

# **A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary**

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February 2022

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### **I. Introduction**

Over the past decade, fundamental legal, policy and institutional changes in Hungary have systematically undermined the rule of law and the protection of human rights, with particular damage to the independence of the judiciary, freedom of the media and fundamental freedoms exercised by civil society. Hungarian authorities have acted methodically to erode the principle of separation of powers, thereby drastically diminishing the capacity of judges to uphold the rule of law and perform their function to act as a check on executive and legislative power.

Since the beginning of the COVID-19 pandemic, Hungarian authorities have imposed a range of broad emergency measures, purportedly in response to the COVID-19 epidemic. These measures have affected and sometimes targeted areas which are not connected to the public health emergency. Such measures have also not been restricted or timebound to the course of the pandemic, but have instead been applied indefinitely<sup>1</sup>. The Hungarian Government has declared a “state of danger” three times as well as a “medical crisis”, adopting hundreds of emergency decrees. Many of these decrees have now been transformed into ordinary statutory law and remain in force in Hungary. While the “state of danger” was terminated in June 2020, amendments introduced parallel to it provided the Government with extensive and ongoing powers.

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<sup>1</sup> This state of danger was terminated in June 2020. See <https://helsinki.hu/en/emergency-regimes-in-hungary-under-the-pandemic/>

These powers can be applied with reference to an epidemic, with significantly weakened constitutional safeguards<sup>2</sup>.

The ICJ recalls that during a declared state of emergency or other state of exception, States do not have unlimited discretion to restrict human rights protections or derogate from human rights obligations. States must ensure that measures taken which restrict human rights are lawful, necessary, proportionate, non-discriminatory and evidence based<sup>3</sup>.

In the context of a public health emergency such as brought on by the COVID-19 pandemic, restrictions are only legitimate and lawful if they are directed at and connected to the protection of public health. Hungary has obligations in terms of the protection of the rights to life and health as a State Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>4</sup> the International Covenant on Civil and Political Rights (ICCPR), the European Social Charter<sup>5</sup> and the European Convention of Human Rights (ECHR).<sup>6</sup> Under the justification of protecting public health, however, Hungary has acted to restrict human rights and expanding its control across all aspects of life, not only for the duration of the public health emergency but also in the long-term. Little if any attempt has been made to justify these restrictions in terms of international human rights law and standards.

This paper details how emergency powers continue to be abused in Hungary to fulfil the government's political objectives and undermine the rule of law. Understood in the context of Hungary's exercise of emergency powers to respond to a "migration crisis" at its borders in 2015, the Government's COVID-19 response evidences a dangerous and longer-term pattern of a willingness of Hungarian authorities to exploit public emergency powers to achieve political objectives. In short, and contrary to Hungary international human rights obligations, the Hungarian authorities' responses to COVID-19 have been used to further its calculated attacks on the independence of the judiciary, freedom of media and expression more broadly, and to restrict civic space.

<sup>2</sup> Id.

<sup>3</sup> UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 (28 September 1984) ("Siracusa Principles").

<sup>4</sup> ICESCR, Article 12, available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

<sup>5</sup> European Social Charter (revised), ETS No. 35, 18 October 1961, Article 11, available at <https://rm.coe.int/168006b642>.

<sup>6</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

## II. Hungary's Response to COVID-19

### 1. National Legal Framework before COVID-19

The 2011 Hungarian Constitution provides for the adoption of six "special legal orders" applicable during a declared crisis in Hungary, namely: "state of national crisis", "state of emergency", "state of preventive defense", "emergency response to terrorism", "unforeseen intrusion", and "state of danger".<sup>7</sup>

Within this framework, a "state of danger" may be declared "[in] the event of a natural or industrial disaster endangering lives and property or in order to mitigate the consequences thereof".<sup>8</sup> This is the purported legal basis for the "state of danger" declared by Hungary in response to COVID-19.<sup>9</sup> It empowers the Government<sup>10</sup> to introduce emergency measures for a period of 15 days "as provided for in a cardinal Act" in order to "suspend the application of certain laws or derogating from the provisions of laws, and to take other extraordinary measures"<sup>11</sup>. The Government is the sole actor that has a say in declaring and terminating a "state of danger", as well as in suspending or restricting the application of human rights beyond ordinary circumstances by emergency decree under a state of danger. However, Parliament must grant its approval for the state of danger, and any decrees passed under it, to be extended beyond that 15-day period.<sup>12</sup>

The statutory law regulating the powers which emerge under a state of danger and the scope within which such powers may be applied is the Disaster Management Act.<sup>13</sup> This Act is directed at preventing disasters or catastrophic events and/or protecting against their harmful effects<sup>14</sup> and provides a list of events which trigger a "state of danger" in accordance with the Constitution.<sup>15</sup> Among such events constituting a state of danger is "a human epidemic causing mass morbidity or a risk of epidemic".<sup>16</sup> The Act empowers the Government to issue decrees suspending or overriding laws "to the extent and in the area necessary for the prevention of a disaster".<sup>17</sup> Areas where restrictions may be considered necessary during a state of danger under this Act include, for instance, derogations from certain provisions relating to court and administrative procedural law and public finance rules.<sup>18</sup>

<sup>7</sup> Constitution of 2011, Articles 48-54, version pre-December 2020 amendments available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)046-e). The relevant part on the special legal orders was repealed and replaced in the Fundamental Law by the Ninth Amendment adopted on 15 December 2020. Following this amendment, three special legal orders are provided for constitutionally: a state of war, a state of emergency, and a state of danger. This framework will become applicable in 2023 and its implications on democracy and the rule of law remain to be seen. See [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2021\)045-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)045-e).

<sup>8</sup> Id., Article 53(1).

<sup>9</sup> [Government Decree](https://www.njt.hu/translation/J2020R0040K_20200326_FIN.pdf) 40/2020 of 11 March 2020 on the declaration of an emergency. See also its translation here [https://www.njt.hu/translation/J2020R0040K\\_20200326\\_FIN.pdf](https://www.njt.hu/translation/J2020R0040K_20200326_FIN.pdf):

<sup>11</sup> "1. The Government hereby declares a state of danger in the entire territory of Hungary for the elimination of the consequences of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens."

<sup>10</sup> Within this report 'Government' is used to refer to the executive power.

<sup>11</sup> Constitution of 2011, Article 53(2)-(3).

<sup>12</sup> Id., Article 53(3).

<sup>13</sup> Disaster Management Act, Act CCXVIII of 2011, available at: <https://www.njt.hu/jogszabaly/2011-128-00-00>

<sup>14</sup> Its scope covers plants and establishments dealing with hazardous substances, as well as administrative bodies and economic organizations involved in the prevention of and protection against serious accidents related to hazardous substances, local governments and natural persons.

<sup>15</sup> Disaster Management Act, Article 44.

<sup>16</sup> Id., Article 44(ca).

<sup>17</sup> Id., Article 45(1).

<sup>18</sup> Disaster Management Act, Articles 47-48.

The Act also empowers the Government to take extraordinary emergency measures to regulate matters including transit and entry restrictions, provision of temporary civil protection service, and police powers to prohibit public gatherings.<sup>19</sup>

In Hungary, under ordinary circumstances, the Constitution allows for the restriction or limitation of “fundamental rights” “to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right”.<sup>20</sup> Under a special legal order such as a “state of danger”, these restrictions may be widened beyond the above scope through emergency powers.

