019, the NPA decided to republish most of the Standing Orders – including the Standing Order on compensations procedures – on its website. The HHC won the case at the first instance, but the NPA appealed against the decision, so the court case is still pending. Despite these achievements, it needs to be highlighted that **for almost a year neither lawyers nor detainees were allowed to familiarize themselves with the Standing Order regulating compensation procedures**.

It is also frequently reported to the HHC that in most cases, penitentiary judges also request the prosecutor's opinion on the compensation claims, but the detainee or the lawyer is only informed about this fact and the prosecutorial opinion itself from the court's decision. Prosecutors are served with the compensation decisions and have the right to appeal them. However, when this happens neither the prosecutor nor the court of second instance is obliged by law to serve the prosecutorial appeal to the inmate and his/her lawyer, so they

[22] Article 70/A Paragraph (1)

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are only informed about the appeal and its contents by the second instance decision, which obviously **deprives them from the possibility to meaningfully argue against the prosecution's stance**, which is a **clear violation of the equality of arms principle**.

4.2. Failure to compensate for substandard physical conditions if required personal space is provided

According to the Penitentiary Code,[23] "post-conviction inmates and inmates detained on other grounds are entitled to compensation for not having been provided with the living space specified in the law **and for any other placement condition – related to the lack of living space – which may violate** the prohibition of torture or cruel, inhuman or degrading treatment, in particular for violations caused by unpartititoned toilets, lack of proper ventilation, lighting or heating, and insects".

In terms of this provision, other placement conditions violating Article 3 of the Convention are to be examined in the compensation proceeding only if the prescribed moving / living space has not been provided for the inmate. **As a result, adequate personal space becomes automatically equivalent to adequate detention conditions, regardless of whether other detention conditions might have made the deprivation of liberty inhuman or degrading**. Even where toilets are not partititoned or there is no sufficient natural light, with inmates suffering from insect bites, the inmates will not be entitled to compensation if the required living space (calculated according to the new rules that are more favourable for the state) is provided. This is in contrast with the above quoted approach of Mursic v. Croatia judgment, according to which the "assessment as to whether there has been a violation of Article 3 cannot be reduced to a numerical calculation of square metres allocated to a detainee. Such an approach would […] disregard the fact that, in practical terms, only a comprehensive approach to the particular conditions of detention can provide an accurate picture of the reality for detainees" (§ 123).

It must be pointed out that that the Action Plan of March 2019 uses a somewhat misleading and insufficient translation of the Penitentiary Code, when it cites Article 10/A Paragraph (1) on page 23, but leaves out the phrase "**related to the lack of living space**" from the translation. However, on page 45 it does acknowledge the issue, when it states the following: "Though under the [Penitentiary Code] the existence of overcrowding is a necessary condition for awarding compensation, that is, other conditions are regarded as conjunctive elements and have only importance in case they co-exist with overcrowding, in certain cases compensation has also been awarded even if no overcrowding existed but the toilet was not properly separated or independent ventilation was not solved."

According to HHC's lawyer sources it is true that in the beginning some judges awarded compensations based on the supplementary physical conditions only, however as the **jurisprudence has moved into a restrictive direction**, it has become the general approach that if the living space meets the legal requirements, then **no compensation is granted no matter how appalling the additional conditions are**. This is in line with the strict grammatical interpretation of the Penitentiary Code, but does not seem to be in line with the ECtHR's approach. Although this would open the possibility for penitentiary judges to request a constitutional review of Article 10/A of the Penitentiary Code from the Constitutional Court, we have no knowledge of any such judicial initiative.

[23] Article 10/A Paragraph (1)

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4.3. Inconsistent and increasingly restrictive jurisprudence

The legal framework of compensation claims for inhuman and degrading prison conditions is complicated, highly technical and often ambiguous. The experience of the HHC and lawyers specializing in compensation claims shows that due to these features there is a highly **diverging jurisprudence** on a number of issues.

Lawyers regularly receive **contradicting decisions in identical situations**. The Action Plan's above quoted account of decisions granting compensation for the lack of partitioned toilettes even in cases when the legally required living space per inmate is provided is one example for the inconsistency of the jurisprudence, but other examples can also be quoted.

4.3.1 Submission or decision on the Article 144/B complaint as a prerequisite of compensation

For instance, it is still not clear whether the complaint under Article 144/B of the Penitentiary Code has to be submitted or if it is also required to be examined by the prison governor as a precondition of the compensation claim. This question occurs frequently in practice because — in order to avoid detrimental treatment — detainees usually submit their complaint and compensation claim on consecutive days shortly before release. Certain courts regard the submission of the complaint as a sufficient prerequisite for claiming compensation, while others are of the view that the compensation complaint may only be filed after the governor has made a decision on the complaint.

4.3.2 Compensation of inmates with registered ECtHR applications

As it was mentioned in HHC's August 2017 Rule 9 communication, in terms of the Penitentiary Code,[24] those can claim compensation irrespective of other preconditions whose applications submitted to the ECtHR concerning such placement have been registered. Under the Penitentiary Code,[25] such claimants were not required to file an Article 144/B complaint to be able to claim compensation ("When deciding on claims submitted under Paragraph (10), Paragraph (6) of Article 10/A shall not be applied […].).

