Decision 32/2014 (XI. 3.) AB

On a finding of Section 137 (1) of Decree 6/1996 (VII. 12.) IM of the Minister of Justice on the Rules for the Execution of Imprisonment and Pre-trial Detention as being contrary to an international treaty and as being contrary to the Fundamental Law as well as the annulment thereof

On the basis of judicial initiatives seeking a determination of whether certain legal provisions are contrary to an international treaty and the Fundamental Law, with the dissenting opinions by Justices *Dr. István Balsai, Dr. Egon Dienes-Oehm, Dr. Imre Juhász, Dr. Barnabás Lenkovics, Dr. Béla Pokol, Dr. László Salamon* and *Dr. András Varga Zs.,* the Constitutional Court, sitting as the Full Court, rendered the following

decision:

1. The Constitutional Court holds that Section 137 (1) of Decree 6/1996 (VII. 12.) IM of the Minister of Justice on the Rules for the Execution of Imprisonment and Pre-trial Detention is in violation of an international treaty and the Fundamental Law, and therefore annuls said provision effective as of 31 March 2015.

2. The Constitutional Court hereby rejects the judicial initiative seeking the annulment of Section 3 (1) of Decree 12/2010 (XI. 9.) KIM of the Minister of Public Administration and Justice amending Decree 6/1996 (VII. 12.) IM of the Minister of Justice on the Rules for the Execution of Imprisonment and Pre-trial Detention.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. In the cases regarding awards of damages pending before the Budapest High Court under Case Nos. 28.P.25.617/2013, 28.P.25.413/2013 and 28.P.20.917/2014, the judge presiding over the cases initiated the procedure of the Constitutional Court, while ordering a stay of the proceedings. In view of the substantive correlation of the subject-matters of the cases, the Constitutional Court consolidated the initiatives pursuant to Section 58 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") and adjudged said initiatives in a single procedure.

[2] 1.1 In his petition, which was filed in all three cases with identical content, the presiding judge alleged that Section 137 (1) of Decree 6/1996 (VII. 12.) IM of the Minister of Justice on

the Rules for the Execution of Imprisonment and Pre-trial Detention (hereinafter referred to as the "Minister of Justice Decree") contravened an international treaty and the Fundamental Law. Under that provision, "[t]he number of persons who may be accommodated in a cell (living quarters) shall be determined in such a fashion that each convicted person has, preferably, six cubic metres of air space and, where possible, three square metres of space for male convicts and three and a half square metres of space for juvenile and female convicts."

[3] In the opinion of the petitioning judge, the contested provision of the Minister of Justice Decree is in breach of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), which was promulgated by Act XXXI of 1993, and which prohibits torture, inhuman or degrading treatment or punishment, and of Article III (1) of the Fundamental Law, which provides for the same. Summarising the case-law of the European Court of Human Rights (hereinafter referred to as the "ECtHR"), the petitioning judge explains that a breach of Article 3 of the Convention generally presupposes suffering and humiliation going beyond the suffering and humiliation inevitably associated with the particular form of lawful treatment or punishment. The State must therefore ensure that the detention of a person is carried out in conditions compatible with respect for human dignity and that the manner and method of execution of the measure do not cause the individual suffering and hardship of a degree of severity that goes beyond the inevitable level of suffering necessarily associated with detention.

[4] The petition states that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the "Committee for the Prevention of Torture") has established in a number of judgements, including several concerning Hungary, that a minimum of 4 square metres of space per person is acceptable for multiple confinement. In the light of these considerations, it is submitted that the ECtHR, in its judgements on the conditions of detention, has considered the provision of less than 4 square metres of space to be inhuman and degrading treatment in breach of Article 3 of the Convention.

[5] 1.2 The petitioning judge observed that, prior to 24 November 2010, the contested provision of the Minister of Justice Decree provided for a minimum air space and a minimum space for movement, set at 6 cubic metres and 3 and 3.5 square metres respectively, as a mandatory provision. However, Decree 10/2010 (XI. 9.) KIM of the Minister of Public Administration and Justice amending Decree 6/1996 (VII. 12.) IM of the Minister of Justice on the Rules for the Execution of Imprisonment and Pre-trial Detention (hereinafter referred to as the "Amendment Decree"), which amended the said legal provision with effect as of 24 November 2010, replacing the words "at least" in the text of the previous legislation with the words "preferably" and "where possible", made the provision a permissive legal provision on the basis of which, *ad absurdum*, it would not be unlawful for the legislator to deprive the detainees of any room for movement.