A legal regime distinct from that in terms of a state of danger applies during a “state of medical crisis”, which is an ordinary legal order emanating from the Hungarian Health Care Act as opposed to a special legal order under the Constitution.<sup>21</sup> Under this Act, a state of medical crisis may be declared in the event of an international public health emergency, such as COVID-19, any foreseeable event detrimental to the life, health or functioning of healthcare providers, and any other event which seriously and directly impedes the provision of healthcare.<sup>22</sup> This framework applies irrespective of whether a state of danger is in effect in Hungary at that moment in time, and thus addresses a medical crisis without resorting to a special legal order. It empowers the Government to adopt specific epidemic control regulations by decree in a number of areas “to the extent necessary and proportionate to the aim to be achieved” to fight a medical crisis.<sup>23</sup> These areas include restrictions relating to the opening and operation of shops and certain institutions, traffic of passengers, goods or livestock, and social distancing and protective wear measures.<sup>24</sup> In the event of a medical crisis, the Government may limit by decree the enjoyment of the right to personal liberty, the rights of patients (such as the patient’s personal freedom and the right to self-determination) and may oblige natural and legal persons to adhere to certain measures, in accordance with Act.<sup>25</sup>

As in a state of danger, a state of medical crisis can be declared and terminated solely by the Government.<sup>26</sup> It may be ordered for an initial period of six months and may be subsequently extended by Government if the conditions requiring it still prevail.<sup>27</sup> In contrast to a state of danger, however, Parliamentary approval is not required to extend the scope of a state of medical crisis or of decrees passed under it. A state of medical crisis can thus be extended indefinitely at the Government’s discretion. These two emergency regimes further differ substantially in three respects.

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<sup>19</sup> Id, Articles 49–51.

<sup>20</sup> Constitution of Hungary, 2011, Article I (3) of the Constitution.

<sup>21</sup> Health Care Act, Act CLIV of 1997 <https://njt.hu/jogszabaly/1997-154-00-00> § 228 – 232/E

<sup>22</sup> Id, § 228(2).

<sup>23</sup> Id, Article 232/D(1), (2).

<sup>24</sup> Id, Article 232/D(1).

<sup>25</sup> Id, Article 56.

<sup>26</sup> Id, § 228(1), (2a).

<sup>27</sup> Id, § 228(2b).

## 2. Recourse to Emergency Powers

On 4 March 2020, the first two cases of COVID-19 in Hungary were identified and reported.<sup>28</sup> On 11 March, the executive administration declared the first state of danger<sup>29</sup> and adopted emergency measures to protect the health and life of “Hungarian citizens”.<sup>30</sup> What followed was a series of emergency decrees whereby Parliament significantly amended and widened the scope of the legal emergency framework discussed in the previous sub-section.

On 30 March 2020, Parliament adopted the first Authorization Act which was justified as a necessary response measure to COVID-19.<sup>31</sup> The Act provided authority to the Government to unilaterally adopt emergency measures in addition to its powers under the Disaster Management Act, without a sunset clause which would limit the application of the Authorization Act in time.<sup>32</sup> At the same time, it did away with the need for Parliamentary approval to extend application of decrees beyond the 15-day period. This meant that in resorting to its emergency powers, the Government directly violated the constitutional provision requiring such approval.<sup>33</sup> In practice, it essentially meant that any future decrees were in force until a state of danger was terminated at the discretion of the Government.

The Authorization Act also excessively widened the scope of emergency decrees that could be passed under a state of danger beyond the areas provided under the Disaster Management Act, empowering the Government to override Acts of Parliament in any area, including those unrelated to the state of danger itself.

These actions appear to constitute an abuse of emergency powers. Between 30 March and 18 June 2020, when then initial state of danger was terminated, the Government adopted more than 150 decrees.<sup>34</sup> Many of these decrees involved violations of human rights and the rule of law, as is explored in Section IV below. The Authorization Act and the decrees issued under it were revoked upon the termination of the state of danger.<sup>35</sup> However, the Government adopted the Transitional Act on 16 June 2020 which incorporated some of the abusive measures under the Authorization Act into ordinary law, allowing the government to “again rule by decree for an indefinite period of time, this time without even the minimal constitutional safeguards”.<sup>36</sup>

<sup>28</sup> Hungary Today, First Coronavirus Cases Identified in Hungary, 4 March 2020, available: <https://hungarytoday.hu/first-coronavirus-cases-identified-hungary/>.

<sup>29</sup> [Government Decree 40/2020](#) of 11 March 2020 on the declaration of an emergency.

<sup>30</sup> [Government Decree 41/2020](#) of 11 March 2020 on the measures to be taken in the event of an emergency order to protect the health and life of Hungarian citizens.

<sup>31</sup> [Act XII of 2020](#) of 30 March 2020 on the Containment of the Coronavirus (hereafter Authorization Act)

<sup>32</sup> The Authorization Act provided:

“During the state of danger, the Government may – in addition to the extraordinary measures and regulations set forth in [the Disaster Management Act] – suspend the application of certain Acts of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.”

<sup>33</sup> Halmi, Gábor, Mészáros, Gábor; Scheppele, Kim Lane: From Emergency to Disaster: How Hungary’s Second Pandemic Emergency will Further Destroy the Rule of Law, *VerfBlog*, 2020/5/30, <https://verfassungsblog.de/from-emergency-to-disaster/>, DOI: 10.17176/20200531-013514-0.

<sup>34</sup> For a full list of decrees adopted under the COVID-19 emergency, see <https://docs.google.com/spreadsheets/d/1t27aU5QYW0pj8PfaNxWuajyPhrwpbO6TxunRjPnrOhM/edit#gid=0>. See also Hungarian Helsinki Committee, Overview of Hungary’s Emergency Regimes Introduced due to the Covid-19 Pandemic, 25 May 2021, available: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/05/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_25052021.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/05/HHC_Hungary_emergency_measures_overview_25052021.pdf).

<sup>35</sup> Authorization Act, available: <https://www.parlament.hu/irom41/10747/10747.pdf>

<sup>36</sup> Hungarian Helsinki Committee et al, Never-Ending Story? Rapid analysis of the Bills T/10747 and T/10748, 27 May 2020, available: [https://helsinki.hu/wp-content/uploads/Never-Ending\\_Story\\_HHC-AI-HCLU\\_rapid\\_reaction\\_27052020.pdf](https://helsinki.hu/wp-content/uploads/Never-Ending_Story_HHC-AI-HCLU_rapid_reaction_27052020.pdf).



The Transitional Act thereby fixed in ordinary law the sweeping mandate provided for under the first Authorization Act, allowing the Government to extend the application and scope of emergency decrees without requiring Parliamentary approval. It amended the Disaster Management Act to provide for a broad range of grounds upon which the Government may pass decrees to suspend or derogate from Acts of Parliament and human rights and take other extraordinary measures during a state of danger.<sup>37</sup> These grounds include “to guarantee the security of life, health, personal, property and legal security of citizens and the stability of the national economy”.<sup>38</sup> This new power now automatically kicks in whenever a state of danger is declared. The Act also widened the Government’s emergency powers as well as the scope of areas which can be subject to emergency measures under a state of medical crisis.

Upon the termination of the first state of danger on 18 June 2020, the government declared a state of medical crisis for 6 months under the Health Care Act.