There is inconsistent jurisprudence regarding this exemption too. While some courts adjudicate cases in line with the norm, and do not require the submission of Article 144/B complaints as a precondition for compensation from those who have registered ECtHR applications, some penitentiary judges take the stance that this is only true for the period preceding 1 January 2017. So if someone submitted an application to the ECtHR on 1 June 2016 concerning his placement under substandard conditions between, let us say, 30 December 2010 and the date of the application, and that person is still detained today in an overcrowded cell, then – according to the judicial practice – he will be able to claim compensation unconditionally for the period between 30 December 2010 and 31 December 2016, while for the period between 1 January 2017 and today, he can only claim compensation if he submits an Article 144/B complaint beforehand. While such a solution could be justified in principle, the legislator chose a different approach, so **this *contra legem* judicial interpretation restricting the right to claim compensation is obviously not acceptable**.

However, HHC has become aware of yet another and even more restrictive interpretation: the Szeged Regional Court holds the view that only those inmates with registered ECtHR applications have the exemption from having to submit an Article 144/B complaint who were released before 1 January 2017. All other Strasbourg applicants must submit complaints or otherwise they lose their right to the compensation with regard to the total period of detention under degrading conditions.

[24] Article 436 Paragraph (10)
[25] Article 436 Paragraph (11)

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According to the lawyers who have shared their experiences with the HHC, **the jurisprudence is becoming increasingly restrictive and in each ambiguous issue, the interpretation that is the least favourable for the inmates becomes widely accepted**.

4.3.3 Health care units and prison hospital wards regarded as falling outside the scope of compensation

The Penitentiary Code states[26] that detainees are "**entitled to compensation for not having been provided with the living space specified in the law** […]. Compensation shall be granted for each day **spent under conditions violating fundamental rights**". The phrase "living space" is defined by Decree 16/2014. (XII.19.) of the Minister of Justice.[27] According to this provision, "the number of inmates placed in a cell or a living unit shall be determined so that each inmate would have at least six cubic metres air, and at least six square metres living space, for a single-occupancy cell, or four square metres living space, for a multiple-occupancy cell." It was reported by lawyers and detainees that several compensation claims were rejected on the basis that health care units and the Central Penitentiary Hospital's wards do not qualify as "cells" or "living units", and therefore no compensation may be claimed for the lack of the required living space in these facilities, as the definition of living space can only be applied to cells and living units under Decree 16/2014. This interpretation creates an **unjustifiable distinction to the detriment of detainees requiring medical care.**

4.3.4 Differences of judicial practice between Regional Courts

Under the Penitentiary Code,[28] penitentiary law cases are decided in the first instance by penitentiary judges who operate at regional courts. In the second instance, the regional court's appeal council delivers judgements. Lawyers have reported that there are **significant discrepancies in the judicial practice of the various regional courts**. Since the HHC did not have the opportunity to examine a representative number of case files, in order to gain an insight into the courts' practice, we sent a FOI request to the National Office of the Judiciary on the number of compensation claims rejected on the grounds of inadmissibility by regional courts.

According to the Penitentiary Code, the judge rejects a claim as inadmissible without examining its merits if: the claim is submitted late; the claim is not submitted by the eligible person; the convicted person did not file the complaint under Article 144/B before submitting the compensation claim; or, for the period indicated in the claim, due to detention conditions that violate fundamental rights, the ECtHR has ordered the State to pay just satisfaction, or the civil court has awarded damages or any other compensation.

These criteria are fairly objective, furthermore, all individual penitentiaries inform the inmates of the relevant rules, and the NPA has also issued an information document available for inmates on the rules of the compensation procedure, so the information provided to inmates about how the process goes is to a great extent unified. Therefore, it could be presumed and expected that ratio of inadmissible compensation claims would be similar in the courts' practices if the application of the law is consistent. The response[29] received from the National Office of the Judiciary however shows that the ratio of inadmissible claims widely varies between the different regional courts in the country.

[26] Article 10/A Paragraph (1)
[27] Article 121
[28] Articles 47-51
[29] Source: Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020.

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Table no. 4 – Number of incoming cases, closed cases and inadmissible cases between January 2017 and November 2019[30]

Name of the Regional Court	Number of incoming cases	Number of closed cases	Cases rejected on grounds of inadmissibility	Ratio of rejection on grounds of inadmissibility within closed cases (%)
Balassagyarmati Törvényszék	1260	670	212	**32%**
Budapest Környéki Törvényszék	5147	2681	156	6%
Debreceni Törvényszék	676	615	0	0%
Egri Törvényszék	324	243	1	0%
Fővárosi Törvényszék	5000	4225	283	7%
Győri Törvényszék	1214	1147	52	5%
Gyulai Törvényszék	158	140	56	**40%**
Kaposvári Törvényszék	174	167	0	0%
Kecskeméti Törvényszék	3109	2593	343	**13%**
Miskolci Törvényszék	2750	2604	99	4%
Nyíregyházi Törvényszék	2767	2532	96	4%
Pécsi Törvényszék	118	79	1	1%
Szegedi Törvényszék	2823	2036	483	**24%**
Székesfehérvári Törvényszék	4407	3379	521	**15%**
Szekszárdi Törvényszék	219	200	16	8%
Szolnoki Törvényszék	166	128	44	**34%**
Szombathelyi Törvényszék	1581	1284	421	**33%**
Tatabányai Törvényszék	13	10	3	**30%**
Veszprémi Törvényszék	220	204	2	1%
Zalaegerszegi Törvényszék	66	58	4	7%
TOTAL	**32192**	**24995**	**2793**	**11%**

[30] Source: Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020.

