

## Hungarian COVID-19 Response and Its Legal Background Some Practical Aspects of Digitalization\*

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**Abstract.** The paper introduces the constitutional and legal background of the so-called ‘special legal order’ (SLO) in Hungary designed for a multitude of emergency situations, and amended as necessary with and since the entry into force of the new Fundamental Law in 2012. In this context, the paper also describes some of the challenges and solutions that Hungary faced with the outbreak of the COVID-19 pandemic, and the several steps that were taken to ensure the continued operation of the state and public services through applying innovation and digitalization solutions.

**Keywords:** COVID-19, Digitalization, Hungary, special legal order, emergency situations, courts, governance, constitutional court, data protection, citizen access, government services

### 1. The General Context of Special Legal Order in Hungary

Democratic and constitutional societies from time to time may be confronted with situations that cannot be averted – or not with the necessary urgency – within the framework provided by the constitution.<sup>1</sup> Specific rules should therefore be drawn up for these exceptional situations, which loosen the constitutional constraints on executive and parliamentary action under the guise of ‘emergency powers’,<sup>2</sup> while at the same time providing substantive protections against possible abuses of power.

The rules of what the new Hungarian constitution (Fundamental Law, FL)<sup>3</sup> calls “special legal order” (SLO) cover the “who does what in which

kind of emergency and for how long” question.<sup>4</sup> They provide for the prohibition on the suspension of the constitution or certain provisions of the constitution, and allow for certain human rights derogations.

However, these rules still require the observance of the principles of temporality, necessity, proportionality, legality, and constitutionality. Along these lines the constitutional regulation of special legal order should be based on four principles: stability, abstraction, flexibility and guarantees.<sup>5</sup>

This article seeks to provide an overview of the complex legal background of SLO in Hungary, to outline some governance-related issue that Hungary had to face during the pandemic, and to present some of the innovative solutions relying on digitalization which helped our epidemiological and government authorities with contact research, certification of immunity or verification of house quarantine.

In exceptional situations, the state may operate under special rules recognized by the FL – under the umbrella term “special legal order” (SLO). These special rules are set out in the Fundamental Law, in which six types of special legal order can be distinguished: (I) state of national crisis, (II) state of emergency, (III) state of preventive defence, (IV) state of terrorist threat, (V) unexpected attacks, and (VI) state of danger.

Under (VI), a state of danger was induced in 2020 due to the Covid-19 pandemic, the first of its

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<sup>1</sup> Jakab András – Till Szabolcs: A különleges jogrend. In: Trócsányi László – Schanda Balázs: Bevezetés az alkotmányjogba, Hvg-orac, Budapest 2016. 430. For a European overview see the 2022 Issue of the European Review of Public Law (2022/1) entitled “The State as a Protector/Guarantor of Last Resort. (Ed: Gérard Timsit – Spyridon Flogaitis).

<sup>2</sup> For a focused but broader European view on this issue, see: Zoltán Nagy – Attila Horváth (eds.): Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19, with a Hungarian chapter by: Nagy, Zoltán – Horváth Attila: The (too?) complex regulation of emergency powers in Hungary? pp. 149-189. CEA Publishing, Ferenc Mádl Institute of Comparative Law, Budapest-Miskolc, 2022.

<sup>3</sup> The most up-to-date English-language text of the FL is available at the website of the Constitutional Court of Hungary at <[https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary\\_20201223\\_fin.pdf](https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf)> accessed 15 February 2022. All references in this Article refer to this text and subsequent legislative texts of the Tenth Amendment, translated from Hungarian as indicated.

<sup>4</sup> Tímea Drinóczi: Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis, MTA Law Working Papers 2020/13. 3.

<sup>5</sup> See: Csink Lóránt: Mikor legyen a jogrend különleges? Iustum Aequum Salutare, XIII. 2017/4. 7-16.

kind in terms of level and scale.<sup>6</sup> Previously, no national-level state of danger was introduced but local restrictions were put in effect to tackle challenges caused mostly by flooding or industrial accidents, in total 16 times in the past 30 years.<sup>7</sup> The longest period for which these restrictions have been in place was 99 days, even since the FL entered into force. As Horváth observes, the effect of pre-2020 SLOs predominantly covered one specific geographic area (typically a county), however, the 2020 COVID-19 SLO was the first to have a national scale and scope, in this sense being a “general SLO” situation. Moreover, he adds that pre-2020 SLOs had a maximum term of 99 days, except in the case of a local industrial accident in the town of Kolontár referred below in fn 7.

Provisions in the FL relevant to SLO situations have been amended two times since its entry into force in 2012.<sup>8</sup> Previously unknown contexts and factors led the constitution-making power to complement, then restructure SLO situations. First, the Sixth Amendment introduced the situation of a terrorist threat in response to growing migratory pressures mixed with undercurrents of terrorism.<sup>9</sup> Then in 2021, the Ninth Amendment introduced a restructured set of SLO situations based on the experiences of the revised SLO framework and the experiences of managing pandemic-prevention. These provisions are expected to enter into force in 2023, and therefore will not be detailed extensively hereunder.

In general, however, it must be pointed out that the constitutional design of emergency responses still leaves many questions unanswered, with regard to pandemic-prevention, responses in terms of which might vary geographically speaking. For instance, if the ‘climate context’ of constitutional and legal thinking in terms of emergency situations is considered, force majeure events (FMEs) such as fires, floods or viral outbreaks can be seen

to induce different responses in different geographic areas.

In the US state of California, for climate reasons, many emergency contingencies might revolve around the prevention of wildfires, while in Hungary, for example, fire has not yet turned out to be something that requires specific constitutional protections. In Hungary, flooding and water-related FMEs are much greater causes for concern. This is just to briefly emphasise that the ‘climate context’ remains an important factor in creating further specific protections against the pandemic, as climate change might beneficially affect the longevity of certain viral strains and therefore might require specific legal response in the future.

A short presentation of some select Hungarian SLO provisions that are relevant to a basic understanding of pandemic prevention scenarios in effect follows, excluding detailed description of situations under (I) and (III)-(V) above that are pertinent to military operations and armed conflicts. Our analysis will focus on a short but concise delineation between two situations: state of emergency and state of danger, which are most often confounded at first sight.

### 1.1. Distinguishing between Danger and Emergency in the Special Legal Order

According to Art. 50 FL, the National Assembly declare the State of Emergency (SOE) in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death.

In a SOE, the President of the Republic can introduce extraordinary measures by presidential decree. These decrees can suspend the application of certain Acts, derogate from provisions of Acts, and take other extraordinary measures in order to mitigate the consequences. The President of the Republic can decide on the use of the Hungarian Defence Forces if the police and national security services proves to be insufficient. Presidential decrees remain in force for thirty days, but the National Assembly can extend them. However, with the termination of the SOE, the presidential decrees also cease to have effect.<sup>10</sup>

As regards the State of Danger (SOD) – the SLO applicable to the coronavirus pandemic – the main rules are laid down in the FL. Article 53 FL provides the legal basis necessary to trigger such an SLO in the form of a ‘natural disaster of elementary force’, and ‘industrial catastrophe’. The specific rules of SOD are set out in two cardinal acts (legis-

<sup>6</sup> Gov. Decree No. 40/2020. (11 March) on the declaration of state of danger.