The state of medical crisis was further extended until 18 December 2021.<sup>39</sup> The adoption of the Transitional Act however gave wide powers to the Government during a state of medical crisis, allowing it to:

“adopt measures severely restricting individual freedoms without introducing a special legal order and without constitutional authorization, via decrees, without involving the Parliament in any way”.<sup>40</sup>

It introduced a provision expanding the Government’s powers during a state of medical crisis beyond its original scope, permitting it to take a wide range of measures such as restricting or prohibiting visits to certain institutions and the movement of persons “to the extent necessary and proportionate to the aim to be achieved – for the purpose of preventing, treating, eliminating the circumstance” pursuant to this emergency “and preventing or eliminating its harmful effects”.<sup>41</sup> This widened the grounds the Government may use to adopt exceptional and temporary powers during an emergency situation, and made them part of the ordinary operation of Government with significant lack of parliamentary control.<sup>42</sup>

On 3 November 2020, the Government declared a state of danger for the second time and adopted a second Authorization Act on 10 November. Under this second state of danger, the same wide-ranging mandate of the first Authorization Act was made operational, at least for 90 days, as it was incorporated into ordinary law through the Transitional Act. The Government also did away with the need for Parliament’s approval to extend decrees after 15 days, although this Act did provide a sunset clause and was to remain in force for only 90 days.

In addition, the Ninth Amendment to the Fundamental Law, an Omnibus Act and amendments to the electoral legislation were also submitted to Parliament on the night of 10 November 2020.<sup>43</sup> On 15 December, Parliament adopted this Amendment, which subsequently came into force on 23 December 2020.<sup>44</sup>

<sup>37</sup> Disaster Management Act, Article 51/A:

“(1) In addition to extraordinary measures and rules set out in Chapter II, the Government may, in order to prevent a human epidemic causing a mass illness endangering the safety of life and property and to eliminate its consequences, in an emergency situation declared in order to protect the health and life of Hungarian citizens, suspend the application of certain laws, derogate from statutory provisions and take other extraordinary measures in order to guarantee the security of life, health, personal, property and legal security of citizens and the stability of the national economy.

(2) The Government may exercise its powers under subsection (1) to the extent necessary and proportionate to the aim to be achieved, for the prevention, treatment and eradication of a human epidemic, as well as for the prevention or elimination of its harmful effects.”

<sup>38</sup> Id.

<sup>39</sup> Hungarian Helsinki Committee, Overview of Hungary’s Emergency Regimes Introduced Due to the Covid-19 Pandemic, 27 September 2021, available: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_27092021.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/HHC_Hungary_emergency_measures_overview_27092021.pdf).

<sup>40</sup> Hungarian Helsinki Committee et al, Detailed analysis of the Transitional Act’s provisions on special legal order and the state of medical crisis, and on other provisions concerning fundamental rights and the rule of law, 30 July 2020, available: [https://helsinki.hu/wp-content/uploads/Transitional\\_Act\\_AIHU-EKINT-HCLU-HHC\\_30072020.pdf](https://helsinki.hu/wp-content/uploads/Transitional_Act_AIHU-EKINT-HCLU-HHC_30072020.pdf), p 4.

<sup>41</sup> Health Care Act, § 232D(2).

<sup>42</sup> Hungarian Helsinki Committee et al, Detailed analysis of the Transitional Act’s provisions on special legal order and the state of medical crisis, and on other provisions concerning fundamental rights and the rule of law, 30 July 2020, available: [https://helsinki.hu/wp-content/uploads/Transitional\\_Act\\_AIHU-EKINT-HCLU-HHC\\_30072020.pdf](https://helsinki.hu/wp-content/uploads/Transitional_Act_AIHU-EKINT-HCLU-HHC_30072020.pdf), p 4.

<sup>43</sup> Venice Commission, Opinion on the Constitutional Amendments Adopted by the Hungarian Parliament in December 2020, CDL-AD(2021)029 Opinion 1035 /2021, 2 July 2021, available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)029-e), p 3.

<sup>44</sup> Id. The Amendment covers many different areas, including: marriage and family and questions of sexual orientation; issues related to the legislative process; the establishment of “public interest asset management foundations performing public duties”; as well as issues relating to exceptional situations such as war or state of emergency.

The Ninth Amendment reduced the possibility to issue “a special legal order” to only three permissible categories: a state of war, a state of emergency, and a state of danger. This change has been welcomed by the Council of Europe’s Venice Commission for clarifying and limiting when exceptional states apply, making the law more accessible and understandable.<sup>45</sup>

Another change is that while the Constitution previously required the creation of a National Defence Council to exercise substantial powers during a national crisis, the Amendment allocates this power in all circumstances to the Government.<sup>46</sup> An explanatory memorandum provided with the amendment attempts to justify it by indicating that: “fast, operative and responsible decision-making is ensured in both the political and the legal sense, for which the Government appears to be suitable in the Hungarian constitutional system.”<sup>47</sup>

Whatever the justification provided, such amendments adopted during the state of emergency without any public consultation are incompatible with the Rule of Law, according to the Venice Commission, which has also rightly raised concerns relating to concentration of emergency powers in the hands of the executive.<sup>48</sup>

When the second state of danger was terminated,<sup>49</sup> a third state of danger was simultaneously declared on 8 February 2021.<sup>50</sup> A third Authorization Act was then adopted on 22 February 2021, re-instating 70 decrees that were set to lose effect with the termination of the second state of danger and replicating the broad powers afforded under the second Act on the effect of any future special decrees.<sup>51</sup>

While the third Authorization Act was set to lapse on 22 May 2021, an amendment<sup>52</sup> to it took effect on the same day to extend its force until the 15th day from the first day of the Hungarian Parliament’s 2021 autumn session. Thus, on 27 September 2021, upon a proposal of the Government, Parliament adopted Bill T/17053 which prolonged the force of the third Authorization Act until 31 December 2021.<sup>53</sup> On 23 November, the Deputy Prime Minister Zsolt Semjén submitted an omnibus bill to Parliament that would, among other things, extend the effect of the Authorization Act until 1 June 2022.<sup>54</sup> Until then, the emergency decrees reinstated and/or adopted under the third Authorization Act remain in force unless withdrawn or repealed by Parliament.<sup>55</sup>

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<sup>45</sup> Id, para 75.

<sup>46</sup> Id, para 78.

<sup>47</sup> Id.

<sup>48</sup> Id, paras 78 and 83

<sup>49</sup> Decree 26/2021.

<sup>50</sup> Decree 27/2021.

<sup>51</sup> Act I of 2021 on the Containment of the Coronavirus Pandemic.

<sup>52</sup> Act XL of 2021.

<sup>53</sup> Hungarian Helsinki Committee, Overview of Hungary’s Emergency Regimes Introduced Due to the Covid-19 Pandemic, 27 September 2021, available: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_27092021.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/HHC_Hungary_emergency_measures_overview_27092021.pdf).

<sup>54</sup> J Woods, Breaking – government to extend the state of emergency in Hungary!, 24 November 2021, available: <https://dailynewshungary.com/breaking-government-to-extend-the-state-of-emergency-in-hungary/>

<sup>55</sup> Hungarian Helsinki Committee, Overview of Hungary’s Emergency Regimes Introduced Due to the Covid-19 Pandemic, 25 May 2021, available: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/05/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_25052021.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/05/HHC_Hungary_emergency_measures_overview_25052021.pdf).

### 3. Measures Purportedly Responding to the COVID-19 Pandemic

The Hungarian administration adopted a variety of means to address the pandemic, including the use of the military, police, and healthcare administrators. Among other measures, it: <sup>56</sup>

- adopted compulsory quarantine and social distancing regulations;
- temporarily closed schools and educational institutions;
- increased police and military presence in the streets;
- required courts to make use of remote hearings;
- increased border controls and entry bans;
- deployed army officers to support certain hospitals; and
- adopted several economic measures under the justification of protecting Hungary's interests.