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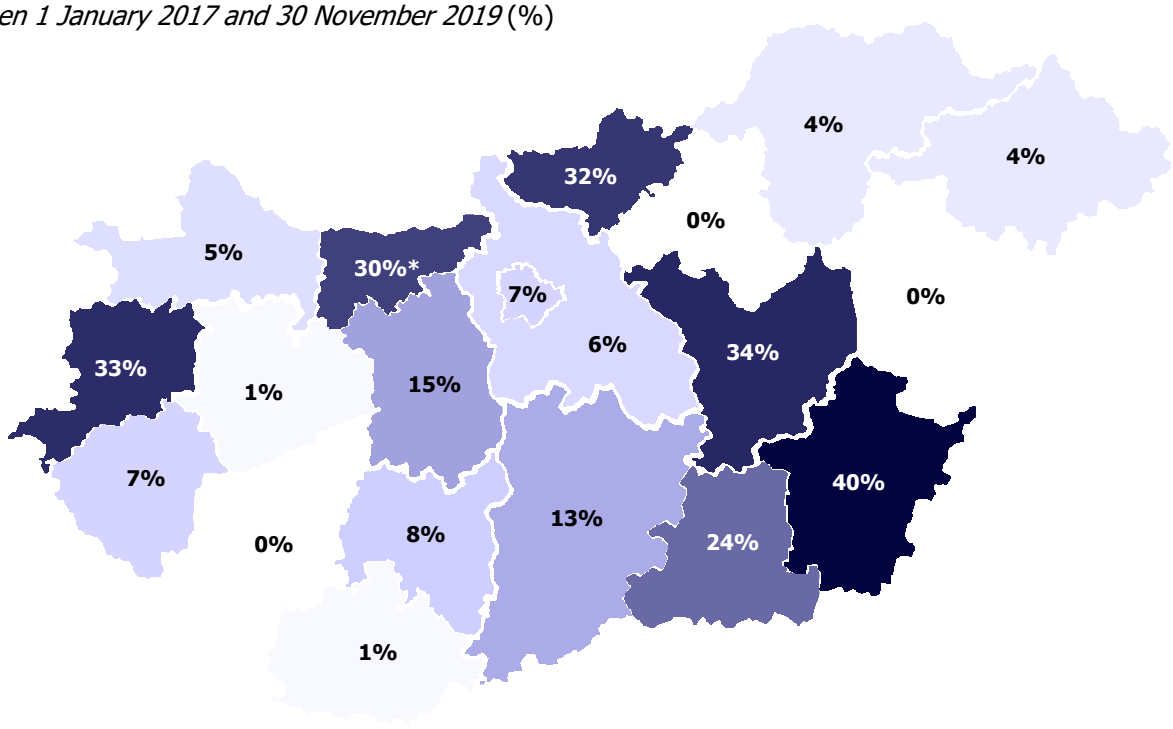
Map no. 1 – Ratio of cases rejected on grounds of inadmissibility within the total number of closed cases between 1 January 2017 and 30 November 2019 (%)



**The Tatabánya Regional court had very few cases since that is the only county where there is no penitentiary institution, only police custody.*

On the national average, 11% of the compensation claims are rejected on grounds of inadmissibility. However, **significant regional differences** can be observed as the map above shows. In comparison to the 11% national average, there are five counties where the inadmissibility rate was significantly higher between 1 January 2017 and 30 November 2019. The rate of inadmissible cases in the practice of the Gyula Regional Court was 40%, at the Szolnok Regional Court it was 34%, at the Szombathely Regional Court 33%, at the Balassagyarmat Regional Court 32% and at the Tatabánya Regional Court 30%. Thus, the data seems to support the observations of lawyers working in the field that there might be **significant differences in the courts' practices not only in the inadmissibility of cases but also in other, more complex issues**.

4.3.5 Constitutional Court decision on the 30-day interruption rule

Another example of **restrictive (and retroactive) interpretation** is offered by a recent judgment of the Constitutional Court.[31] In that particular case a former detainee, who served his sentence between 29 October 2014 and 10 March 2016, filed a compensation claim due to substandard detention conditions in March 2017 (on the basis of Article 436 of the Penitentiary Code, which opened the possibility for claiming compensation for substandard detention conditions that came to an end within one year preceding the coming into force of the amendment introducing compensations).

In terms of the Penitentiary Code,[32] if a detainee is placed in appropriate conditions for a period longer than 30 days, his/her substandard detention conditions are regarded to be terminated. From the termination of the substandard detention conditions, detainees have six months to file a compensation claim. Since the

[31] Decision no. IV/1833/2017, 25 June 2019.
[32] Article 10/A Paragraph (4)

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complainant was placed in adequate conditions for a period longer than 30 days (33 days) in 2015, the penitentiary judge decided that the detainee was not entitled to compensation for the period that preceded these 33 days, because the six-month deadline counted from the 2015 termination of the substandard detention conditions had expired by the time he submitted his compensation claim in March 2017. In his constitutional complaint, the detainee complained about **the regional court evaluating, to his detriment, a provision of the Penitentiary Code that was even not in force** at the time when – according to the court – he should have enforced his claim. The Constitutional Court decided in his favour and declared that this interpretation resulted in a **violation of the prohibition of applying the law retroactively**.