<sup>7</sup> 15 times for flood-protection on the River Tisza mostly, and 1 time for preventive action taken to avoid the consequences of a red sludge flooding as a result of an industrial accident in a bauxite plant. For a detailed overview of the duration and source of law of these SLO situations, cf. Horváth Attila: A 2020-as COVID-vészhelyzet alkotmányjogi szemmel. In: Nagy Zoltán – Horváth Attila (eds.): A különleges jogrend és nemzeti szabályozási modelljei. Mádl Ferenc Intézet, Budapest, 2021, pp. 149-150.

<sup>8</sup> Through two amendments to the Fundamental Law, the Sixth and the Ninth Amendment. (The text of the amendments has been incorporated into the text of the FL, which is available – without the Tenth amendment – in English at: [https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary\\_20201223\\_fin.pdf](https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf)).

<sup>9</sup> Cf. Trócsányi László: Az alkotmányozás dilemmái – 10 év múltán. *Acta Humana*, 2021/2, 135-154, esp. 146-149.

<sup>10</sup> See fn 7 supra.

lative acts adopted by two-thirds majority of the National Assembly). These are the 2011 Disaster Prevention Act (DPA), and the 2020 Coronavirus Containment Act (CCA)<sup>11</sup>. The DPA adds further causes to the above in the form of ‘danger “of other origin”, especially a human (or animal) pandemic causing mass infection or danger thereof; disruption of critical infrastructures; and water contamination.<sup>12</sup>

Under the applicable rules, the Government can declare a SOD, in case of a natural disaster or industrial accident endangering life and property, to mitigate its consequences, and it may introduce extraordinary measures, including the adoption of decrees, the suspension of the application of certain Acts, derogation from the provisions of certain Acts and other extraordinary measures. These remain in force for 15 days, and the National Assembly may extend their effect, just as in the case of the adoption of the 2020 CCA, mentioned above.<sup>13</sup>

## 1.2. The Ninth Amendment of the Fundamental Law

The National Assembly of Hungary adopted the Ninth Amendment to the FL on 22 December 2020, which significantly renews SLO provisions.<sup>14</sup> Through this Amendment, instead of the above-mentioned six types of SL, starting in 2023, the Hungarian FL will only recognize three states: a state of war, a state of emergency, and a state of danger.<sup>15</sup>

The new SLO rules provide the Government with a central role in all three instances, unlike the current provisions, which gives extraordinary power to the National Defence Council (in case of the state of national crisis) or to the President of the Republic (in the case of the SOE).<sup>16</sup> In their response sent to the Venice Commission, the Hungarian Government pointed out that these changes became necessary to ensure a fast and responsible decision-making process in a political and legal sense.<sup>17</sup> However, the new Amendment could reinforce such critical views that argue the scales being recently tipped in favor of the executive power in the system of checks and balances.<sup>18</sup>

To briefly summarize, if and when they enter into force in July 2023, the new rules will result in the following changes:

- (i) The SOD will be declared if an attempt is made to overthrow or subvert the constitutional order or launch a coup d’etat, or if any illegal act that endangers the security of life or property on a mass scale is made.
- (ii) The SOE will require a two-thirds majority of the National Assembly to be declared for thirty days, unless the National Assembly extends for another thirty days.<sup>19</sup>

In addition, the Ninth Amendment also tightens up the definition for SOD so that it can only be declared in the event of a natural disaster or industrial accident that endangers the safety of life and property, and in order to eliminate the consequences thereof. Declaring a SOD would require a two-thirds parliamentary majority and last up to thirty days with a possible (parliamentary) extension.<sup>20</sup>

Based on this legislative framework, in the following Part 2, we will present the timeline of pandemic governance in Hungary.

## 2. Hungarian Pandemic Governance – A Chronological Overview

At the end of 2019, the coronavirus suddenly burst into the public consciousness. No one suspected at the time that it will change every aspect of our everyday lives. Despite news from abroad, Hungary had not adequately assessed the immediacy and scale of the possible dangers brought about by the spread of the pandemic in the beginning of 2020.

In early March, the Government and all the major news outlets communicated that there were no signs of COVID-19 in Hungary. The first case was reported on 4 March, and a week later, on 11 March 2020, the Government declared a SOD<sup>21</sup> on a national scale. (At that time Hungary only had 16 diagnosed cases<sup>22</sup> of COVID-19 according to the Government Information Site<sup>23</sup>).

<sup>11</sup> English language legislative text available at < <https://perma.cc/9LMR-YS3L> > accessed 15 February 2022.

<sup>12</sup> See fn 7 supra.

<sup>13</sup> See fn 7 supra.

<sup>14</sup> See fn 7 supra.

<sup>15</sup> See fn 7 supra.

<sup>16</sup> See fn 7 supra.

<sup>17</sup> Venice Commission: Ninth Amendment to the Fundamental Law and Explanatory Memorandum 2021: <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)045-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)045-e)> accessed 21 January 2022.

<sup>18</sup> Szabó Zoltán: Alkotmányozás a koronavírus árnyékában – Az alkotmányoknak is meg kell küzdeniük a vírussal? Tár-

sadalomtudományi Kutatóközpont – Jogtudományi Intézet: <<https://jog.tk.hu/blog/2021/12/alkotmanyozas-a-korona-virus-arnyekaban>> accessed 21 January 2022.

<sup>19</sup> See fn 7 supra.

<sup>20</sup> See fn 7 supra.

<sup>21</sup> Gov. Decree No. 40/2020. (11 March) on the declaration of state of danger.

<sup>22</sup> <<https://www.worldometers.info/coronavirus/country/hungary/>> accessed 18 February 2022.

<sup>23</sup> < Újabb magyar nőnél diagnosztizáltak új koronavírus-fertőzést (gov.hu)> accessed 18 February 2022.

Extraordinary measures relating to the pandemic were set out in separate Government Decrees. During the first wave, the Government issued more than 100 decrees<sup>24</sup>, not all of which were specifically related to the fight against the pandemic.

From 27 March 2020, the Government ordered a restriction on movement,<sup>25</sup> including the imposition of leaving a domicile, place of residence, permitted only for a justified reason – a list of which is also specified by a Government Decree, including, e.g., the performance of work, carrying out professional obligations, getting access to health care or health services, shopping in specified stores – mainly in groceries selling daily consumer goods – among other measures. According to the decree, businesses required to close – with a few exceptions – and a time window was introduced for those who were over the age of 65, enabling them to shop between 9 to 12 a.m. while excluding under 65s from grocery stores and pharmacies.<sup>26</sup>

The Government also mobilized the armed forces and introduced hospital commanders into hospitals to ensure the steady flow, logistics and protection of healthcare equipment and devices, supplies of medication.<sup>27</sup>

The argument could be made that the Government responded to the pandemic by simultaneously fearing the worst and assuming the best. The Prime Minister of Hungary and every major news and media outlet reported that the pandemic would be over before the summer of 2020.<sup>28</sup> It is true that by 16 June 2020, the National Assembly had lifted all coronavirus restrictions and officially terminated the SOD, but at the same time also passed a law instituting a 'state of epidemiological preparedness'.<sup>29</sup>

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<sup>24</sup> See: Kiss Barnabás: Csak a változás állandó. A különleges jogrend alkotmányi-alaptörvényi szabályozásának alakulása Magyarországon. In.: *Forum Acta Juridica et politica* XI. 3. Szeged, 2021. 235.