[6] In the view of the petitioning judge, the permissive nature of the regulation can be justified by economic necessity at most (scarcity of available prison space), but a fundamental human right cannot be restricted for economic reasons.

[7] 1.3 he petitioning judge is of the opinion that, in the case of prisoners being accommodated in a multi-person cell, the minimum space for movement available per prisoner must be 4 square metres on the basis of an obligation arising from an international treaty, and that the regulation in Section 137 (1) of the Minister of Justice Decree, which requires less living space, therefore violates Article 3 of the Convention and is not in accordance with Article III (1) of the Fundamental Law.

[8] 1.3.1 In the light of the considerations set out above, the judge hearing the case primarily requested the Constitutional Court to annul the said provision in its entirety and to hold that the provision is inapplicable in cases pending before the court.

[9] 1.3.2 In the alternative, the court submitted that, in the absence of a basis for annulling the contested provision of the Minister of Justice Decree in its entirety, the Constitutional Court should annul Section 3 (1) of the amended provision of the Amendment Decree, which adds the terms "preferably" and "where possible" to the wording of the earlier legislation, and find that the amending provision is not applicable to the cases pending before the court.

[10] 1.3.3 As a secondary alternative, the presiding judge requested the Constitutional Court, in the event that it did not find its alternative request well-founded, to annul the terms preferably and where possible in Section 3 (1) of the Minister of Justice Decree and to declare that the contested wording of the Minister of Justice Decree was not applicable in the proceedings pending before the court.

II

[11] The legal provisions taken into account by the Constitutional Court read as follows:

[12] 1. The provisions of the Fundamental Law read as follows:

"Article Q (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law."

"Article T (3) No law shall conflict with the Fundamental Law."

"Article III (1) No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited."

[13] 2. The provisions of international treaties read as follows:

[14] 2.1 The provisions International Covenant on Civil and Political Rights, promulgated by Law Decree No. 8 of 1976 (hereinafter referred to as the "Covenant") read as follows:

"Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

"Article 10 (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[15] 2.2 The provision of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated by Act XXXI of 1993 reads as follows:

"Article 3 Prohibition of torture - No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[16] 3. The provision of the Minister of Justice Decree at issue reads as follows:

"Section 137 (1) The number of persons who may be accommodated in a cell (living quarters) shall be determined in such a fashion that each convicted person has, preferably, six cubic metres of air space and, where possible, three square metres of space for male convicts and three and a half square metres of space for juvenile and female convicts".

III

[17] 1. The Constitutional Court considered, first of all, whether the judicial initiatives complied with the conditions laid down by law. Pursuant to Section 25 of the Constitutional Court Act, if a judge, in the course of the adjudication of a specific case in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Article 24 (2) (b) of the Fundamental Law, submit a petition for a finding that the legal regulation or a provision thereof is contrary to the Fundamental Law, and / or the exclusion of the application of the legal regulation contrary to the Fundamental Law.

[18] The Constitutional Court is competent to consider whether an international treaty is incompatible with the Constitution pursuant to Article 24 (2) (f) of the Fundamental Law. Pursuant to Section 32 (1) of the Constitutional Court Act, the Constitutional Court shall, within the scope of its competence under Article 24 (2) (f) of the Fundamental Law, review the conflict of laws with an international treaty on the initiative of the petitioners or in the course of any of its proceedings of its own motion. Pursuant to Section 32 (2) of the Constitutional Court Act, a judge may, in addition to ordering a stay of court proceedings, initiate proceedings before the Constitutional Court if, in the course of the determination of an individual case pending before him, a rule of law is to be applied which he finds to be in breach of an international treaty. The Constitutional Court has held that the judicial initiatives comply with the conditions laid down in Section 25, Section 32 (1) and (2) and Section 52 (1) and (1b) of the Constitutional Court Act.