On the one hand, the case illustrates the restrictive approach courts increasingly take towards the issue of compensation. On the other, it might give the impression that the Constitutional Court may be expected to remedy violations arising from this approach. However, due to the reasons outlined below, the **Constitutional Court's impact is likely to remain limited**. The constitutional complaint against judicial decisions violating constitutional rights is available for those who have already exhausted the available remedies, which in the case of compensations means those who appealed against the first instance decision in the compensation procedure. As it will explained below, the deadline for appealing against first instance decisions on compensation claims is very short, but more importantly, there are serious hurdles complainants must surmount to be successful in a constitutional procedure.

First, in constitutional complaint proceedings, the petition has to meet very strict formal and substantive criteria. Under the Act on the Constitutional Court[33], **constitutional court proceedings may be initiated in exceptional circumstances**. This is an exceptional remedy that is only regarded as admissible if in the Constitutional Court's view the complaint raises "constitutional-law issues of fundamental importance", thus, the court has very wide discretion to decide whether to admit a complaint at all. Thus, complainants must not only be able to put forth a well-founded argumentation concerning the highly technical and ambiguous text of the Penitentiary Code, they must also convince the Constitutional Court that the issue is of constitutional importance. It is obviously highly challenging to submit such a petition (even lawyers' petitions are often found inadmissible for not meeting the formal and substantive criteria), so detainees without any legal assistance have practically no chance to submit an admissible petition. However, not many inmates can afford the costs of the necessary legal representation, and due to the short deadline and other problems of the legal aid system, the possibility of getting meaningful representation through the legal aid service is questionable.

Second, the **Constitutional Court is not bound by time limits** in its procedure, consequently most of the procedures are excessively lengthy (by way of example, the above outlined case was initiated in 2017, but the decision was only delivered in the summer of 2019). Finally yet importantly, if the Constitutional Court decides in favour of a detainee, **it will not help retroactively those inmates whose compensation claim was rejected** by the penitentiary judge on the same legal grounds. Those whose case is already closed have no right to a retrial based on the Constitutional Court's decision, because the Penitentiary Code excludes this opportunity.

4.3.6 Other examples for restrictive tendencies

According to some lawyers, in the beginning, courts accepted as a duly met requirement for claiming compensation if the inmate submitted the Article 144/B complaint after his/her release but before putting forth the compensation claim. Later this changed on the basis that the complaint as a preventive remedy may only fulfil its function if it is **submitted at a time when the penitentiary system still has a chance to remedy the inhumane detention conditions**.

[33] Article 26(2) of Act CLI of 2011

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This is a reasonable approach, however it does not seem to be followed when the question of pre-2017 detention periods arise. While some courts did accept in the past claims regarding pre-2017 detention periods without the preceding submission of an Article 144/B complaint, recently it seems to have become the dominant view that **without a complaint, no compensation may be claimed even for those periods when the complaint was not available**. This is problematic, since if the purpose of the Article 144/B complaint is preventive, then its submission may not be required for a compensation that is granted with regard to a period where the possibility of putting forth a complaint was not in place. If courts take into account the preventive nature of the complaint when it is unfavourable for the inmates (post-release submission), then they should also do so when it is favourable for them.

As it was mentioned above, while in the beginning the courts did not require the submission of complaints every three months, recently, the jurisprudence has become more restrictive, and courts have started to **grant compensation only for the three months preceding the submission of the complaint** which serves as the basis for the compensation claim.

According to some lawyers, this approach has been extended to **demanding separate complaints for each individual institution where the inmate was detained under inhumane conditions**. Thus, if a person is moved from one penitentiary to the other and was/is detained in substandard conditions in both, if he/she submits an Article 144/B complaint in the second institution, and then turns to the court for compensation, the court will only examine his/her complaint with regard to the second institution on the basis that he/she di not complain in the first one.

Lawyers also have the impression that the daily rates have generally been on the decrease. While in the beginning there was an effort to differentiate according to the actual circumstances of the detention, recently it has become increasingly frequent that the **courts grant the statutory minimum of HUF 1,200 per day irrespective of the rate of overcrowding or the additional conditions**.

4.4. Lengthy proceedings

The Government's Action Plan emphasises in more than one place the – envisaged – speediness of the compensation procedure. However, several lawyers have reported **cases where no decision has been delivered since the first half of 2017**, the first large wave of claims submissions.

According to one lawyer who provides legal representation in several compensation procedures, this is primarily because the **penitentiary institutions often lose the detainees' files and documents** and therefore they forward the compensation claim to the court without the supporting documentation. In such cases, the penitentiary judge must suspend the procedure until the penitentiary institutions send the full documentation. This lawyer has had a large number of cases in which – due to the penitentiary institutions' failure to deliver full and up to date documentation – the court has not been able to deliver a judgement since 2017.

According to another lawyer, delays are primarily characteristic in the case of those long-time convicts who initiated the compensation procedures in the first half of 2017. Most of them had been detained in several institutions for long times throughout the years (sometimes dating back to 8-15 years), and therefore, the **different institutions have a difficulty in gathering all the material** that should be sent to the penitentiary judges.