<sup>25</sup> Gov. Decree No. 71/2020 (27 March) on restricting movement.

<sup>26</sup> See fn 21 supra.

<sup>27</sup> Gov. Decree No. 72/2020 (28 March) on hospital commanders and protecting healthcare supply.

<sup>28</sup> See statement of Prime Minister Orbán on the end of the coronavirus pandemic: Orbán Viktor: a járvány harmadik hullámát letörtük, lényegében le is győztük (koronavirus.gov.hu). Infectologist János Szlavik's statement on the coronavirus pandemic: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiC\\_r7U0bH6AhW-hv0HHT\\_TCxiQFnoECBQQAQ&url=https%3A%2F%2Fhvg.hu%2Ffitthon%2F20200213\\_Szlavik\\_A\\_nyarra\\_vege\\_lehet\\_a\\_koronavirusjarvanynak&usg=AOvVaw1Uv9SWqV5dVB7u04sUWox3](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiC_r7U0bH6AhW-hv0HHT_TCxiQFnoECBQQAQ&url=https%3A%2F%2Fhvg.hu%2Ffitthon%2F20200213_Szlavik_A_nyarra_vege_lehet_a_koronavirusjarvanynak&usg=AOvVaw1Uv9SWqV5dVB7u04sUWox3)

<sup>29</sup> Act LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness. Available in Hungarian: <https://njt.hu/jogszabaly/2020-58-00-00>.

In this context, some argue that the Government erred many times by instituting certain measures, e.g. by ordering all hospitals to free up 60% of their beds by discharging non-COVID patients.<sup>30</sup> The Government seized control of hospitals through instituting military leadership, and moved patients (e.g. cancer patients) out of hospitals, and postponed almost every non-lifesaving surgery – in preparation for a worst-case scenario.<sup>31</sup>

During the first wave, Hungary had only 6139 confirmed cases of COVID-19 – a high number, but still low in comparison to the situation in the second, third and fourth waves.<sup>32</sup>

At the end of October 2020, Hungary recorded more new infections in a day than during the whole first wave.<sup>33</sup> On 11 November 2020, the Government reintroduced the SLO with extraordinary measures,<sup>34</sup> whereby Hungary ended up last in Europe to impose any kind of lockdown.

The Prime Minister announced a nationwide general curfew between 8 p.m. and 5 a.m. with an exception of those commuting to work. Businesses were required to close by 7 p.m., restaurants were limited to offering services in the form of home delivery, sporting events could only be held in empty stadiums, and family gatherings were limited to 10 people. Universities and high schools transitioned to distance or digital education.<sup>35</sup> Hungary was therefore faced with stricter rules, new and tightened restrictions, which were necessary on the one hand, but controversial on the other hand, especially considering the restrictions and numbers of COVID-19 cases in the first wave.

During this period, the National Assembly decided to adopt a new Act on the Healthcare Service Relationship,<sup>36</sup> which led to the termination of employment in the case of about 4000 doctors and nurses due to heavy resistance to the new law being enacted based on the conditions it offered. All this in a climate when the Hungarian public healthcare system was already crumbled under previous budget cuts, which further complicated effective defense against the pandemic.

In the following Part 3, we will look at some of the issues that arose in terms of the operation of

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<sup>30</sup> IV/320/2020/EFFHAT Order of the Ministry of Human Resources (EMMI) 2020.04.07.

<sup>31</sup> See fn 27 supra.

<sup>32</sup> See the statistics since 2020: <https://www.worldometers.info/coronavirus/country/hungary/> accessed 9 September 2022.

<sup>33</sup> See fn 33 supra.

<sup>34</sup> Gov. Decree No. 478/2020 (3 November) on the declaration of state of danger.

<sup>35</sup> Gov. Decree No. 484/2020 (10 November) on the second phase of protective measures applicable during the period of state of danger.

<sup>36</sup> Act C of 2020 on Healthcare Service Relationship.

the judiciary, including the work of the Constitutional Court.

### 3. The Effect of the Pandemic on the Hungarian Judicial System

The global situation resulting from the pandemic has been causing radical changes in almost every aspect of the life of the people and the states, including the operation of certain public institutions. Naturally, it has also posed serious challenges – both procedural and administrative – regarding the functioning of the courts in Hungary as well.<sup>37</sup> To provide a broader picture for the climate in which the pandemic reached the Hungarian judiciary, we will shortly describe some issues of judicial administration in general below.

First, in 2011, the National Assembly enacted a law regarding new structures of judicial governance (Act CLXI of 2011 on the organization and administration of the courts, Court Organization Act, COA).<sup>38</sup> In accordance with this law, the administration of the justice system relies on two main actors, the President of the National Office of the Judiciary (NOJ) and the National Judicial Council (NJC).<sup>39</sup>

The NOJ and its president represent the central organization of judicial administration that supports, manages, controls, and supervises the main activities of the Judiciary. The president has wide-ranging powers over court administration, including the recruitment and promotion of judges, management of the judiciary's budget, and IT infrastructure, while the 15-member NJC serves as an oversight body over the NOJ and its president.<sup>40</sup>

The NJC expresses opinions regarding appointments, positions, relocations, or assignments of the judges.<sup>41</sup> It also expresses opinions on the annual budgetary plan of the court, the utilization of the approved budget, the organizational and op-

erational policy, and the case allocation plan of the court.<sup>42</sup>

The NJC furthermore has the power to scrutinize the actions of the NOJ President, and in certain cases, exercise a veto, and ultimately, if the NOJ President becomes “unworthy” of the office, the NJC can request the National Assembly to vote on removing the NOJ President from office.<sup>43</sup>

This decade-old judicial reform has provoked widespread debate at national and international level as well, with one of the controversial points being with the constitutional status of courts and judges and the powers of the president of the NOJ and the administrative model that this represents.<sup>44</sup> Many saw this new structure as a concentration of power, others as a loss of judicial autonomy,<sup>45,46</sup> as part of a “constitutional crisis”.<sup>47</sup>

To describe the general context of judicial administration, we should start by mentioning that leading judicial positions are generally filled through application procedures.<sup>48</sup> The General Judicial Assembly (GJA, a consultative body to the NJC) –an essential part in these procedures<sup>49</sup> – gives its opinion on the applicants via secret ballot. In those cases where there is more than one applicant, the GJA must establish a ranking, beside providing opinions on the applicants.

If the NOJ President wants to appoint an applicant who did not receive the majority support of the GJA, the President must obtain the preliminary

<sup>42</sup> Section 76 of Act CLXI of 2011 on the organization and administration of the courts’.

<sup>43</sup> On what this meant in practice in a concrete case, see: Vadász Viktor: Krízis a bírósági igazgatásban? MTA Law Working Papers 2018/13. <[https://jog.tk.hu/uploads/files/2018\\_13\\_Vadasz.pdf](https://jog.tk.hu/uploads/files/2018_13_Vadasz.pdf)> accessed 24 January 2022.