[19] 2. In his alternative petition, the petitioning judge requested the Constitutional Court to annul Section 3 (1) of the Amendment Decree and to exclude its application in the court proceedings (*see* Reasoning [9]). In several decisions, the Constitutional Court has consistently held that "[...] where the petitioner claims that the content of a new provision is unconstitutional, the Constitutional Court does not review the unconstitutionality of the law

enacting the new provision, but of the law incorporating the new provision by means of the amendment." {Decision 8/2003 (III. 14.) AB, ABH 2003, 74, 81.; last reinforced in Decision 26/2014 (VII. 23.) AB, Reasoning [18]} In view of this fact, the Constitutional Court in the present case did not assess Section 3 (1) of the Amendment Decree, but Section 137 (1) of the Minister of Justice Decree applicable to the case, and thus rejected the judicial petitions in their part concerning the assessment of the said provision of the Amendment Decree.

IV

[20] The petitions are in part well-founded.

[21] 1. The Constitutional Court has reviewed the legal context in which prisoners are housed in penal institutions. It found that the general provisions on the placement of prisoners are contained in Law Decree No. 11 of 1979 on the Implementation of Penalties and Measures (hereinafter referred to as the "Penalties Implementation Law Decree"). Pursuant to the Penalties Implementation Law Decree, prisoners must be provided with healthy and cultured accommodation in the penal institution which meets the hygienic conditions [*see* Section 25 (1) (b), Section 36 (1) (a) and Section 46 (1) (a) of the Penalties Implementation Law Decree]. Detailed rules on placement, including rules on the minimum space for prisoners to move around during placement, are laid down in the Minister of Justice Decree. Section 137 (3) of that legislation provides for the floor area of a single cell, whereas Section 137 (1), which is relevant in the present case, regulates the conditions of accommodation in a multiple-person cell. From the entry into force of the Minister of Justice Decree on 1 October 1996 until 23 October 2010, the latter provision provided that "[t]he number of persons who may be accommodated in a cell (living quarters) shall be determined in such a fashion that each convicted person has at least six cubic metres of air space and, where possible, three square metres of space for male convicts and three and a half square metres of space for juvenile and female convicts." [Decree 8/1979 (VI. 30.) IM of the Minister of Justice on the Rules for the Implementation of Sentences, which was in force prior the entry into force of the Minister of Justice Decree at issue, already contained a minimum standard for placement, pursuant to its Section 85 (2), which stipulates that "[a] cell shall provide between 6 and 8 cubic metres of air space per person, with sufficient space for movement."]

[22] The contested provision of the Minister of Justice Decree, as of 24 October 2010, acquired its current wording, which is contested by the petitioner, as a result of the Amendment Decree, under which the above values are not mandatory but it is possible to provide a smaller amount of space for movement.

[23] An important provision concerning the size of the space available for movement is also contained in Section 137 (2) of the Minister of Justice Decree, whereby the area occupied by fixtures and fittings which reduce the space available for movement is not to be taken into account when determining the space available for movement. The list of fixtures and fittings in each type of cells is given in Annexes 3 to 6 to the Minister of Justice Decree. Under these

provisions, *inter alia*, the area occupied by the bunk, seat, locker and table (and, in the case of disciplinary and special security cells, the running water toilet and the toilet) in the cell shall not be counted as part of the space to be provided for the movement of prisoners.

[24] 2. The prohibition of torture, inhuman or degrading treatment or punishment is enshrined in the Fundamental Law and in all major international human rights conventions.

[25] 2.1 Article 3 of the Convention concluded by the Member States of the Council of Europe and Article 7 of the Covenant adopted under the auspices of the United Nations (UN) prohibit both inhuman and degrading treatment or punishment, in addition to torture. Article 10 of the Covenant makes that general provision more specific, as is relevant to the present case, to the group of detainees, when it states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Within the framework of the United Nations, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (promulgated in Hungary by Law Decree No. 3 of 1988), which established a comprehensive definition of torture (*see* Article 1), was adopted, and the States Parties also committed themselves to prohibit all inhuman or degrading punishment or treatment other than torture on their territory (*see* Article 16).

[26] On 26 November 1987, the Member States of the Council of Europe signed in Strasbourg the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (promulgated in Hungary by Act III of 1995), which explicitly aims to strengthen the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment by means of preventive, visit-based procedures rather than judicial ones. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was established under Article 1 to conduct visits to States Parties to investigate the treatment of detainees and to make recommendations and proposals to the State concerned in its reports, where appropriate.