A significant number of emergency decrees directly impact on the rights of non-citizens in Hungary.<sup>57</sup> The administration was also criticized for the failures within its public health system, with reports of poor conditions compromising the right to health. Examples of such deficiencies include: the lack of sanitizers, inadequate isolation or social distancing measures; and insufficient personal protective equipment for doctors and staff.<sup>58</sup> In April 2020, the Minister of Human Resources reportedly also ordered for 36 000 hospital beds nationwide to be emptied in order to receive COVID-19 patients, leaving patients with non-COVID-19 related ailments to be discharged without proper care or follow-up.<sup>59</sup> Furthermore, in contravention of media freedom and the right to freedom of expression, only government media was allowed access to hospitals.<sup>60</sup>

As of 9 January 2022, Hungary's vaccination rate is still lagging behind the European average with 157.97 doses of vaccine per 100 people.<sup>61</sup> Vaccination rollout in Hungary was relatively quick to commence in comparison to its EU counterparts, as it made available vaccines produced by the Russian Federation (-Sputnik V) and China (Sinopharm) as early as February 2021.<sup>62</sup> This authorization was made despite the lack of endorsement and accreditation for use of both vaccines by the European Medicines Agency (EMA) and the World Health Organization (WHO). The Government seemed to regard bypassing such endorsement as a matter of national pride,

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<sup>56</sup> European Parliament, Briefing: States of emergency in response to the coronavirus crisis: Situation in certain Member States, June 2020, available: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS\\_BRI\(2020\)649408\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf), p 6.

<sup>57</sup> See for instance on initial measures under the first emergency decree of 11 March 2020: About Hungary, Coronavirus Update: Border controls, ban on entry, compulsory home quarantine, 12 March 2020, available: <https://abouthungary.hu/news-in-brief/coronavirus-update-border-controls-ban-on-entry-compulsory-home-quarantine>.

<sup>58</sup> Human Rights Watch, Hungary: Health Care Failures Endanger Lives, 4 August 2020, available: <https://www.hrw.org/news/2020/08/04/hungary-health-care-failures-endanger-lives>.

<sup>59</sup> Klub Radio, Kúnetz: Kassler is openly lying about hospital evacuations, 21 May 2020, available: <https://www.klubradio.hu/adasok/kunetz-kassler-nyiltan-hazudik-a-korhazkiuritesekrol-112582>.

<sup>60</sup> Reuters, Hungarian journalists say state conceals impact of world's deadliest COVID-19 outbreak, 21 March 2021, available: <https://www.reuters.com/business/media-telecom/hungarian-journalists-demand-access-hospitals-covid-centres-2021-03-31/>.

<sup>61</sup> Statista, Number of COVID-19 vaccine doses administered in Europe as of January 9, 2022, by country, available: <https://www.statista.com/statistics/1196071/covid-19-vaccination-rate-in-europe-by-country/#:~:text=The%20UK%20was%20the%20first,a%20vaccination%20rate%20of%2071.48>

<sup>62</sup> B Novak, With the Economy on the Ropes, Hungary Goes All In on Mass Vaccination, New York Times, 12 February 2021, available: <https://www.nytimes.com/2021/02/12/world/europe/hungary-coronavirus-vaccination-sputnik.html>.

with the Hungarian state secretary declaring: “Hungary is neither a half-colony nor a colony. We can make our own decisions”.<sup>63</sup> This move was facilitated through a decree on 28 January 2021 authorizing the use of vaccines that had already been approved in a minimum of three countries, including a single EU state, and which had already been given to at least one million people in those countries.<sup>64</sup> This decision is inconsistent with Hungary’s own obligation to ensure the safety of efficacy of medications provided to its inhabitants in terms of the right to health.<sup>65</sup> The provision of safe and effective COVID-19 vaccines is a core obligation of immediate effect under this right.<sup>66</sup>

The sudden and hasty authorization of the Sinopharm vaccine by Hungary caused skepticism from and significant public resistance to vaccination. In response to such vaccine hesitancy, the Government published highly questionable and likely unsound data and analysis aimed to discredit US pharmaceutical company Pfizer in comparison to Sinopharm and Sputnik V.<sup>67</sup> The publication of potentially misleading health information, particularly in the wake of the pandemic, is inconsistent with the obligations of Hungary to ensure information accessibility and avoid the “deliberate withholding or misrepresentation of information vital to health protection or treatment”.<sup>68</sup> However, subsequently, Hungary quietly rejoined the EU vaccine pool in September 2021, as it is part of the EU’s third vaccine purchase agreement with Pfizer/BioNTech.<sup>69</sup> The move can be understood as part of Hungary’s vaccination plan for children, since Pfizer was approved for children aged 5 to 11 by the EMA.<sup>70</sup> At the same time, Hungary has also initiated talks with the Russian Federation regarding permission to use its Sputnik Light COVID-19 vaccine in Hungary.<sup>71</sup>

The early choice of vaccines between Sputnik V and Sinopharm also meant that the Government was leaving a significant proportion of the population, including older persons and immune-compromised persons, with a choice of either accepting vaccines not approved by the European Union<sup>72</sup> or waiting for alternatives the Government had actively sought to discredit. Although the administration rebutted many claims that its vaccination strategy was politically motivated, in February 2021 Hungary was identified as the worst performer in the EU in terms of doses administered in relation to vaccines it had received.<sup>73</sup> Hungary’s former chief medical officer referred to the Government’s actions as “abusive” for “forcing a significant part of the population to make decisions for which it is not prepared”.<sup>74</sup>

<sup>63</sup> S Pogany, Hungary’s Covid-19 wars, 17 March 2021, available: <https://socialeurope.eu/hungarys-covid-19-wars>.

<sup>64</sup> Government decree no. 19/2021 (I. 28.).

<sup>65</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html> [accessed 19 January 2022].

<sup>66</sup> See for instance International Commission of Jurists, “Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses” (1 September 2020), available at: <http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>; ICJ, “The Unvaccinated Equality not Charity in Southern Africa” (May 2021), available at: <https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>

<sup>67</sup> T Vaski, Gov’t Publishes Controversial Data to Prove Sinopharm and Sputnik Better Than Pfizer, 26 April 2021, available: <https://hungarytoday.hu/hungary-vaccines-vaccine-effectiveness-inoculation-vaccine-effectiveness-comparison-pfizer-sputnik-sinopharm/>

<sup>68</sup> General Comment 14, para 50.

<sup>69</sup> S Dziros, Hungary silently rejoins the EU’s joint vaccine pool, 26 November 2021, available: <https://www.euronews.com/2021/11/26/hungary-silently-rejoins-the-eu-s-joint-vaccine-pool>

<sup>70</sup> Id.

<sup>71</sup> Reuters, COVID-19: Hungary to start talks on permission for Sputnik Light, 26 November 2021, available: <https://www.reuters.com/business/healthcare-pharmaceuticals/covid-19-hungary-start-talks-permission-sputnik-light-2021-11-26/>

<sup>72</sup> Shengennisainfo, EU Postpones Approval of Russian Sputnik V Vaccine Until Next Year, 21 October 2021, available: <https://www.schengennisainfo.com/news/eu-postpones-approval-of-russian-sputnik-v-vaccine-until-next-year/>

<sup>73</sup> Z Kerner, Politico: 56 percent of all vaccines in Hungary have been administered so far, 23 October 2021, available: <https://24.hu/belfold/2021/03/10/vakcina-atoltottsag-arany/>

<sup>74</sup> Klub Radio, Village: This is an abusive government, raping us, 25 February 2021, available: <https://www.klubradio.hu/adasok/falus-ez-egy-bantalmazo-kormanyzat-megeroszakol-bennunket-116429>.