As yet another example of the increasingly restrictive approach, one lawyer said that in the beginning there were cases in which the courts "sanctioned" such delays by the penitentiaries by basing their decisions on the accounts of the inmates (on the basis that if the penitentiary cannot refute the inmate's claim, it is justified to

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accept those as the basis for the judgment), but lately this has also changed and this approach has been abandoned.

The Government's own numbers seem to substantiate that **there are delays** in adjudicating compensation claims. The Government states that between the beginning of 2017 and 11 February 2019, 21,503 compensation cases were initiated (see the table on p. 25 of the Action Plan – annual numbers were added up by HHC) and by 31 January 2019, 5,683 decisions (approximately 25% of the cases) were adjudicated by the judges in compensation procedures (Action Plan, p. 26). This seems to suggest that 15,820 cases (approx. 74%) were still pending at the time of writing the Action Plan. **However, the Government's arguments are not consistent**, since it is also stated in the Action Plan that only in 2018, 7,446 cases were closed by the courts, which is much higher than the aggregate number for 31 January 2019.

To clarify the situation, the HHC submitted an FOI request to the National Office of the Judiciary asking about the average length of cases between their arrival to the court and adjudication and the number of cases pending for more than a year. These Office did not respond to these claiming that no official data collection is in place in these regards, but sent some information concerning compensation claims.[34] Their data show that between the beginning of 2017 and 30 November 2019, a total number of 32,192 compensation cases were initiated, and 24,995 (78%) of them were closed, within the closed cases 2,793 (9%) were rejected on grounds of inadmissibility. This means that 7,197 (22%) of the overall caseload was still pending on 30 November 2019. However, information on the average length of cases (starting with the submission of the claim to the penitentiary) would be required to have a true picture of the situation in this regard.

It must also be emphasised in relation to the issue of length that **if the penitentiary judge does not deliver a decision within the prescribed deadline, there is no remedy** for the inmates. On the other hand, detainees or their lawyers **have only eight days to appeal against the first instance decision** of the penitentiary judge, which in practice makes it almost impossible to prepare a substantiated appeal, because the lawyers – as mentioned above – have no access to the case file and evidence before the first instance decision is handed down.

[34] Source: Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020.

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4.4.1 Substantial regional differences in the number of pending cases

Examining the previously analysed data issued by the National Office for the Judiciary, substantial regional differences can be observed in the number of cases pending on 30 November 2019.

Table no. 5 – Number of pending cases per regional court on 30 November 2019[35]

Name of the Regional Court	No. of pending cases on 30/11/2019
Balassagyarmati Törvényszék	**590**
Budapest Környéki Törvényszék	**2466**
Debreceni Törvényszék	61
Egri Törvényszék	81
Fővárosi Törvényszék	**775**
Győri Törvényszék	67
Gyulai Törvényszék	18
Kaposvári Törvényszék	7
Kecskeméti Törvényszék	**516**
Miskolci Törvényszék	146
Nyíregyházi Törvényszék	235
Pécsi Törvényszék	39
Szegedi Törvényszék	**787**
Székesfehérvári Törvényszék	**1028**
Szekszárdi Törvényszék	19
Szolnoki Törvényszék	38
Szombathelyi Törvényszék	297
Tatabányai Törvényszék	3
Veszprémi Törvényszék	16
Zalaegerszegi Törvényszék	8
TOTAL	**7197**

Out of 21 regional courts, there are six where there were more than 500 cases pending on 30 November 2019.

The rate of pending cases within all incoming cases between 1 January 2017 and 30 November 2019 shows the regional differences even more clearly.

[35] Source: Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020.

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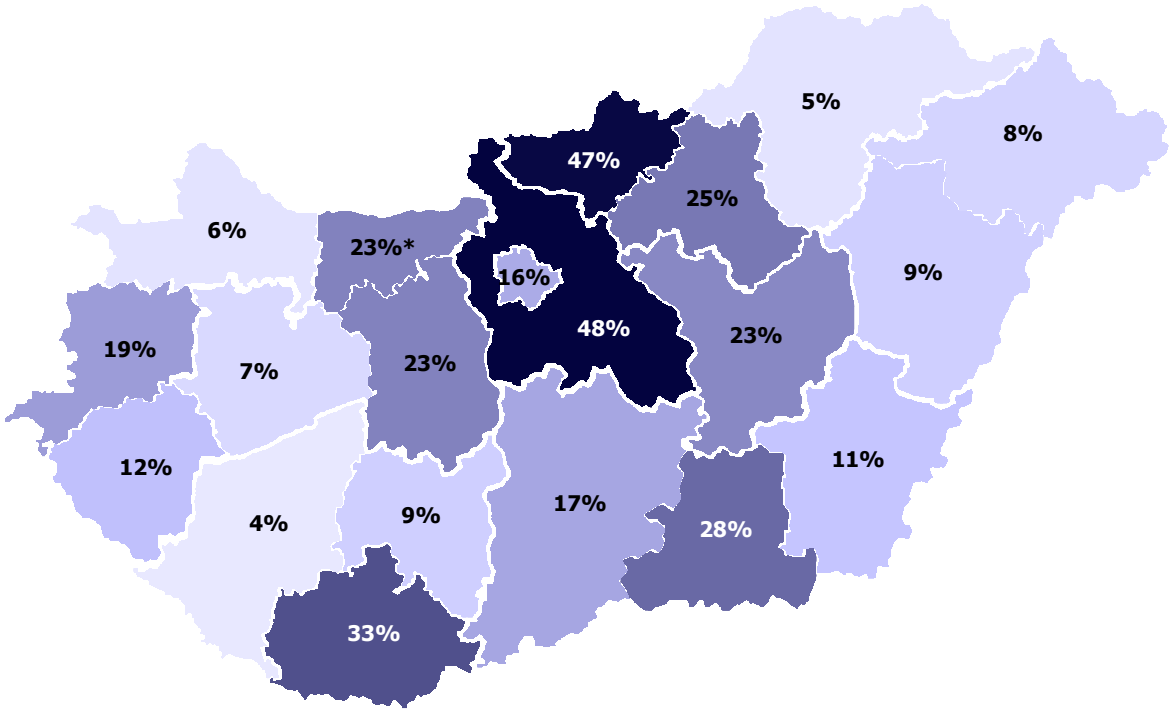
Map no. 2 – Ratio of pending cases within all incoming cases between 1 January 2017 and 30 November 2019 (%)