<sup>44</sup> See, Opinion CDL-AD(2012)001 and Opinion CDL-AD(2012)020 of the Venice Commission.

<sup>45</sup> Balogh-Békési Nóra: A bírói hatalmi ág az Alaptörvény rendszerében. *Iustum Aequum Salutare* XII. 2016. 4. 10.

<sup>46</sup> Varga Zs. András: Judicial reform – why and how?, Pázmány Law Working Paper, 2018/14. < [https://plwp.eu/files/PLWP\\_2018-14\\_VargaZs.pdf](https://plwp.eu/files/PLWP_2018-14_VargaZs.pdf)> accessed 17 February 2022.

<sup>47</sup> European Association of Judges: Report on the fact-finding mission of the EAJ to Hungary: < <https://www.iajuim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>> accessed 24 January 2022; European Commission: Recommendation for a Council recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary: European Commission: Recommendation for a Council recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary.

<sup>48</sup> For a summary on the appointment procedure see, Kovács Ágnes: Új modell a bírósági igazgatásban: Bírák Központi nyomás alatt, BUKSZ 2019: < [http://buksz.c3.hu/190304/06.2\\_probkovacs.pdf](http://buksz.c3.hu/190304/06.2_probkovacs.pdf)> accessed 24 January 2022.

<sup>49</sup> Section 132(4) of Act CLXI of 2011.

<sup>37</sup> On introducing the structures of the Hungarian justice system in light of the new Fundamental Law, see: Fleck, Zoltán. “Changes of the Judicial Structure in Hungary—Understanding the New Authoritarianism.” *OER Osteuropa Recht* 64.4 (2019): 583-599.

<sup>38</sup> For a summary of the 2011 judicial reform, see: Osztoivits András: Az új magyar bírósági szervezetrendszer. in: Rixer Ádám (ed.): *Állam és Közösség. KRE ÁJK*, 2012, Budapest; 381-388. and Raccuja Gergely: Judicial Reforms in Hungary, [https://www.academia.edu/7791782/Judicial\\_Reforms\\_in\\_Hungary](https://www.academia.edu/7791782/Judicial_Reforms_in_Hungary) accessed 18 February 2022.

<sup>39</sup> For a summary on the NOJ and NJC see: <https://birosag.hu/en/national-office-judiciary> accessed 26. September 2022.

<sup>40</sup> [https://www.encl.eu/images/stories/pdf/factsheets/obt\\_hungary.pdf](https://www.encl.eu/images/stories/pdf/factsheets/obt_hungary.pdf).

<sup>41</sup> Kovács Ágnes: Ki védi meg a magyar bíróság függetlenségét? Személyzeti politika a központi igazgatásban. MTA Law Working Papers, 2019/10, 4-8.

opinion of the NJC in support of such appointment.<sup>50</sup> In exceptional cases, if the application procedure and the repeated application procedure were unsuccessful, the NOJ President has the power to fill a court executive position through mandate for a maximum term of one year.<sup>51</sup>

In the context of the “constitutional crisis” affecting the Hungarian judiciary on the level of administration, it should not be forgotten that the absence of an otherwise necessary cooperation between the NOJ President and the NJC have significantly strained the relationship of these organs and lead to an eventual parliamentary vote to keep the NOJ President in office, despite harsh tones of dissatisfaction with her activities.<sup>52</sup>

Finally, the National Assembly elected her for a position at the Constitutional Court, and by this act, everyone hoped that the “constitutional crisis” will be resolved. The Hungarian justice system was forced to deal with the new situation caused by the pandemic in this tense environment.

With the new President of the NOJ being elected, it has been seen that the imposition of the temporary rules during the SOD brought about by COVID-19 still in some terms prevents the proper functioning of constitutional institutions playing a key part in the judicial appointment procedures.

During the SOD, one of the first emergency measures taken by the president of the NOJ was to prohibit the meetings of the GJA, preventing the proper functioning of a constitutional institution essential in judicial appointment procedures.

### 3.1. Extraordinary judicial recess

In this context, from 15 March 2020, the courts instituted an extraordinary judicial recess.<sup>53</sup> As courts could thus not hold preparatory and trial hearings due to the pandemic, every hearing after this time had been indefinitely postponed.<sup>54</sup> Courts have informed litigants and parties about the postponement without setting new trial dates.<sup>55</sup>

<sup>50</sup> Section 132(6) of Act CLXI of 2011.

<sup>51</sup> Section 133(2) of Act CLXI of 2011.

<sup>52</sup> See: Amnesty International and Hungarian Helsinki Committee: Constitutional Crisis in the Hungarian Judiciary, 2019, <https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf> accessed 26 September 2022.

<sup>53</sup> Gov. Decree No. 45/2020. (III.14.) on measures to be carried out during the state of danger ordered to prevent the human pandemic causing mass casualties and endangering the safety life and assets as well as to defend against its consequences in order to protect the health and life of Hungarian citizens.

<sup>54</sup> Decision 37.SZ/2020. (III.17.) of the president of the NOJ: [https://budapestkornyekitorvenyszek.birosag.hu/sites/default/files/news/37.sz\\_.pdf](https://budapestkornyekitorvenyszek.birosag.hu/sites/default/files/news/37.sz_.pdf) accessed 26 September 2022.

<sup>55</sup> See above fn.

However, the judicial recess did not affect those duties of courts that could be taken care of without holding hearings.

According to the regulation in question, urgent procedural acts need to be carried out, if possible, by remote hearings.<sup>56</sup> When such an act could not be carried out this way, a special courtroom protocol was put in place. According to this, the persons present were required to keep at least two meters social distance, and to certify if they have been in an “affected area” in the previous 14 days, or met an infected person or their relative.<sup>57</sup> If it was deemed likely that an infected person was present in the courtroom, the trial would be immediately interrupted by the court.

With the entry into force of the special procedural rules during the SOD,<sup>58</sup> the extraordinary judicial recess has been terminated, and remote hearings were specified as a default from 31 of March, 2020.

### 3.2. Electronic correspondence with the litigants and parties, remote hearings

The primary aim of the relevant Government Decree specified above was to ensure the proper functioning of the courts, while still assuring the safety of the people. The first line of defence against the virus was to reduce and, as far as possible avoid, personal contact. The special procedural rules contributed to this by suspending personal consulting hours in the courts<sup>59</sup>, holding preliminary procedures in writings, omitting preparatory hearings<sup>60</sup>, requiring remote hearings<sup>61</sup>, and allowing judicial employees to work from home, provided that such a working method suited the nature of their tasks.<sup>62</sup>

In order to reduce the length of procedures, the legislature required electronic correspondence to be selected as optional or mandatory in certain court procedures, and the courts had to adapt to this new situation. (NB company registration procedures have been exclusively electronic since 1 July 2008 in the first-instance, and since 1 January 2012 in the second-instance procedure<sup>63</sup> as well,

<sup>56</sup> See fn 57 supra.

<sup>57</sup> Decision 35.SZ/2020. (III.15.) of the President of the NOJ: [https://birosag.hu/sites/default/files/2020-03/35.sz\\_vezelyhelyzet\\_elnoki\\_intezkedes\\_0.pdf](https://birosag.hu/sites/default/files/2020-03/35.sz_vezelyhelyzet_elnoki_intezkedes_0.pdf) accessed 26 September 2022.