[27] 2.2 The Council of Europe has addressed the issue of the proper treatment of prisoners in a number of documents, most notably, in the context of the present case, Recommendation Rec (2006) 2 of the Committee of Ministers on the (new) European Prison Rules and Recommendation R (99) 22 of the Committee of Ministers on overcrowding and the increase in the prison population. The first recommendation highlights the following points in relation to the accommodation of persons deprived of their liberty:

"Rule 18

18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

[...]

18.3. Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

18.4. National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.

[...]"

[28] Recommendation No R (99) 22 stresses the need to establish maximum capacity levels for individual prisons in order to avoid extreme levels of overcrowding.

[29] The Recommendation states that, in prisons where overcrowding exists, particular attention should be paid to respect for human dignity and to the positive and humane treatment of prisoners by prison staff. In addition, particular attention should be paid to the amount of space available to prisoners, hygiene, adequate food, health care and employment of prisoners outside the institution, in accordance with the European Prison Rules.

[30] In order to counteract the negative effects of overcrowding, the Recommendation calls on States Parties to maximise the possibility for prisoners to maintain contact with their families and to maximise the use of community support.

[31] 2.3 In its report on its most recent visit to Hungary, from 3 to 12 April 2013, the CPT noted that since its previous visit (in 2009), overcrowding in Hungarian prisons had increased significantly, reaching a national average of 144% in 2013. The Committee complained that the previous provision of the Minister of Justice Decree, which strictly defined the minimum space for prisoners to move in as 3 square metres (for men) and 3.5 square metres (for juveniles and women), had been made optional by the Amendment Decree [*see* paragraph 37 of CPT/Inf (2014) 13 dated 30 April 2013]. In the light of the preceding, the CPT called on the Hungarian authorities to redouble their efforts to combat overcrowding in prisons, in consultation with all concerned, taking into account the relevant recommendations of the Committee of Ministers of the Council of Europe. It also proposed to reintroduce the strict minimum requirements for the minimum freedom of movement for prisoners. In addition, the CPT reiterated its recommendation, already published in its previous reports concerning Hungary and other States Parties, concerning the minimum living space, namely a minimum of 4 square metres per person in multi-person cells and 6 square metres per person in single-person cells. The CPT would refer to its reports of previous years [*see*, for example, CPT/Inf (2010) 16, report of 8 June 2010, paragraph 80, and CPT/Inf (2010) 1, report of 11 February 2010, CPT/Inf (2010) 1, report of 11 February 2010, paragraph 51, concerning Slovakia] compared to which it tightened its recommendation by introducing a new element that the minimum living space requirement does not include toilets / toilet facilities on the premises [*see* paragraph 40 of CPT/Inf (2014) 13, report dated 30 April 2014, and paragraph 42 of CPT/Inf (2014) 21, report dated 25 June 2014, concerning Poland].

[32] 3. In the opinion of the petitioning judge, the contested provision of the Minister of Justice Decree is contrary to an international treaty because it infringes Article 3 of the Convention. In that regard, the Constitutional Court first of all considers the obligation imposed on Hungary by the Convention to accommodate prisoners, in particular as regards the living space to be provided for them. In doing so, it takes as a basis not only the text of the Convention but also the case-law of the ECtHR, which is empowered to interpret and interpret the provisions of the

Convention, since Hungary, by acceding to the Convention, has also submitted itself to the jurisdiction of the ECtHR.

[33] 3.1 Article 3 of the Convention is regarded by the ECtHR as one of the most fundamental values of a democratic society, providing for the absolute prohibition of torture and inhuman or degrading treatment or punishment, whatever the circumstances and whatever the conduct of the victim {Chahal v United Kingdom [GC] (22414/93), 15 November 1996, para 79; Labita v Italy [GC] (26772/95), 6 April 2000, para 119}.

[34] The prohibitions listed in Article 3 have in common that they all cause a degree of physical and / or mental anguish, suffering or pain to the individual concerned. In line with the case-law of the ECtHR, a distinction can be drawn between these concepts (torture, inhuman treatment or punishment, or degrading treatment or punishment) on the one hand, on the basis of the intensity of the suffering caused. Accordingly, the condition for torture to be considered the most serious is that the conduct inflicted on the victim must cause him or her very serious and cruel suffering {Ireland v United Kingdom (5310/71), 18 January 1978, para 167}. In addition, in line with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECtHR understands torture as deliberate conduct with a purposive element defining torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating {Salman v Turkey (21986/93), 27 June 2000, para 114}.