**The Tatabánya Regional Court only very few cases since that is the only county where there is no penitentiary institution, only police custody.*

These regional differences raise serious concerns regarding the equal opportunity of the complainants for a fair and speedy trial.

5. Recent developments regarding the regulation of compensation procedures

In the Sections above, shortcomings and deficiencies of the compensation procedure in force from 1 January 2017 have been highlighted. The period between January 2017 and December 2019 can be described as a period of efforts to properly implement the ECtHR's judgments regarding prison overcrowding. While it was not unproblematic and the solutions chosen were not always ideal, the direction of the measures taken by the Hungarian authorities was definitely oriented towards compliance.

However, at the beginning of January 2020, the issue of prison overcrowding became the focus of political communication characterised by intensive penal populism, and the Government's approach took a serious turn with a clear intent to severely restrict prisoners' right to compensation by introducing new legislative acts, thus reversing many years of progress in establishing a domestic remedy. For that reason, **urgent action is needed to reverse the negative changes, the intervention of the Committee of Ministers is crucial at this point**. The developments are presented below.[36]

[36] See also: Csaba Győry, *Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law. New Hungarian Law "Suspends" the Execution of Final Court Rulings.* Verfassungsblog, online, 12/03/2020.
Available at: https://verfassungsblog.de/fighting-prison-overcrowding-with-penal-populism-first-victim-the-rule-of-law/

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The recent series of related events started with a press conference on 9 January 2020, where the Hungarian **Prime Minister** said[37] that it is an "impossible situation" that Hungary has to pay "millions" to "convicted criminals from the money of Hungarian taxpayers because their detention was not adequate". He stated that **he had instructed the Ministry of Justice "not to pay a penny" to inmates** on this basis. Similar statements of high-level government officials followed the next week, one of them alleging[38] that NGOs and their attorneys have built a "business" on compensation payments. The Prime Minister confirmed in an interview on 17 January 2020,[39] that **the Government will "suspend" compensation payments** to inmates, and they **will initiate in the Parliament "immediately" that the respective rules are amended**. In the same interview, he attacked the attorneys representing detainees in compensation procedures, and talked about "prison business" as well in relation to the compensation scheme.

Finally, on 21 January 2020, **Resolution 1004/2020. (I. 21.) of the Government on the Immediate Action against Abusing the Compensation Procedures Launched due to Prison Overcrowding** was promulgated, with the following text:

"It is the Government's position that certain convicted criminals and their aids use the compensation procedures launched with reference to prison overcrowding in an abusive manner, for their own enrichment, which justifiably violates the sense of justice of the society and, in particular, that of the victims of criminal offences, and so preventing this demands immediate action. To that end, the Government calls on the Minister of Justice

1. *to suspend, without delay, the payment of compensations due to prison overcrowding in individual cases until the latest possible date under the [respective] laws;*
2. *To review, without delay, the regulation in force […]."*

Thus, in practice, in contradiction of what the earlier official statements suggested, the Government resolution prescribed that compensation payments would still be awarded and paid, but **the act of payment would be pushed to the latest date legally possible**.[40]

On 17 February 2020 the Government submitted a **Bill to the Parliament on immediate measures to be taken in order to abolish the "*abuse* of compensation procedures relating to prison overcrowding"**. This was passed on 25 February 2020 and **entered into force on 7 March 2020**.[41]

The Law contains the following provisions:

1. Parliament calls on the Government to draft new regulations in line with the outcome of the national consultation with a view to the interest of the victims by 15 May 2020 (Article 1).

2. Parliament calls on the Government to ensure that by 30 September 2020 the average occupancy rate would not exceed 100% (Article 2).