<sup>58</sup> Gov. Decree No. 74/2020. (31. March) on procedural measures in effect during the state of danger.

<sup>59</sup> Section 12 (2) of Gov. Decree No. 74/2020. (31. March) supra.

<sup>60</sup> Section 21 of Gov. Decree No. 74/2020. (31. March) supra.

<sup>61</sup> Section 23 of Gov. Decree No. 74/2020. (31. March) supra.

<sup>62</sup> Section 7 of Gov. Decree No. 74/2020. (31. March) supra.

<sup>63</sup> Szalai Péter: Az elektronikus cégeljárás. In: G. Karácsony Gergely (ed.): Az elektronikus eljárások joga, Gondolat Kiadó, Budapest, 2018. 36.

so there were already institutional solutions for certain cases within the court system, that served as best practices.)

Over the past decade, civil procedures have also seen the benefits of significant digitalization.<sup>64</sup> Electronic correspondence between regional courts acting as court of first instance and their clients have been set out as an option in the legislation since 1 January 2013.<sup>65</sup> As of 2015, electronic correspondence is available at all courts, and as of 2016<sup>66</sup> it is not just an option, but it is mandatory for the parties acting with a legal representative.<sup>67</sup>

Since 2018, as part of digitalization efforts directed at improving the quality of the justice system, more than 100 courtrooms have been equipped for the performance of remote hearings in Hungary. According to the NOJ, in 2019 courts held 3163 remote hearings, most frequently in criminal procedures.<sup>68</sup>

At first glance, it may seem like these preceding reforms have significantly eased the necessity of the digital transition caused by the pandemic, but these impressions might be wrong, as will be discussed later on.

From mid-2020, the special procedural rules state that a hearing may be held also by way of an electronic communications network (called Via Video - an internal video conferencing system of the NOJ<sup>69</sup>) or other means suitable for the transmission of an electronic image and sound.<sup>70</sup> The guidance of the NOJ specified other audio-visual electronic means as such private applications or programs as Skype or Microsoft Teams,<sup>71</sup> but judges are free to make use of any other encrypted programs.<sup>72</sup> If none of the abovementioned elec-

tronic means are available or in cases where the physical presence of a party is necessary, the courts accept the parties' submissions in writing as a last resort.<sup>73</sup>

So far, no information is available on how many hearings were held using an electronic communication network during the SOD. The opportunity was given, however, in practice, the courts preferred not to use the option of remote hearings. Instead, they more likely postponed the proceedings as previously presented.

This not only raises practical concerns but also challenges fundamental principles of procedural law (as it will be described below), and seems to go contrary to the spirit of the Decree introducing the changes as well. As it was mentioned before, the primary purpose of the decree was to ensure the proper operation of the courts.

### 3.3. Issues with the right to a fair trial

One of the practical concerns raised by remote proceedings concerns the fundamental principle of publicity in a fair trial. Be it nomadic tribal structures or modern democracies, it can be argued that the operation of the administration of justice is a 'group activity', a community act, with an indispensable part being played by the individual. Members of a community were and are present in the proceedings, but not only in a concrete, distinguishable procedural roles (for example plaintiffs or defendants), but also as "controllers" (one might say assessors, not only to mean members of the jury, but as members of the public as well) to ensure the impartiality and independence of the justice system and of the trial courts.

In Hungary, the FL states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and judgment shall be announced publicly.<sup>74</sup> The main problem in this context is that the emergency regulation only superficially addressed the right to a public trial in electronic hearings, as discussed and explained above.

It goes without saying that, in a remote/electronic procedure, publicity can raise some practical issues. For its proper functioning, everyone must have the proper technological equipment, and the protection of personal rights and personal data must be ensured during the procedure. The emergency regulation did not contain a provision on publicity, so it was evident that the courts should have ensured the participation of the press or members of the society based on the otherwise applicable (subsidiary) provisions regard-

courts-in-hungary-ready-or-not/ > accessed 17 January 2022.

<sup>73</sup> See fn 60 supra.

<sup>74</sup> Art. XXVIII. of the Fundamental Law of Hungary.

<sup>64</sup> Pákozdi Zita: A polgári eljárásjog egyes aktuális kérdései. < [http://acta.bibl.u-szeged.hu/30711/1/juridpol\\_doct\\_009\\_321-337.pdf](http://acta.bibl.u-szeged.hu/30711/1/juridpol_doct_009_321-337.pdf) > accessed 21 January 2022.

<sup>65</sup> See fn 67 supra.

<sup>66</sup> Alexandra Bogárn: Hungary: A new era in electronic litigation has begun, < <https://www.lexology.com/library/detail.aspx?g=a9b39193-4d66-44e9-ac47-cebaf43ad6ef> > accessed 18 February 2022.

<sup>67</sup> Pál Emil Mészáros: The Evolution of Electronic Administration and Its Practice in Judicial Proceedings, *Journal of law and social sciences of the Law Faculty of University J.J. Strossmayer*, Vol. 34. No. 3-4. 2018.

<sup>68</sup> < <https://birosag.hu/en/news/category/about-courts/soon-184-courtrooms-will-be-available-remote-hearings> > accessed 18 January 2022.

<sup>69</sup> Chapter XLVII of the Hungarian Code of Civil Procedure; 19/2017. (XII.21.) decree of the Minister of Justice.

<sup>70</sup> Section 23 (1) Gov. Decree No. 74/2020. (31 March) supra.

<sup>71</sup> < <https://birosag.hu/hirek/kategoria/ugyfeleknek/tajekoztato-veszelyhelyzet-ideje-alatt-ervenyesulo-egy-es-eljarasjogi> > accessed 18 January 2022.

<sup>72</sup> DLA Piper: Remote courts in Hungary: ready or not? < <https://blogs.dlapiper.com/advocatus/2020/04/remote->

ing publicity in the Civil and Criminal Procedure Codes.<sup>75</sup>

According to the Civil Division of the Supreme Court (Kúria) the publicity and the participation of the society in electronic hearings should have been adequately ensured, but the exact manner of doing so has not been determined.<sup>76</sup> The opinion of the Civil Division of the Kúria stated that the provisions on publicity in the Civil Procedure Code apply, with the exception - using a strange turn of phrase - stating that "the public must have access to the designated place of the hearing".<sup>77</sup> This literally is construed to mean where the judge is on the day of the trial. In practice this might even mean the actual place of residence or home office of the judge at the day of the trial, which might lead to complications. The rules further state that the above need to happen in compliance with further regulations on protective measures (personal distance, use of protective equipment, etc.).

However, this completely contradicts the purpose of emergency regulation, since during this period the courts were not allowed to take any procedural acts requiring personal presence. For these reasons, clients and the public were also precluded from entering court buildings.

After the Government reintroduced the SOD, Government Decree No. 112/2021. (III.6.) on certain procedural measures applicable during the period of SOD entered into force which extended the possibility of excluding the public during the term of the SOD.<sup>78</sup>

In summary, in the above-mentioned period, the practice under the emergency procedural rules basically violated the principle of orality, the principle of immediacy and publicity. These raise the question: Can a government decree overrule an essential element of the right to a fair trial?