In addition, the scope of the Government's strategy of the vaccine roll-out initially left out non-citizens entirely.<sup>75</sup> Non-citizens residing in Hungary were only allowed to register for vaccination as of 4 May 2021.<sup>76</sup> Nevertheless, to date undocumented migrants remain unable to access vaccination owing to identification requirements in the registration process, requiring them to provide an address as well as a residency permit number, identity number or passport number in order to access vaccines.<sup>77</sup> This is inconsistent with Hungary's obligation to provide universal and non-discriminatory access to COVID-19 vaccines in ensuring effective access to the right to health to those residing in its territory.<sup>78</sup> According to the WHO, States should comply with their obligation to provide non-discriminatory access to vaccination by prioritizing access to groups disproportionately impacted by the pandemic, including migrant workers, refugees, asylum seekers, and undocumented migrants.<sup>79</sup> The International Commission of Jurists has also called for non-discriminatory access to vaccines on several occasions since the start of the pandemic.<sup>80</sup>

Hungary is now administering EMA- and WHO-approved Pfizer, Moderna, Jansen and AstraZeneca vaccines<sup>81</sup> in addition to the Sputnik and Sinopharm vaccines.<sup>81</sup> However, the approved EU Digital COVID Certificate, meant to ease travel in the EU for those who have been administered any EMA-approved vaccine, leaves out those who received Sputnik V or Sinopharm vaccines, yet another consequence of Hungary's initial policy in relation to vaccine provision.<sup>82</sup> Under this new framework, it remains within the discretion of EU States to open their borders to travelers who have accessed vaccines without EU marketing authorization.<sup>83</sup> Meanwhile, Hungary remains the only EU country using these two vaccines and the freedom of movement in the EU of those who received such vaccines thus is entirely in the hands of other Member States for the foreseeable future. This is concerning, particularly given the resurgence at the end of 2021 in COVID-19 cases in the most vaccinated countries worldwide, sparking concern over the effectiveness of Sinopharm as recent studies show, it also induces weaker antibody responses.<sup>84</sup> Given the new developments around the Omicron variant, the European Commission adopted rules relating to the EU Digital COVID Certificate, to establish a binding acceptance period of 9 months of vaccination certificates for intra-EU travel.<sup>85</sup>

<sup>75</sup> The Application Site For Healthcare And Healthcare Professionals, 31 December 2020, available: <https://www.nnk.gov.hu/index.php/koronavirus-tajekoztato/932-a-covid-19-vedooltasra-jelentkezési-hely-az-egesz-segugyi-es-egeszsegugyben-dolgozok-szamara>. See also Picum, The COVID-19 Vaccines and Undocumented Migrants in Hungary, 28 May 2021, <https://picum.org/covid-19-vaccines-undocumented-migrants-hungary/>.

<sup>76</sup> Daily News Hungary, Vaccine registration opens for foreign residents, ethnic kin in Hungary, 4 May 2021, available: <https://dailynewshungary.com/vaccine-registration-opens-for-foreign-residents-ethnic-kin-in-hungary/>.

<sup>77</sup> Non-citizens may register through the government website available at <https://vakcinainfo.gov.hu/>.

<sup>78</sup> CESCR, Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19) E/C.12/2020/2 (15 Dec 2020), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en).

<sup>79</sup> WHO SAGE values framework for the allocation and prioritization of COVID-19 vaccination (14 September 2020), available at: [https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV\\_SAGE\\_Framework-Allocation\\_and\\_prioritization-2020.1-eng.pdf?ua=1](https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV_SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf?ua=1), p 11.

<sup>80</sup> See International Commission of Jurists, "The Unvaccinated Equality not Charity in Southern Africa" (May 2021), available at: <https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>, p 45. See also: ICJ, "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" (1 September 2020), available at: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>, p 39; ICJ, "International Commission of Jurists' Statement To The Committee On Economic, Social And Cultural Rights On The Opening Of Its 69th Session" (10 February 2020), available at: <https://www.icj.org/wp-content/uploads/2021/02/ICJ-CESCR-Opening-Statement-Final.pdf> and ICJ, "ICJ calls on States to ensure human rights compliant access to COVID-19 vaccines (UN Statement)" (1 March 2021), available at: <https://www.icj.org/icjhrccd2covid19/>.

<sup>81</sup> To date nine vaccines have been approved for use against COVID-19 in Hungary. See COVID-19 Vaccine Tracker, Last Updated 17 January 2022, available: <https://covid19.trackvaccines.org/country/hungary/>.

<sup>82</sup> European Commission, EU Digital COVID Certificate, available: [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en).

<sup>83</sup> European Commission, EU Digital COVID Certificate Factsheet, 1 June 2021, available: [https://ec.europa.eu/commission/presscorner/detail/en/FS\\_21\\_2793](https://ec.europa.eu/commission/presscorner/detail/en/FS_21_2793).

<sup>84</sup> See R Hart, Covid Surges In 4 Of 5 Most Vaccinated Countries—Here's Why The U.S. Should Worry, 11 May 2021, available: <https://www.forbes.com/sites/roberthart/2021/05/11/covid-surges-in-4-of-5-worlds-most-vaccinated-countries-heres-why-the-us-should-worry/>; Reuters, Sinopharm's COVID-19 shot induces weaker antibody responses to Delta -study, 21 July 2021, available: <https://www.reuters.com/business/healthcare-pharmaceuticals/sinopharms-covid-19-shot-induces-weaker-antibody-responses-delta-study-2021-07-21/>; Reuters, Sinopharm's COVID-19 shot offers weaker protection among elderly, 23 July 2021, available: <https://www.reuters.com/business/healthcare-pharmaceuticals/sinopharms-covid-19-shot-offers-weaker-protection-among-elderly-study-2021-07-23/>; A Taylor, Why the world's most vaccinated country is seeing an unprecedented spike in coronavirus cases, 5 June 2021, available: <https://www.washingtonpost.com/world/2021/05/06/seychelles-vaccines-covid-cases/> and A Taylor, Beijing and Moscow are losing the vaccine diplomacy battle, 11 January 2022, available: <https://www.washingtonpost.com/world/2022/01/11/china-russia-omicron-vaccine/>.

<sup>85</sup> European Commission, EU Digital COVID Certificate: Commission adopts binding acceptance period of nine months for vaccination certificates, 21 December 2021, available: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6837](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6837).

#### 4. Situation towards the end of 2021

The Government continues to rule by emergency decrees under both a state of danger and a state of medical crisis. While it is unclear if and when the state of danger will ultimately be terminated, the medical crisis has been extended for a further six months, and is operational until 18 December 2021. In mid-December 2021, the Hungarian Parliament had decided to extend the COVID-19 pandemic-related state of emergency until June 1, 2022.<sup>86</sup> Restrictions introduced under both the medical crisis and the third Authorization Act therefore remain in place.

Moreover, by virtue of the Transitional Act consolidating emergency decrees into ordinary law, over 400 provisions remain applicable at the time of writing, some applying in a permanent ordinary manner until revoked by Parliament, some applying until the expiry of a set date, and others applying indefinitely but solely under a state of danger or medical crisis.<sup>87</sup> Despite adopting significantly restrictive measures, Hungary has therefore not formally derogated from its international human rights treaty obligations under the ECHR or ICCPR throughout the pandemic.<sup>88</sup> Under international law, a formal derogation by a Member State during a state of emergency entails taking measures to temporarily derogate from its obligations in respect of human rights.<sup>89</sup> Since Hungary has not formally derogated from such obligations, derogations of rights are impermissible and any restrictions or limitations of rights are limited in scope and means in terms of both domestic and international law as detailed below.