3. The Law enters into force immediately after being published in the official journal (Article 3).

[37] https://index.hu/belfold/2020/01/09/orbaninfo_gyongyospata_gyori_gyerekgyilkos_birosagi_iteletek_biralat/
[38] https://hirtv.hu/magyarorszageloben/tuzson-az-nem-lehetseges-hogy-bunozoknek-fizet-a-magyar-allam-2493378
[39] http://www.miniszterelnok.hu/orban-viktor-a-kossuth-radio-jo-reggelt-magyarorszag-cimu-musoraban-8/
[40] The HHC prepared two Rule 9 communications with regards to the execution of the judgements of the European Court of Human Rights in the cases of Varga and Others v. Hungary and István Gábor Kovács v. Hungary (Application no. 14097/12 and 15707/10). These were submitted on 20 January 2020 and on 21 January 2020 and are available here: https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Varga_and_Others_v_Hungary_20200120.pdf and https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Varga_and_Others_v_Hungary_20200121.pdf
[41] Act IV of 2020

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4. Compensation must be transferred to the penitentiary deposit account of the detainee (if he/she is still detained when the compensation is paid) or to the personal bank account of a former convict who has already been released. (Article 4).

5. **Payment of compensation to inmates granted by judicial decisions delivered after the new law came into force will be suspended until 15 June with a view to "putting an end to the abuses related to compensations paid for prison overcrowding"** (Article 5). (Any compensation claim that was adjudicated before the new law came into force will continue to be paid in accordance with the Government Resolution, i.e. on the last day of the deadline for paying it.)

The legislative actions have been communicated by the Government publicly and were presented as political issues. Both the presentation of the subject and the legislative changes adopted are alarming.

1. The Government announced[42] on 19 February 2020 that two questions of the "national consultation" would address the issue of "prison business", and the issue is expected to be in the centre of attention in the coming weeks or months. National consultations are a frequently used political communication tool of the Hungarian Government. These are questionnaires sent to each and every Hungarian voter with manipulative, leading questions on issues that are politically important for the Government. The counting of the responses is usually done in a manner that is methodologically neither sound nor controlled, but the results are used as a basis of reference for Governmental policies and measures. **The State Secretary speaking on behalf of the Government said that the issue of compensations became a theme in the consultations, because "*criminals*" have so far launched 12 thousand proceedings against Hungary, which has already cost the Hungarian tax payers HUF 8.5 billion. He added that the Government would pose the question whether Hungarians support or oppose the possibility of such compensation proceedings**. The State Secretary said that the Government had a clear position on these issues, but "organisations financed from abroad" had a differing opinion, this is why it was important that as many people as possible would voice their views.

2. It must be emphasised that **the Law already refers to the outcome of the national consultation as something supporting the proposed legislative measures, although**, due to the current situation arising from the COVID-19 pandemic, **the questionnaires have not even been sent out yet**.

3. **The Bill was submitted without any prior public consultation**, although such a consultation is required by the Act on the Legislative Process. Under the relevant provisions, the Government should have uploaded the draft bill on its website allowing the public and professional organisations sufficient time to comment on it, and the comments should have been reacted to. These obligations – as not unusual in the practice of the Government – were violated. Also, the Bill was adopted with no substantial amendments in the text and with no further consultation or impact assessment whatsoever.

4. Lawyers are entitled – by the Law on Attorneys – to handle money deposits under controlled, transparent and legal conditions. **Article 4 of the Law** (which – not in an express manner, but definitely – deprives them of this possibility) **will constitute a serious breach of freedom of contract**, since it deprives the parties (the lawyer and the detainee) to freely agree where the amount of compensation shall be transferred. **The rule is also discriminative**, since this is the only type of money and compensation that lawyers will not be allowed to take into a deposit. The most serious problem is that the new rule will also severely restrict the inmates' capacity to sue for compensation, as fewer lawyers will take such cases, because this way they cannot surely collect the compensations on their depository accounts and transfer

42 https://www.kormany.hu/hu/miniszterelnoki-kabinetiroda/parlamenti-allamtitkar/hirek/nemzeti-konzultacio-ket-kerdesvonatkozik-a-bortonbizniszre

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the amount after deducting their pre-negotiated fees. **Thus, a significant number of detainees are likely to remain without legal support, which – especially due to the complexities of the legislative framework and the above presented difficulties – is likely to deter many from suing**.

On 5 March 2020, the Government issued Decree 34/2020 (III. 5.) in order to create the legal framework for **building mobile container prisons in ten different premises**. According to available information[43] HUF 30 billion (ca. EUR 83.3 million) was earmarked for the purposes of the construction of these prisons.

While the intention to reduce the occupancy rate to 100% is obviously to be welcomed, the HHC is of the view that container prisons cannot offer a lasting solution. They are acceptable if used temporarily, but there is a risk that container prisons will become permanent in Hungary, especially since the authorities plan to place a large number of inmates (ca. 1700 people) in such prisons. Experience has shown (see above) that building permanent prisons takes a long time and a lot of money. Even if the prison building project envisaged in the Action Plan is finally started, the realisation that maintaining the container prisons and going forward with the prison constructions is a very expensive scheme, is likely to prompt the authorities to settle with the already existing solution on which substantial amounts of resources have already been spent. (By way of example, the transit zones established for the detention of asylum seekers, have been using containers for the placement of people for five years, and no permanent structures are planned to be built.)