[35] Inhuman treatment or punishment is defined as any conduct causing serious physical and / or mental suffering to the person concerned which falls below the level required to constitute torture or lacks the intentionality and purpose referred to above {Ireland v United Kingdom (5310/71), 18 January 1978, para 167; Ramirez Sanchez v France [GC], (59450/00), 4 July 2006, para 118}.

[36] Among the prohibitions, humiliating treatment or punishment involves the least suffering, and conduct that can be assessed in this context typically causes the sufferer mental anguish manifested in a feeling of inferiority. In assessing whether a form of treatment is degrading, it must also be taken into account whether its purpose was to humiliate or degrade the person concerned and whether, as a consequence, it adversely affected his or her personality in a manner contrary to Article 3 {Raninen v Finland (20972/92), 16 December 1997, para. 55; Peers v Greece (28524/95), 19 April 2001, para. 68}. However, the ECtHR has also emphasised that the absence of such intention does not necessarily preclude a violation of Article 3 of the Convention {Riad and Idiab v Belgium (29787/03), 24 January 2008, para 95}.

[37] The ECtHR has established that the degree of inhuman or degrading treatment or punishment must reach a minimum level to fall within the scope of Article 3, the assessment of which is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim {Ireland v United Kingdom (5310/71.), 18 January 1978, para. 162; Peers v Greece, (28524/95), 19 April 2001, para. 67}.

[38] It is the consistent jurisprudence of the ECtHR that only further suffering and humiliation beyond what is necessarily associated with certain forms of lawful treatment or punishment

violates the prohibition in Article 3 of the Convention. Measures leading to deprivation of liberty (typically detention for the purpose of a coercive measure or a custodial sentence) are often accompanied by this circumstance, and the State must therefore ensure that the conditions of a person's detention do not violate that person's human dignity. The State must accordingly guarantee that the manner and form in which the measure is carried out do not subject the person to distress or hardship beyond the level of suffering which his detention inevitably entails, and that, to the extent that it is reasonable for a penitentiary institution to expect, the health and well-being of the detainee are adequately safeguarded {Kudła v. Poland [GC], (30210/96), 26 October 2000, paragraphs 92 to 94}.

[39] 3.2 In the case law of the ECtHR, overcrowding of prisoners in a penitentiary clearly constitutes a violation of Article 3, including the prohibition of inhuman or degrading treatment or punishment. An extreme level of overcrowding is in itself a violation of the Convention {see Kalashnikov v. Russia (47095/99), 15 July 2002, para. 97}, while a less severe level is generally a violation of Article 3 when combined with the negative effects of other circumstances of detention. One objective and quantifiable element of the ECtHR's benchmark for determining overcrowding is that it takes into account the CPT's recommendation that the minimum living space for prisoners in multi-person cells should be 4 square metres {Cenbauer v Croatia (73786/01), 9 March 2006, para 46}. If the ECtHR finds that the living space per person in the cell reached 4 square metres in the case of the applicant, it will not declare the conditions of detention to be in breach of the Convention {Šemić v Slovenia (5741/10), 5 June 2014, para 30}. The ECtHR has also quantified the degree of extreme overcrowding, stating that if the available living space is less than 3 square metres, this constitutes, irrespective of the other circumstances, a serious overcrowding which in itself constitutes a violation of Article 3 {Tunis v Estonia (429/12), 19 December 2013, para 44}. The ECtHR almost invariably finds a violation in cases of personal space of between 3 and 4 square metres, but in these cases it is typically due to other conditions of detention, such as the very short time spent outside the cell and the high temperature inside the cell {*see* Praznik v Slovenia (6234/10.), 28 June 2012, paragraph 20}, the negative consequences of inadequate toilet facilities and insufficient food {*see* Modarca v Moldova (14437/05), 10 May 2007, paragraphs 66 and 67} and the cumulative effects of overcrowding violate the prohibition of inhuman or degrading treatment. However, the closer the margin of appreciation granted to the applicant is to the threshold set in the Recommendation, the greater the possibility that the ECtHR, assessing the impact of measures to alleviate overcrowding (typically the increased amount of time spent outside the cell), will not find a violation {*see* for example Jevšnik v Slovenia (5747/10), 9 January 2014, paragraphs 25 and 26}. The ECtHR case-law has consistently understood the CPT's minimum requirement of living space to mean the size of the cell area per person, although in several of its decisions {*see*, for example, Šemić v Slovenia (5741/10), 5 June 2014, para 27, and Mandić and Jović v Slovenia (5774/10), 20 October 2011, para 77}, it has generally noted that the area so calculated is further reduced by the space occupied by the equipment in the cell.