### III. International Human Rights Framework on Public Emergencies and similar states of exception

Where States adopt exceptional measures pursuant to a declared or undeclared state of emergency or other state of exception, such measures are subject to strict conditions in terms of international law. Hungary is a party to the ICCPR and ECHR both of which provide in express terms the legal standards to be applied to exceptional measures. In respect of certain rights, such as freedom of expression, association and peaceful assembly and freedom of movement, the ICCPR and ECHR allow for limitations for only a finite number of legitimate purposes, including in order to protect public health. Any such measures must be: adequately prescribed by law, including by being reasonably foreseeable in their application (principle of legality); necessary in pursuit of one of the specified legitimate aims; proportionate to that aim, including by being the least restrictive means of achieving it; and non-discriminatory in purpose and effect. These conditions apply whether or not any formal emergency has been declared or notified.

A State may also derogate from certain human rights obligations where there is a declared state of emergency that threatens the life of the nation (ICCPR article 4; ECHR article 15). Under such circumstances, the State must notify the States Parties through the UN Secretary General (in the case of the ICCPR), and the Secretary General of the Council of Europe (in the case of the ECHR). Any measure of derogation must be time limited and must be strictly necessary to meet a specific threat.

<sup>86</sup> New.cn, Hungary extends COVID-19 state of emergency until Jan 1 2022, available [http://www.news.cn/english/europe/2021-09/29/c\\_1310215897.htm](http://www.news.cn/english/europe/2021-09/29/c_1310215897.htm), 29 September 2021.

<sup>87</sup> Hungarian Helsinki Committee, Overview Of Hungary's Emergency Regimes Introduced Due To The Covid-19 Pandemic, 24 February 2021, available: [https://helsinki.hu/wp-content/uploads/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_24022021.pdf](https://helsinki.hu/wp-content/uploads/HHC_Hungary_emergency_measures_overview_24022021.pdf).

<sup>88</sup> Council of Europe (CoE), *Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms*, Status as of 28/05/2021; CoE, *Venice Commission – Observatory on Emergency Situations*.

<sup>89</sup> Siracusa Principles, Articles 39-40.

Certain rights may not under any circumstances be derogated from and are therefore sometimes referred to as “non-derogable”. These include the right to life (article 6 ICCPR, article 2 ECHR); the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent (article 7 ICCPR ; article 3 ECHR); the prohibition of slavery, slave-trade and servitude (article 8 ICCPR; article 4 ECHR); the prohibition of imprisonment because of inability to fulfil a contractual obligation (article 11 ICCPR); the requirement that both criminal liability and punishment are limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, (article 15 ICCPR, article 7 ECHR); the recognition of everyone as equal before the law (article 16 ICCPR); freedom of thought, conscience and religion (article 18 ICCPR); and the fundamental elements of a fair trial.<sup>90</sup>

Within the context of the pandemic, the Human Rights Committee (HRC) has stressed States’ obligation to “take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction”.<sup>91</sup> The obligation to protect the right to health is provided under directly Article 12 of the CESCR, to which Hungary is a party.

The Venice Commission of the Council of Europe has stressed that resorting to emergency measures should follow principles that “aim to minimize the damage to fundamental rights, democracy and rule of law [...] thus subject to the triple, general conditions of necessity, proportionality and temporariness.”<sup>92</sup>

At the beginning of the pandemic, the WHO Director-General Tedros Adhanom Ghebreyesus called upon States not to politicize and guide COVID-19 related responses and international cooperation through political agendas.<sup>93</sup> The International Commission of Jurists has repeatedly stressed that “grounding States’ public health measures in the human rights framework provides the most effective way to advance global health with justice”.<sup>94</sup> It has also emphasized that responses to global public health emergencies “cannot be unfettered” in order “to foster scientifically accurate, human rights compliant global health responses”.<sup>95</sup>

<sup>90</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> [accessed 20 January 2022], para 16.

<sup>91</sup> UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (30 April 2020), available: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>

<sup>92</sup> Venice Commission, Respect For Democracy, Human Rights and the Rule of Law During States Of Emergency: Reflections CDL-AD(2020)014 Study n° 987/2020, 19 June 2020, available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e), para. 6

<sup>93</sup> World Health Organization, COVID-19 virtual press conference, 8 April 2020, available: [https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-08apr2020.pdf?sfvrsn=267145f5\\_2](https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-08apr2020.pdf?sfvrsn=267145f5_2).

<sup>94</sup> International Commission of Jurists, Human Rights in the time of COVID-19: Front and Centre – ICJ news, articles, op-eds, legal blogs, videos, available: <https://www.icj.org/human-rights-in-the-time-of-covid-19-front-and-centre/>.

<sup>95</sup> Id.

The Venice Commission has asserted that a state of emergency is a legal institution in itself subject to legal regulation and in this respect, “even in a state of public emergency the fundamental principle of the rule of law must prevail.”<sup>96</sup> It emphasizes the importance of maintaining, amongst other things:

“the legality principle, separation of powers, division of powers, human rights, the State monopoly of force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation in and supervision on public decision making, transparency of government, freedom of expression, association and assembly, rights of minorities as well as the majority rule in political decision making.”<sup>97</sup>

The Venice Commission has asserted that any emergency measure should thus “not be (ab)used to introduce permanent changes in legislation or administration. In principle, amendments to the constitution should not be made during states of emergency.”<sup>98</sup> In line with this, the OHCHR has also emphasized the importance of including “safeguards such as sunset or review clauses, in order to ensure return to ordinary laws as soon as the emergency situation is over.”<sup>99</sup> In particular, in ensuring respect to the rule of law and underlying principles of lawfulness, necessity and proportion, authorities’ use of emergency powers and measures must remain subject to regular and constant scrutiny and oversight by Parliament and an independent judiciary. The ICJ’s Legal Commentary to the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis highlights that “[i]n times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of law” as are “the competency and capacity of judges to review the executive’s decision to declare an emergency”.<sup>100</sup>

Accordingly, COVID-19 related measures must be subject to remedy and review both “during and after the acute phase of a crisis” in order to ensure that such measures are “evidence-based, necessary, and proportionate based on the available science, public health concerns, and human rights norms”.<sup>101</sup> In 2020, UN experts called on states not to use emergency powers as a justification for authoritarian and repressive action and warned that:

“[t]o prevent such excessive [emergency] powers becom[ing] hardwired into legal and political systems, restrictions should be narrowly tailored and should be the least intrusive means to protect public health.”<sup>102</sup>

<sup>96</sup> Venice Commission, Respect For Democracy, Human Rights and the Rule of Law During States Of Emergency: Reflections CDL-AD(2020)014 Study n° 987/2020, 19 June 2020, available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e), para 44.

<sup>97</sup> Id, para 9.

<sup>98</sup> Id, para. 13.

<sup>99</sup> OHCHR, Emergency Measures And Covid-19: Guidance, 27 April 2020, available: [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf).

<sup>100</sup> International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 2011, available: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

<sup>101</sup> N Sun, Applying Siracusa: A Call for a General Comment on Public Health Emergencies, 23 April 2020, available: [https://www.hhrjournal.org/2020/04/applying-siracusa-a-call-for-a-general-comment-on-public-health-emergencies/#\\_edn18](https://www.hhrjournal.org/2020/04/applying-siracusa-a-call-for-a-general-comment-on-public-health-emergencies/#_edn18).