Even if they meet the requirements concerning living space and air space (the latter is doubtful due to the low floor-to-ceiling height), mobile prisons are likely to create different problems regarding inhuman or degrading detention conditions. For instance, experience shows that the containers become extremely overheated during the summer. Unless air-conditioning is provided (which is unlikely due to its costs), the temperatures are likely to become unbearable on hotter days. In the transit zones, this issue if solved by allowing the asylum seekers to stay in the air-conditioned community rooms during the day and spending only the nights in the containers, but this option is not available for prisoners, unless only very low risk inmates are placed in such prisons, which is unlikely due to the large number of inmates to be placed in such sructures..

Finally, the prison system already suffers from understaffing. Close to one thousand people are missing from the penitentiary administration. Even if the container prisons are indeed built by this fall, they cannot be operated without well trained personnel, and the plans that have become public do no offer solutions for that problem.

6. Recommendations

6.1. Procedural recommendations

- The HHC respectfully recommends to the Committee of Ministers of the Council of Europe **to continue to examine this group of cases under the enhanced procedure.**
- The HHC recommends that the Committee of Ministers of the Council of Europe Government would call on the Government **to collect and include in its next Action Plan those data that are indispensable for reviewing the effectiveness of the implementation,** including data on the numbers of inmates

[43] https://hirado.hu/belfold/belpolitika/cikk/2020/02/27/gulyas-harminc-milliard-forintot-kap-a-bm-a-bortontelitettseg-csokkentesere

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held under less than 3 square meters of personal space, the length of the compensation proceedings, or the regional differences in the compensation amounts.

- The HHC respectfully calls on the Committee of Ministers of the Council of Europe to **review this group of cases, with special regard to the ongoing changes of the compensation system**, once the review of the compensation system as initiated by the Hungarian Government and prescribed by Act IV of 2020 is complete.

6.2. Substantive recommendations

- The Government should address prison overcrowding and mitigate the harmful consequences of inadequate detention conditions by **reviewing its criminal policy** and invest in the sufficient use of alternative, non-custodial alternatives to detention, and by focusing its efforts on long-term strategies for crime prevention and reduction.
- **Data crucial for the assessment of the degree of implementation** (such as the number of inmates with insufficient moving space, length of compensation proceedings, data allowing for the assessment pf the consistency of the jurisprudence) **shall be regularly collected and made accessible** for the interested public by the Hungarian authorities.
- The NPA should **allow the HHC to recommence its prison monitoring activity** to support the protection and enforcement of detainees' rights.
- Physical conditions other than moving space shall be taken into account in the course of implementing the ECtHR judgments in question. **The provisions on the compensatory mechanism shall be amended to make sure that if the overall physical conditions** (access to fresh air, proper natural lighting, the partitioning of toilettes, absence of parasites) **are substandard to the extent that they justify this, inmates should be entitled to claim compensation even if they are provided with the required moving space**.
- **The unnecessary restrictions concerning contact with the outside world and especially family members should be removed**. Inmates should as a main rule be allowed physical contact with their visitors, and only those should be prevented from this possibility whose risk assessment justifies such a restriction.
- Until the planned prison constructions are completed, and thus it can be guaranteed that complaints into detention conditions carry a realistic chance of success, the application of the requirement to submit such **complaints as a precondition for claiming compensation, ought to be suspended**.
- **The legal provisions concerning the compensation scheme should be amended in order to create a consistent jurisprudence across the country**. Issues to be reviewed in this regard should concern (i) the legal standing of persons who have submitted valid and admissible applications to the ECtHR from the possibility of obtaining a compensation within the Hungarian legal system, and (ii) uncertainties concerning the **relationship of Article 144/B complaints and the admissibility of compensation claims**; (iii) other admissibility criteria; (iv) the burden of proof if the penitentiary system fails to submit the documentation on the inmate's detention conditions; (v) the need to submit complaints every three months in order to be able to claim compensation for the whole time period under which detention conditions were substandard.
- **In compensation claim proceedings the equality of arms should be respected**. With this aim, it should be prescribed for the penitentiary institution to **send to the claimant and his/her lawyer the documentation** it forwards to the penitentiary judge along with the claim. Furthermore, it should be mandatory for the prosecution to serve its opinion as well as its appeal to the inmate and his/her counsel so that they could submit their observations to the court adjudicating the claim.

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- **The law should be amended to make it clear that penitentiary health care units and prison hospital wards fall under the scope of the compensation scheme**, i.e. if someone is held under degrading conditions in a penitentiary health care unit or prison hospital ward he/she should also be entitled to compensation.
- **Additional financial and human resources** should be provided to the penitentiary system and the judiciary to handle compensation claims, until the influx of claims is stabilised at a manageable level.
- The Government should ensure that even after the envisaged review, **compensation procedures will comply with** the spirit of the Convention, the ECtHR case-law and especially the pilot judgment regarding Hungary. With a view to this, the Government should initiate an **effective, politically neutral and professional way to debate on how to implement the pilot judgement** instead of using political propaganda tools such as the national consultation.
- The Government should guarantee that the **compensation procedure will be practically accessible to all inmates** regardless of their financial or social status and legal representation could be available by them. With a view to this, the limitation that counsels are banned from collecting their clients' compensations on heir depository accounts should be removed from the law.
- **The suspension of compensation claims awarded by the courts should be terminated with immediate effect**. There is no justifiable reason to keep inmates waiting for long months for compensation that has been awarded to them by a lawful court in a lawful proceeding for the violation of their fundamental right to not being subjected to degrading treatment.