Article 54 (1) FL states that certain elements of the right to a fair trial under Article XXVIII paras. (2)-(6) can be subject to restriction or limitation exceeding thresholds of necessity and proportionality in a SLO situation. Interestingly, these provisions exclude the principles of immediacy (tied to the requirement of reasonable time) and also exclude publicity, allowing a much needed space for the legislature to accommodate emergency situa-

tions like the one brought about by COVID-19. On another interesting sidenote, the right to appeal (remedy) is also excluded from those fair trial provisions that cannot be restricted or limited exceeding thresholds of necessity and proportionality, but we have not seen – thus far – such cases in which this might have been an issue.<sup>79</sup>

Continuing along the lines of constitutional issues, the next Part 4 describes certain issues that relate to the emergency operation of the Constitutional Court and some of the relevant cases that have been dealt with during the COVID-19 SOD until the end of 2021.

#### 4. Hungarian Constitutional Justice during COVID-19

As a first response to the challenges of the pandemic, the President of the Hungarian Constitutional Court (HCC) requested an amendment to the Act on the operation of the HCC (HCCA) and instituted the possibility for ordering the digital operation of the Court by using electronic means in adjudicating on all matters in plenary and panel formation. By way of this rule, all sessions of HCC can be organized through means of electronic communication upon the decision of the President. Such a protocol has been in effect since the HCCA was amended on 18 May 2020.<sup>80</sup>

In October 2020, the Data Protection Unit of the Council of Europe in their Data Protection Report entitled 'Digital Solutions to Fight COVID-19' reported regarding the importance of emergency measures and their constitutional review that in Hungary "ordinary courts were closed thus preventing the Constitutional Court review of the proportionality of measures introduced under emergency conditions as this procedure could solely be initiated by ordinary courts."<sup>81</sup>

This above statement, however, is *prima facie* unsubstantiated by looking at the legislative framework underlying constitutional justice in Hungary. Ordinary courts (judges) are entitled to initiate proceedings in front of the HCC if in the case before them a constitutional question emerges as a precondition for their decision (under Article 25 HCCA)<sup>82</sup> but this in no way means that 'solely' ordinary courts could initiate such proceedings and that closing down these courts due to the pandemic therefore prevented individuals from

<sup>75</sup> Section 231-232 of the Civil Procedure Code of 2016 and Chapter LXXI of the Criminal Procedure Code of 2017.

<sup>76</sup> 2/2020. (30. April) PK opinion of the Civil Division of the Supreme Court.

<sup>77</sup> Section 4 of 2/2020. (30. April) PK opinion of the Civil Division of the Supreme Court

<sup>78</sup> Ignácz György – Madarasi Anna: A bírósági tárgyalások nyilvánossága veszélyhelyzet idején. In *Medias Res*, 2/2020. < <https://media-tudomany.hu/archivum/a-birosagi-targyalasok-nyilvánossaga-veszelyhelyzet-idejen/> > accessed 18 January 2022.

<sup>79</sup> See fn 6 supra.

<sup>80</sup> See: Article 48/A of the HCCA at: < <https://hunconcourt.hu/act-on-the-cc> > accessed 18 February 2022.

<sup>81</sup> See: Digital Solutions to Fight COVID-19. <https://rm.coe.int/prems-120820-gbr-2051-digital-solutions-to-fight-covid-19-text-a4-web-16809fe49c>.

<sup>82</sup> See: Article 25 of the HCCA at: < <https://hunconcourt.hu/act-on-the-cc> > accessed 12 September 2022.



having recourse against these rules. Under Article 26(2) of the HCCA,<sup>83</sup> anyone (also individuals and organizations) that feel that their rights were violated by laws enacted, has a direct recourse to the HCC without any judicial proceedings being conducted at all (in the context of legislation that was adopted and violates rights due to its entry into force). (Also, this is without prejudice to such constitutional complaints that can indeed be filed by individuals or organizations against final judicial decisions in case a violation of a fundamental rights is alleged.)

In light of the above, we think it is important to mention that with due regard to maintaining a necessary and accessible record of all constitutional review proceedings in matters of “viral constitutional law” brought about by the pandemic, the HCC compiles a digital database of all COVID-19-related petitions and decisions,<sup>84</sup> but so far none had a specifically ‘digital aspect’ that would merit further analysis for the purposes of this paper.<sup>85</sup> To this day, there has only been 1 (one) COVID-related judicial initiative coming from ordinary courts to the HCC questioning certain rules imposed by Government Decree 522/2020 (XI.25.), which has been decided by HCC Decision 28/2021 (XI.5) AB határozat – as it can be seen in the database mentioned above under fn 86.

From among the other cases, one constitutional complaint (*alkotmányjogi panasz*) could be mentioned, however, as it deals with an issue of online scaremongering (spreading news that incite fear, during SLO) on social media. Petitioner in this case was an attorney-at-law, who felt personally affected by a violation of the right to freedom of expression because “*he publishes a lot on social media and online as part of public debate*”, and a new provision introduced in the Criminal Code on scaremongering adds additional conditions to his exercise of his freedom of expression, and this is in violation of Art IX FL, adversely affecting him. While the HCC rejected the complaint, the Court defined a constitutional requirement stating that the “*new provision can threaten with punishment only such disclosures of fact, the falsity of which was known to the perpetrator at the time of committing the crime or they have distorted these facts themselves and*

*which are suitable to obstruct or foil protective measures at the time of special legal order*”.<sup>86</sup>

It remains to be seen whether in the future more specifically digital cases will make it the HCC for constitutional review of judicial decisions or legislative norms, which would be a great and interesting step forward, developing their jurisprudence adapting to the changing circumstances of life brought about by technology, some of which are going to be addressed in the next chapter.

## 5. Pandemic Prevention through Digitalization – A Showcase

After describing the general legal framework of the so-called special legal order (SLO) in Hungary tailored to the COVID-19 pandemic and the operation of certain state institutions in this period, this last section describes those aspects of digitalization and innovation that have been engaged and applied by the Government to try and alleviate the negative effects of the pandemic and offer electronic governance services and solutions to citizens.

A 2021 global survey (McKinsey Global Survey of executives)<sup>87</sup> found that responses to COVID-19 have sped up the adoption of digital technologies by several years – and that many of these changes could be here for the long haul due to such compelling state interests like the protection of public health otherwise called pandemic prevention.

During a pandemic, it is crucial that the authorities successfully carry out excessive contact research in order to follow the spread of the virus. Besides the extraordinary measures that were introduced with the SLO, the Government had to find new ways for “contact research”, certification of immunity and verification of compliance with home quarantine obligations.

Before going into details on this front, a short description of the basic infrastructure that has successfully operated since the introduction of the SLO, or even before that is important.

In general, the most basic coordination of COVID-administration on the level of services is carried out by NISZ Zrt. (National Information Technology Service Provider), the Ministry of the Interior, the PM’s Office and the Cabinet Office. In the coordination of these state bodies, the following are worth mentioning:

<sup>83</sup> See: Article 26(2) of the HCCA at: < <https://hunconcourt.hu/act-on-the-cc> > accessed 12 September 2022.