[40] 3.3 The ECtHR has so far ruled in a total of four cases concerning Hungary on the basis of applications from prisoners who complained about overcrowding in various penitentiary institutions in Hungary.

[41] 3.3.1 In Szél v. Hungary, the applicant spent a total of 21 months in a cell with a floor area of 2.76 square metres and a further 21 months in a cell with a floor area of 3.15 square metres per person, and 9 months in a cell with a floor area of 3.125 square metres per person, in all cases with toilets where adequate intimacy was not ensured. The ECtHR found that his detention in overcrowded conditions did not respect his basic human dignity and was therefore likely to have an adverse effect on his physical and mental well-being, and concluded that the overcrowded and unhygienic conditions amounted to inhuman and degrading treatment {*see* Szél v Hungary (30221/06), 7 June 2011, para 18}.

[42] 3.3.2 In István Gábor Kovács v. Hungary, the applicant was housed for 67 days in cells with a floor area of 3.5-4.00 square metres per detainee, including the furnishings. The ECtHR considered such overcrowded accommodation, together with the fact that the applicant had to spend almost the whole day in the cells, to be a violation of fundamental human dignity and thus a violation of Article 3 of the Convention {*see* Kovács István Gábor v Hungary (15707/10), 17 January 2012, para 26}.

[43] 3.3.3 In Hagyó v. Hungary, the applicant was placed in a cell with a gross floor area of 3.52 square metres per person for more than four months and was only allowed to leave his cell for one hour per day and the authorities increased the time he could spend outside the cell only after six months. The ECtHR considered that such prolonged detention in such crowded conditions, combined with the fact that the applicant was overweight and suffered from respiratory illnesses such as asthma and chronic sinusitis, constituted treatment which went beyond the suffering inevitably associated with lawful detention. On this basis, taking into account the cumulative effect of the above factors on the applicant's physical well-being, he found a violation of Article 3 of the Convention {see Hagyó v Hungary (52624/10), 23 April 2013, paragraphs 45-47}.

[44] 3.3.4 In Fehér v Hungary, the applicant was housed in cells with an average floor area of 1.7 square metres per person for more than two years and one month, which the ECtHR assessed as a restriction of living space to such an extent that it could not be sufficiently mitigated even by the four hours per day of time spent outside the cells for the greater part of the period in question. For the remainder of the period, the applicant had 2.16 square metres or 2.4 square metres and 2.5 square metres, then 2.75 square metres of living space and was able to spend most of his days outside the cells in all cases. The ECtHR noted that this circumstance diminishes the effect of overcrowding, "[...] however, it cannot overlook the fact that the available living space fell in each case under 3 m^2 per person, that is, substantially lower than the CPT standard." In the light of the above, the ECtHR held that the crowded conditions of the applicant's detention amounted to inhuman and degrading treatment in breach of Article 3 of the Convention {*see* Fehér v Hungary (69095/10), 2 July 2013, paras 20 and 21}.

[45] 4. The petitioning judge also found the challenged legal provision to be contrary to Article III (1) of the Fundamental Law, and the Constitutional Court therefore outlines the elements of the said provision of the Fundamental Law relevant for the assessment of the present case.

[46] 4.1 The Constitutional Court has not yet addressed the content of the provision on the absolute prohibition of torture, inhuman or degrading treatment or punishment [Article 54 (2) of the previous Constitution and Article III (1) of the Fundamental Law] in detail in its previous decisions. These prohibitions, supplemented by the prohibition of cruel treatment or punishment, were previously regulated by the Constitution in Article 54 together with the right to human life and dignity. Accordingly, the prohibition of torture, inhuman and degrading treatment and punishment was an independent form of the right to human life and dignity and the inalienability of this fundamental right, as specified by the constituent power. Although the Fundamental Law regulates the right to life and dignity of the human person (Article II) and the prohibition of torture, inhuman and degrading treatment or punishment (Article III) in separate articles, the manner in which the constituent power drafted the norms merely creates a formal distinction, therefore, in the interpretation of the Constitutional Court, the prohibitions in Article III (1) are also separate, special formulations of the prohibition of the violation of the right to life and dignity of the human person. This understanding is also consistent with the content of Article 3 of the Convention, as developed by the ECtHR, according to which a violation of these prohibitions also constitutes a violation of human dignity.