<sup>102</sup> COVID-19: States should not abuse emergency measures to suppress human rights – UN experts, 16 March 2020, available: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.



The International Health Regulations (IHR)<sup>103</sup> and the international legal framework under the ECHR and ICCPR outlined above, as well as obligations under other international human rights treaties, establish the framework within which measures restricting human rights during a public health emergency may be lawful. In 2020, UN experts reminded states that “[r]estrictions taken to respond to the virus must be motivated by legitimate public health goals and should not be used simply to quash dissent”.<sup>104</sup>

Finally, it is crucial for emergency measures to reflect the human rights and circumstances of persons from specific marginalized groups who are in vulnerable situations and often disproportionately impacted by the pandemic and the measures to tackle it. The UN Secretary General has therefore called for COVID-19 responses which are “inclusive, equitable and universal”, highlighting States’ responsibility to ensure that everyone is protected from COVID-19 and its impact, including through “special measures and protection for particular groups most at risk or disproportionately impacted”.<sup>105</sup>

In situations where societal stigma against minority persons and/or persons from marginalized groups is prevalent, the resort to emergency powers may exacerbate discrimination. The UN Human Rights Committee has therefore called on States not to “tolerate, even in situations of emergency, the advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence” and to “take steps to ensure that public discourse in connection with the COVID-19 pandemic does not constitute advocacy and incitement against specific marginalized or vulnerable groups, including minorities and foreign nationals.”<sup>106</sup>

#### IV. Analysis of Emergency Powers in Hungary

##### 1. A Pattern of Abuse

As a whole, the invocation and use by the Hungarian authorities of emergency powers to respond to COVID-19 constitutes a systemic and concerted effort to rule by decree which appears to be intended to assert executive power and diminish parliamentary and judicial oversight across various sectors and with a permanent effect.

At the outset, considering in particular the Transitional Act in the context of the international human rights framework applicable during states of emergency, it is clear that Hungary’s emergency laws fail to meet its obligations under international human rights law. In transitioning emergency powers into ordinary law, the Government has consistently ignored the temporary nature of its emergency powers and empowered itself to adopt measures which are not lawful, necessary and proportionate. Moreover, in providing a wide-ranging unilateral discretion in respect of future decrees that may be issued, such measures are lacking in particular the necessary legislative oversight and administrative and judicial review to determine emergency measures’ legality.

In order to understand the seriousness of the threat to the rule of law in Hungary by the Hungarian authorities, it is important to understand how emergency powers have been employed in other contexts in the past decade in Hungary, leading up to the COVID-19 pandemic.

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<sup>103</sup> WHO, International Health Regulation, 2005; R Habibi et al, Harmonizing Global Health Law and Human Rights Law to Develop Rights-Based Approaches to Global Health Emergencies, 24 February 2021, available: <http://opiniojuris.org/2021/02/24/harmonizing-global-health-law-and-human-rights-law-to-develop-rights-based-approaches-to-global-health-emergencies/>; R Habibi et al, Reshaping Global Health Law in the Wake of COVID-19 to Uphold Human Rights, 1 June 2021, available: <https://www.hhrjournal.org/2021/06/reshaping-global-health-law-in-the-wake-of-covid-19-to-uphold-human-rights/>.

<sup>104</sup> COVID-19: States should not abuse emergency measures to suppress human rights – UN experts, 16 March 2020, available: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.

<sup>105</sup> United Nations, “COVID-19 and Human Rights: We are all in this together” (April 2020), available at: <https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/UN-SG-Policy-Brief-Human-Rights-and-COVID-23-April-2020-1.pdf>, p 10.

<sup>106</sup> Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (24 April 2020), available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>, para 2(e).

### a. The 2011 Constitution

The regulation of emergency powers under the 2011 Constitution of Hungary is evidence of a decade-long pattern of consolidating abusive emergency measures into ordinary law. The Constitution itself, which provides for expansive special emergency power, was adopted in response to the 2008 global financial crisis and purportedly justified by the “paralyzed nature” of the constitutional entities at the time.<sup>107</sup> While these measures were purportedly enacted to respond to financial crisis, they became and remain a seemingly permanent part of the constitutional law of Hungary. Furthermore, as in the case of many emergency decrees adopted under the justification of tackling COVID-19, the legal regime has been used in ways unrelated to the emergency that apparently motivated for its necessity.

In its 2011 Opinion on the then newly passed Constitution, the Venice Commission raised concerns as to what it saw as the incorporation “cultural, religious, moral, socio-economic and financial policies” into cardinal law.<sup>108</sup> With the Government and its allies forming two-thirds of the Hungarian Parliament, the ruling majority had given “its crisis management policy a constitutional rank”.<sup>109</sup>

In its opinion, the Venice Commission expressed a variety of concerns presented by the new Constitution, including the threat to the separation of powers and the weakening of the national checks and balances system. In particular, the new Constitution contained a vague constitutional framework lacking detailed rules on the operation of the judiciary, the system of the courts and the competence, independence, and impartiality of judges and tribunals.<sup>110</sup> It also failed to enshrine “precise indications” on the content of human rights or strong guarantees for their effective protection and enjoyment.<sup>111</sup>

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<sup>107</sup> K Kovacs, Hungary’s Struggle: In a Permanent State of Exception, 17 March 2016, available: <https://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/>.

<sup>108</sup> Venice Commission, Opinion on the New Constitution of Hungary CDL-AD(2011)016 Opinion no. 621 / 201, 20 June 2011, available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e), para. 145.

<sup>109</sup> K Kovacs, Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

<sup>110</sup> See Venice Commission, Opinion on the New Constitution of Hungary CDL-AD(2011)016 Opinion no. 621 / 201, 20 June 2011, available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e), paras 92, 102-110.

<sup>111</sup> Id, paras 147-148.

## b. Emergency Powers during the “Crisis Situation Caused by Mass Immigration” of 2015

In September 2015, following a substantial increase in refugees and migrants arriving at its borders, Hungary amended its asylum law to introduce and declare a “crisis situation caused by mass migration”<sup>112</sup> in some provinces.<sup>113</sup> It swiftly criminalized any entry through its borders<sup>114</sup> and vowed to defend its culture, values and language by “every means necessary”.<sup>115</sup>

To be able to declare such a crisis, the Government made use of “a very vague constitutional authorization”, Article 15(1) of the Constitution, that allows the government to “exercise powers which are not expressly conferred by laws on another state body”.<sup>116</sup> This was the same provision used to trigger a state of danger during COVID-19.

The state of migration crisis has been extended every six months since being declared five years ago. Lacking a legal justification or a legitimate objective from its inception, this purported crisis was extended again on 7 September 2021, despite the increasingly low numbers of asylum applications in Hungary.<sup>117</sup>

The systemic attack on non-citizens in Hungary, including migrants, refugees, asylum seeker rights and stateless persons, has increased under the pretext of the ongoing pandemic. On 1 March 2020, although no COVID-19 cases had yet been recorded in Hungary, the Government indefinitely suspended admission to its transit zones in order to “defend its borders”, claiming, without any evidence, that “there is a connection between the coronavirus and illegal migration”.<sup>118</sup>

When the first cases were reported among Iranian students legally residing in Hungary in the following days, the administration used the pretext of COVID-19 to charge the students with violating quarantine rules, leading to their expulsion to Iran.<sup>119</sup> The suspension of the right to apply for asylum remains in place, despite easing of restrictions in Hungary amidst its accelerated level of COVID-19 vaccination and low numbers of recorded cases.<sup>120</sup>

Finally, there have been several reported instances in which migrants lawfully residing in Hungary have been served with an expulsion decision on baseless accusations of violating COVID-19 rules. A decree passed under the pretext of the pandemic remains in force suspending migrants’ right to request an interim measure pending a court decision on whether such violations actually took place.<sup>121</sup>

<sup>112</sup> Government Decree 269/2015 of 15 September 2015 Announcing a Crisis Situation Caused by Mass Immigration and Establishing the Rules related to the Declaration, Maintenance and Termination of the Crisis Situation, available (Hungarian original): <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15128.pdf> and (unofficial English translation) at <http://www.refworld.org/docid/55f90f614.html>. Later extended to other counties by Government Decree 270/2015 of 18 September 2015, available (Hungarian) at <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15131.pdf>.