<sup>84</sup> Unfortunately only available in Hungarian: < <https://alkotmanybirosag.hu/a-jarvanyugyi-veszelyhelyzettel-kapcsolatosan-indult-eloado-alkotmanybirora-szignalt-alkotmanybirosagi-ugyek> > accessed 18 February 2022.

<sup>85</sup> Some cases dealt with ex post review of constitutionality of legislation concerning the protection of employment in the SLO, with relevant aspects of regulating telework.

<sup>86</sup> HCC Dec. No. 15/2020 (VIII. 8.) AB határozat, decided on 8 August 2020.

<sup>87</sup> < [https://www.mckinsey.com/~/\\_/media/mckinsey/featured%20insights/mckinsey%20global%20surveys/mckinsey-global-surveys-2021-a-year-in-review.pdf](https://www.mckinsey.com/~/_/media/mckinsey/featured%20insights/mckinsey%20global%20surveys/mckinsey-global-surveys-2021-a-year-in-review.pdf) > accessed 31 January 2022.

- *Vaksinainfo.gov.hu*<sup>88</sup> (basic information on vaccine availability and registration for vaccination) and *koronavirus.gov.hu*<sup>89</sup> (basic information on the pandemic SLO)<sup>90</sup>
- *Secure video-conferencing platform* developed by NISZ and T-Systems - used in local government coordination of vaccination – called: *NISZ Videokonferencia – VIKI*;<sup>91</sup>
- *Government Window (Kormányablak)* app for one-stop-shop administration of various client needs during the SLO;<sup>92</sup>
- Use of the *Client Gate* (online admin tool) to gather statistical data analyzing the spread of COVID-19 (H-UNCOVER, ran by the Hungarian Central Statistical Office in 2020), in cooperation with four national universities (Semmelweis, Debrecen, Szeged, Pécs), from support awarded by the Ministry of Innovation and Technology (ITM).<sup>93</sup>

Partly connected to these issues, Ritó and Szabó also describe the basic roles of the Hungarian Central Statistical Office (see above), the National Authority of Customs and Tax Enforcement and the National Data Protection of Authority in their most recent article in December 2021. We shall elaborate on the role of the DPA below.<sup>94</sup>

In the following subchapter, there is a review of some of the applications and digital solutions that

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<sup>88</sup> < <https://vakcinainfo.gov.hu/> >.

<sup>89</sup> < <https://koronavirus.gov.hu/> >.

<sup>90</sup> See: Privacy Policy for the site under [https://koronavirus.gov.hu/sites/default/files/sites/default/files/imce/adatkezesi\\_tajekoztato\\_koronavirus\\_honlap\\_20200520.pdf](https://koronavirus.gov.hu/sites/default/files/sites/default/files/imce/adatkezesi_tajekoztato_koronavirus_honlap_20200520.pdf) specifying that the Ministry for the Interior operates the site, but the content is edited by the Cabinet Office of the Prime Minister.

<sup>91</sup> For a description, see <https://www.nisz.hu/szolgalatasok/telekommunikacio> or <https://me.str.video.gov.hu/hu/contents/contact> (secure online surface only available for designated, authorized personnel).

<sup>92</sup> <https://kormanyablak.hu/hu/impreszum> (The State Secretary responsible for Territorial Administration together with NISZ edits and operates the app).

<sup>93</sup> <https://www.portfolio.hu/gazdasag/20200428/koronavirus-magyarorszag-eneddig-nem-latott-adatokat-ismerhetunk-meg-428752>; <https://semmelweis.hu/hirek/2020/05/05/h-uncover-szurovizsgalat-a-pozitiv-eredmenyrol-24-48-oran-belul-ertesites-erkezik/>. A short description of the program is available (in Hungarian) in the 2021 National Reform Programme of Hungary submitted to the EU Commission as part of the European Semester (p. 48.) at: [https://ec.europa.eu/info/sites/default/files/2021-european-semester-national-reform-programme-hungary\\_hu.pdf](https://ec.europa.eu/info/sites/default/files/2021-european-semester-national-reform-programme-hungary_hu.pdf).

<sup>94</sup> Ritó Evelin – Szabó Balázs: Gondolatok a Covid-világjárvány közigazgatási rendszerünkre gyakorolt hatásairól. In *Medias Res*, 2021/2, 273-286, esp. 279-283. (In Hungarian) < <https://media-tudomany.hu/wp-content/uploads/sites/13/2021/12/imr-2021-2-05.pdf> >, accessed 20 February 2022.

have been applied in Hungary to fight the spread or effects of the pandemic.

### 5.1. VirusRadar

VirusRadar is a free application developed by NextSense and donated to KIFÜ, the Governmental Agency for IT Development operating under the Ministry of Technology and Innovation. Its use is voluntary. The application records encounters between devices (through encrypted aliases) running the app in the background using the Bluetooth connection. This requires the devices to be within at least 2 meters of each other for at least 20 minutes. The app using a randomized pseudonymous identification code linked to the phone number; no other data – like geolocation information – is stored.<sup>95</sup>

If the epidemiological authority is notified or determines that the user is infected, the app sends the encounters stored over the past two weeks to a central server controlled by the Hungarian State, containing otherwise encrypted phone numbers. With this information the epidemiological authorities engaged in contact tracing can notify the identified contacts. In terms of popularity, the Ministry of Innovation and Technology has published some statistics regarding downloads between May and September 2020, that show 75000 downloads.<sup>96</sup> For comparison, the overall population of Hungary is close to 10 million, out of which 4M people use smartphones and thus have the capability to run the application. Upon a search conducted on the AppStore in Hungary, the seems application no longer available for iOS platforms. According to data available online it is available in North Macedonia (under the name Stop Korona!),<sup>97</sup> but the website of the developer seems to be out of commission<sup>98</sup>).

### 5.2. The Home Quarantine System

The application HKR was developed by Asura Technologies and helps verifying compliance with home quarantines. According to Government Decree No. 181/2020 (4 May) on the electronic monitoring of official home quarantines ordered with respect to the human epidemic endangering life and property and causing disease outbreaks, the epidemiological authority shall order that compli-

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<sup>95</sup> < <https://www.elte.hu/content/virusradar-mobilalkalmazas.t21894> > accessed 31 January 2022.

<sup>96</sup> < <https://koronavirus.gov.hu/cikkek/itm-mar-tobb-mint-75-ezren-toltottek-le-virusradar-alkalmazast> > accessed 31 January 2022.

<sup>97</sup> See: <https://rm.coe.int/prems-120820-gbr-2051-digital-solutions-to-fight-covid-19-text-a4-web-/16809fe49c>, p. 29.

<sup>98</sup> <https://stop.koronavirus.gov.mk/en>.

ance with the rules relating to official home quarantine be monitored by using an electronic software suitable (i) for tracking the movements of, and (ii) for transferring the facial image of and the health data provided by, any adult having capacity to act. The application can be used if the adults concerned has an appropriate device and they voluntarily install and use the software. If so, the users must register with an identification card or by providing their personal data manually or by scanning an ID document.<sup>99</sup>

After registration, the epidemiological authority checks if the registrant is in the police house quarantine database, and activates the app. The system then sends remote verification requests to the user at random times via SMS. The remote verification request must be replied by the user within 15 minutes by launching the application and logging in.