[47] 4.2 The provision challenged in the petition regulates an element of the treatment of prisoners, namely the manner in which they are housed in a penal institution. The Constitutional Court has previously held that the legal basis for interference with the fundamental rights of prisoners "[...] is the final judgement in criminal proceedings, but the actual restriction or interference takes place in the course of the execution of the sentence. It is the conviction, in law, but it is the fact of execution that makes a tangible difference to the situation of individuals." [Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31., last reaffirmed in Decision 30/2013 (X. 28.) AB, ABH 2013, 892, 902.]

[48] The Constitutional Court, as a general criterion for assessing the constitutionality of prison legislation, has stated that "[t]he prisoner is not the object of the enforcement of the sentence, but the subject of it, with rights and obligations. [...] The extreme values of the constitutional framework of the penitentiary system are the right to human dignity and personal security on the one hand, and the prohibition of torture and cruel, inhuman or degrading treatment or punishment on the other." [Decision 13/2001 (V. 14.) AB, ABH 2001, 177, 193., last reaffirmed in Decision 30/2013 (X. 28.) AB, ABH 2013, 892, 902.]. In the light of the foregoing, the Constitutional Court emphasises that it follows from the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment that its application must be ensured in all cases, including in the execution of detention.

[49] The Constitutional Court has previously examined the constitutionality of a legislative provision governing the execution of sentences in the context of the prohibition in question on a single occasion, in the course of which it found that the legislation requiring the compulsory participation of prisoners in the cleaning and care of the prison does not infringe the prohibition of cruel, inhuman or degrading treatment. [Decision 684/B/2001 AB, ABH 2004, 1545, 1554.] This decision of the Constitutional Court is similar to the general principle developed by the ECtHR that only suffering additional to that necessarily associated with

certain forms of lawful treatment or punishment violates Article 3 of the Convention (*see* points [33] to [38] of the Reasoning for this Decision).

[50] 4.3 In view of the fact that the Convention and the Fundamental Law, which are invoked in the judicial initiative, regulate the prohibition of inhuman or degrading treatment or punishment in almost identical terms, and the Constitutional Court's consistent practice of accepting the level of legal protection set out in international treaties and the related case law as the minimum standard for the realisation of fundamental rights {Decision 32/2012 (VII. 4.) AB, Reasoning [41], the Constitutional Court considers the case law of the ECtHR interpreting Article 3 of the ECHR Convention to be emphatically authoritative in assessing the compatibility of the contested provision with the Fundamental Law (*see* points [33] and [44] of the Reasoning for this Decision).

[51] 5. In the light of the requirements of the prohibition of inhuman or degrading treatment or punishment set out above, the Constitutional Court has carried out its scrutiny of the compatibility of the contested provision with the Convention and the Fundamental Law.

[52] 5.1 In its proceedings, the Constitutional Court also took into account that, by virtue of Article Q) of the Fundamental Law, it must refrain from assessing a legal solution declared by the ECtHR to be in breach of the Convention as compatible with the Convention [previously in a similar vein Decision 166/2011 (XII. 20.) AB, ABH 2011, 545, 557]. However, when the Constitutional Court has to decide whether the challenged legislation is compatible with the Convention, it cannot ignore the difference between the ECtHR's and its own jurisdiction in the present case, namely the fact that the ECtHR has taken its decisions in relation to specific violations of law, including an assessment of the specific circumstances of the case, whereas the Constitutional Court, on the basis of the judicial initiative, is carrying out an abstract review of the rules in the present case. {Nikolova v Bulgária [GC] (31195/96.) 25 March 1999 para 60}.

[53] The Constitutional Court must assess the guidelines contained in the ECtHR decisions cited above in order to determine, at an abstract level, the general requirement of the challenged legislation, which is necessary to determine whether the provision is compatible with the international treaty invoked or with the Fundamental Law.