The application starts the camera and the user must follow the instructions appears on the screen, until he / she get "Remote verification successful" message. Finally, the app also notifies the users at the end of the official house quarantine. The data stored in the application may be used in criminal proceedings for violation of epidemic control regulations, and no further specific uses are allowed.<sup>100</sup>

In the context of different state approaches to introducing/imposing the use of contact tracing and similar softwares, Ritó and Szabó make the remark that more democratic patterns of use are characteristic to Europe, while in other places, and they mention Australia, the population is mandated to use these applications. As they observe, this might be the cause of the number of infections being lower in Australia, concluding that policies of mandated use (such that have not been seen in Hungary) undoubtedly make tracing and information gathering incomparably more effective.<sup>101</sup>

### 5.3. EESZT Covid Control – Developments in the E-Health Infrastructure

In 2016, the Decree of the Ministry of Human Resources (EMMI) No. 39/2016. (21. XII.) on the detailed rules for the National eHealth Infrastructure (EESZT) introduced a digital infrastructure for mandatory data reporting to General Practitioners, booking appointments for treatments, and other undertakings. To this day, one can easily get access

to such services as booking appointments, test and exam results or prescriptions.

According to the Government Decree No. 60/2021. (12. II.) on certifying immunity to coronavirus, immunity to coronavirus shall be certified by either an official verification card or an application after February 2020. This application is the so-called EESZT CovidControl, so certification of immunity "moved online" as well, as part of the EESZT surface, allowing to book vaccination appointment and get access to various COVID-19 test results. It is important to note that the online surface and the parallel app may also be used for both purposes, with access being provided with the validation of the social security number (SSN) provided or through logging in via the Client Gate e-government portal.<sup>102</sup>

After the identification of the person concerned, the application certifies the vaccinated status of the person concerned relying on data from the EESZT such as name, SSN, date of vaccination, vaccine type or the fact of having gone through the infection in the form of an EU recovery certificate or attesting the fact or absence of natural immunity.

### 5.4. KRÉTA

KRÉTA (CHALK) is the Core System of Public Education and Teaching Registration. It is used by the public school system and is based on a vast legal background of Acts, decrees in the different education sectors. Schools generally use the software to communicate with parents, recording the grades of the students among other functions.

During Covid-19, a new app interface has been added, which parents can use to inform the school – by providing name, e-mail address and a contact telephone number – if there is a COVID-19 infected person in the same household as the student, which may exempt the student from attendance obligations, if there are any.<sup>103</sup>

### 6. Towards a Conclusion: Some Remaining Concerns?

While the pandemic seems to move very slowly towards its conclusion, this paper discusses the Hungarian COVID-19 response through some examples reaches its peak. Public dissatisfaction with many state measures that have been introduced to prevent further damage is omnipresent everywhere in Europe, but there are some legal concerns as well that may need to be shortly intro-

<sup>99</sup> < <https://hazikaranten.hu/> > accessed 31 January 2022.

<sup>100</sup> Ibid.

<sup>101</sup> Ritó Evelin – Szabó Balázs: Gondolatok a Covid-világjárvány közigazgatási rendszerünkre gyakorolt hatásairól. In *Medias Res*, 2021/2, 273-286, 286. (In Hungarian) < <https://media-tudomany.hu/wp-content/uploads/sites/13/2021/12/imr-2021-2-05.pdf> >, accessed 20 February 2022.

<sup>102</sup> < <https://www.eeszt.gov.hu/hu/covid-controll-app> > accessed 31 January 2022.

<sup>103</sup> < <https://tudasbazis.ekreta.hu/pages/viewpage.action?pageId=53772362> > accessed 31 January 2022.

duced. This is the case for Hungary as well. This last part presents some of the legal challenges that have been voiced against regulations adopted within the framework of Hungarian pandemic governance.

Previously, this paper has intentionally presented many aspects regarding the protection of personal data and privacy in terms of the apps described. This brings us to a petition<sup>104</sup> that has been filed to the Hungarian Data Protection Agency (NAIH) by the Hungarian Civil Liberties Union (HCLU) concerning the imminent danger of a violation of the right to personal data (protected under Article VI of the FL), which requested a recommendation by the DPA to end such violations.

The petition revolves around legal questions raised by the app EESZT CovidControl as it is alleged not to be in compliance with data protection by design principles and Article 25 of the GDPR. The reason for this is identified by the petitioner in the fact that it is technically possible to grab the screen of the app and therefore record personal data appearing therein. It has also been raised as an issue that the basic app to certify immunity contains different data sets but the purpose of processing is the same. While the physical card contains passport and ID info + QR code, the “app card” (virtual card accessible via reading a QR code does not contain ID, passport information by the SSN. The argument is then made that the SSN could not at all be accessible to those doing the checks in the public interest, so the purpose of data processing is ill-defined. The petition was filed in July 2021, but no decision has been reached yet that would be available to the public or the scientific community.<sup>105</sup>

In a broader European context, the EU Fundamental Rights Agency conducts cyclical investigations in terms of the different practices of human rights in the Member States and this is also the case during the pandemic. In terms of Hungary, the 2020 Pandemic Report contained information (May) that– based on information available – that there is no contract tracing app in operation at that time, then later was corrected in July<sup>106</sup> by citing numbers of 15.000 downloads and addressing is-

sues of availability for various different platforms, just as we did above. At the same time, FRA cited concerns raised by Amnesty International that those who do not voluntarily submit to electronic monitoring of home quarantine, should expect regular and rigorous in person control by the authorities.<sup>107</sup>

We are not convinced that during a pandemic situation accompanied by a special legal order this instance is actually a grave concern resulting in the violation of human rights, because compelling state interests justify derogations from many rights in emergency situations and under emergency powers.

This is just another piece of evidence that not all rights issues are unambiguous in times of crisis such as the one brought about by COVID-19, but we are looking forward to the quick conclusion of this period and hope that things might quickly return to normal, even if it is a ‘new normal’, but without the pandemic.

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<sup>104</sup> Available here (in Hungarian): < [https://tasz.hu/a/files/Nemzeti-Adatvedelmi-es-Informacioszabadsag-Hatosag-beadvany\\_EESZT-TAJ.pdf](https://tasz.hu/a/files/Nemzeti-Adatvedelmi-es-Informacioszabadsag-Hatosag-beadvany_EESZT-TAJ.pdf) > accessed 18 February 2022.

<sup>105</sup> For a description of all legal issues described in Hungarian, cf. fn 81 supra.

<sup>106</sup> Remark: Differences in available data and lack of pertinent national information might at times be due to the fact that the Hungarian reporting for the purposes of FRA data collection is being carried out not by a national company or NGO but by a Brussels-based Belgian company, Milieu Law and Policy Consulting SRL as part of FRANET (a network of different stakeholders responsible for data collection and research corresponding to the purview of FRA).

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<sup>107</sup> See: Coronavirus Pandemic in the EU – Fundamental Rights Implications. Hungary (country report), 2 July 2020. 24. available at: < [https://fra.europa.eu/sites/default/files/fra\\_uploads/hu\\_report\\_on\\_coronavirus\\_pandemic\\_july\\_2020.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/hu_report_on_coronavirus_pandemic_july_2020.pdf) > accessed 17 February 2022.