[54] 5.2 On the basis of the above, the Constitutional Court has held that the abstract requirement that the space for life and liberty of movement provided for prisoners in multiple cells must in all cases be at least sufficient to ensure that they are accommodated in a penal institution without prejudice to their fundamental right to human dignity is derived from the prohibition of inhuman or degrading treatment, which is also laid down in the Convention and the Fundamental Law. Without such a minimum level of space for living or moving around, overcrowding will arise which will prevent the persons concerned from being treated humanely and in a manner which is appropriate to them, whatever their circumstances, and will therefore constitute inhuman and degrading treatment or punishment.

[55] It follows from the absolute nature of the prohibition in Article 3 of the Convention and Article III (1) of the Fundamental Law that the State, as legislator, is under an obligation to lay down in law, in a mandatory and applicable manner, the minimum degree of freedom of movement to be granted to prisoners, in a manner which precludes any derogation from it.

[56] The Constitutional Court held that the contested provision, following its amendment in 2010, does not comply with the requirement arising from that international treaty and the Fundamental Law, given that it allows detainees to be placed in cells in which the minimum required space for movement is not provided, and therefore infringes Article 3 of the Convention and Article III (1) of the Fundamental Law.

[57] 5.3 In the present case, the Constitutional Court saw no possibility of imposing on the legislature, on the basis of the case-law of the ECtHR, a more specific and quantified obligation on the minimum space for life and liberty of movement than that described above, since, in the exercise of its powers of an abstract nature, it cannot assess the circumstances of detention which may arise and which, in specific cases, are relevant in the context of the examination of compliance with the Convention in terms of their individual (often cumulative) effects.

[58] In the present case, the Constitutional Court also took into account the fact that the quantifiable elements of the standard developed by the ECtHR define the living space per person in the cell including the area occupied by the furnishings and equipment of the cell (*see* point [39] of the Reasoning for this Decision), whereas the Hungarian legislation currently in force disregards this part of the area when determining the minimum space to be provided (*see* points [21] to [23] of the Reasoning for this Decision).

[59] The legislature therefore has a relatively wide margin of appreciation in determining in the legislation the minimum amount of space for life and liberty of movement for a prisoner and the method of calculating it, and in assessing the specific circumstances of detention and of the prisoners themselves, while complying with the requirement set out in points [54] to [56] of this Decision and taking account of international recommendations on the placement of prisoners.

[60] 6. In determining the date of annulment, the Constitutional Court took into account the fact that in the present case, the mosaic annulment proposed in the initiative was not possible, since, without the words "preferably" or "where possible", the provision would only provide for the mandatory provision of 6 cubic metres of air space and 3 and 3.5 square metres of space for movement, from which no derogation is provided for in a direction more favourable to the detainees. The total annulment of the provision, with *ex nunc* effect, would mean that there would be no legal requirement for the amount of air and space to be provided for detainees.

[61] On the basis of the foregoing, the Constitutional Court has concluded that the temporary maintenance of the contested provisions is less prejudicial to legal certainty than the absence, for a limited period, of legislation specifying the amount of space to be provided for detainees. In the light of the above, the Constitutional Court decided to annul the provision with effect from 31 March 2015, leaving the legislator time to draft a new legal provision in line with the Convention and in conformity with the Fundamental Law.

[62] The publication of the decision of the Constitutional Court in the Hungarian Gazette is based on Section 44 (1) of the Hungarian Constitutional Court Act.

Budapest, 27 October 2014

Dr. Péter Paczolay sgd.,

Chief Justice of the Constitutional Court

Dr. Elemér Balogh sgd., Justice	Dr. Béla Pokol sgd., Justice
Dr. István Balsai sgd., Justice	Dr. László Salamon sgd., Justice
Dr. Egon Dienes-Oehm sgd., Justice	Dr. István Stumpf sgd., Justice
Dr. Imre Juhász sgd., Justice	Dr. Tamás Sulyok sgd., Justice
Dr. László Kiss sgd., Justice	Dr. Péter Szalay sgd., Justice
Dr. Barnabás Lenkovics sgd., Justice	Dr. Mária Szívós sgd., Justice-Rapporteur
Dr. Miklós Lévay sgd., Justice	Dr. András Varga Zs. sgd., Justice