<sup>113</sup> Act LXXX of 2007 on Asylum of 1 January 2008, available (unofficial English translation) at <https://www.refworld.org/docid/4979cc072.html>.

<sup>114</sup> Amendments to Act C/2012 on the Criminal Code, and Act XIX/1998 on Criminal Procedure.

<sup>115</sup> Resolution proposed on 28 August and approved on 22 September 2015. Original text: <https://www.parlament.hu/irom40/05984/05984.pdf>

<sup>116</sup> Article 15(1), Constitution of Hungary, 2011. See also K Kovacs, Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers, 6 April 2020, available: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

<sup>117</sup> Hungarian Helsinki Committee, Short Overview of the Asylum Procedure: Hungary, available: [https://asylumineurope.org/reports/country/hungary/asylum-procedure/general/short-overview-asylum-procedure/#\\_ftnref1](https://asylumineurope.org/reports/country/hungary/asylum-procedure/general/short-overview-asylum-procedure/#_ftnref1).

<sup>118</sup> Infomigrants, Coronavirus: Hungary suspends admission of asylum seekers, 3 April 2020, available: <https://www.infomigrants.net/en/post/23169/coronavirus-hungary-suspends-admission-of-asylum-seekers>.

<sup>119</sup> Hungarian Helsinki Committee, The rule of law quarantined in the case of the Iranian student, 15 April 2020, available: <https://helsinki.hu/en/the-rule-of-law-quarantined-in-the-case-of-the-iranian-student/>.

<sup>120</sup> World Health Organization, COVID-19: Hungary, available:” <https://covid19.who.int/region/euro/country/hu>.

<sup>121</sup> 570/2020. (XII. 9.), Government Decree on certain provisions relating to home affairs and administrative matters and certain measures relating to emergencies, available: <https://net.jogtar.hu/jogszabaly?docid=A2000570.KOR&db-num=1>.

## 2. Targeted Attacks on the Rule of Law

Judicial independence, media freedom and civic space have already been under attack by the government for a number of years, and the COVID-19 related crisis provided a further occasion for the government to continue to erode them, and thereby suppress checks on executive power. In its 2021 Rule of Law report, the European Commission highlighted the worsening situation in the country, noting that the amendments to the Constitution which took place without public consultation in a manner which is inconsistent with human rights and the rule of law.<sup>122</sup>

### a. Judicial Independence

Judicial independence in Hungary has been under systematic attack by the authorities since 2011 through, among other things, legal and institutional “reforms” adopted. These changes have had a “chilling effect” among Hungarian judges which, “[d]ue to the prevailing legal and institutional structures” and “vaguely formulated internal policies”, remains operative throughout the current judicial system.<sup>123</sup> The current administration is behind this chilling effect through persistent attacks on individual judges in the media, in order to silence criticism of measures or laws affecting the judiciary. As a result, judges in Hungary typically “are afraid to express their opinion even in relation to professional matters”.<sup>124</sup>

The Government has also acted methodically to silence individual judges through many effective means, including disciplinary proceedings, criminal prosecution and removal from office.<sup>125</sup>

In 2012, for example, a so-called court “reform” led to the early retirement of various judges, with pro-government judges being instated in their place.<sup>126</sup> The Court of Justice of the EU (CJEU) later found these measures to be discriminatory on the basis of age.<sup>127</sup> Judge András Baka, the former President of the Hungarian Supreme Court (Kúria), submitted a complaint against Hungary to the European Court of Human Rights in 2012 over the authorities’ decision forcing him into early retirement.<sup>128</sup> The Court found a violation Judge Baka’s right of access to court under Article 6 ECHR as well as of his freedom of expression under Article 10 ECHR as his early retirement was prompted by the views and opinions on legislative changes affecting the judiciary in Hungary which he had publicly expressed in his professional capacity.<sup>129</sup>

The Government has not effectively enforced this judgment yet and has failed to adopt safeguards to prevent retaliation against judges for critical public opinions and to guarantee their reinstatement.<sup>130</sup>

<sup>122</sup> European Commission, 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary SWD(2021) 714, 20 July 2021, available: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf), 2.

<sup>123</sup> [https://helsinki.hu/wp-content/uploads/AIHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf) p. 2.

<sup>124</sup> Council of Europe, Communication by Amnesty International Hungary and the Hungarian Helsinki Committee under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, in the case of Baka v. Hungary (Application no. 20261/12), 29 July 2020, available: <https://helsinki.hu/en/the-looming-shadow-of-the-baka-v-hungary-case-the-government-is-still-failing-to-guarantee-the-freedom-of-expression-of-judges/>.

<sup>125</sup> See International Commission of Jurists, Hungary: disciplinary action against judge for recourse to EU Court must cease, 18 November 2019, available: <https://www.icj.org/hungary-disciplinary-action-against-judge-for-recourse-to-eu-court-must-cease/>; and Council of Europe, Reply from the authorities (16/08/2019) following a communication from a NGO (Hungarian Helsinki Committee) (05/08/2019) in the BAKA group of cases v. Hungary (Application No. 20261/12), 20 August 2019, available: [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-D-D\(2019\)877E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-D-D(2019)877E%22%5D%7D); and Hungarian Helsinki Committee et al, A Constitutional Crisis in the Hungarian Judiciary, 9 July 2019, available: <https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf>.

<sup>126</sup> Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

<sup>127</sup> Europea. Commission v Hungary, 6 November 2012, available: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=47BE6CE8F3FFB2A968FDC47239C86389?text=&docid=129324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12775028>

<sup>128</sup> Baka v Hungary, 23 June 2016, available: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-163113%22%5D%7D>; and International Commission of Jurists, Written Submissions On Behalf Of The International Commission Of Jurists: Baka v Hungary, 8 April 2015, available: <https://www.icj.org/wp-content/uploads/2015/04/ECHR-AmicusBrief-Baka-v-Hungary-Advocacy-Legal-Submission-2015-ENG.pdf>

<sup>129</sup> Id.

<sup>130</sup> The Committee of Ministers overseeing the implementation of judgements has asked Hungary to submit an action plan. The plan should make sure the judgement is submitted by 16 December 2021. See Hungarian Helsinki Committee, The Council of Europe is losing its patience in the Baka case, 20 September 2021, available: <https://helsinki.hu/en/the-council-of-europe-is-losing-its-patience-in-the-baka-case/>

Indeed, in 2019, the Council of Europe's Committee of Ministers noted that these concerns have "not only not been addressed but rather aggravated".<sup>131</sup> Hungary has since also resorted to initiating disciplinary proceedings against a judge who brought a preliminary request to the Court of Justice of the European Union (CJEU).<sup>133</sup>

The COVID-19 pandemic has also repeatedly delayed the selection of Court Presidents, resulting in posts either remaining empty or being filled unilaterally by the National Office for the Judiciary (NOJ) President. Moreover, the NOJ's practice of, without sufficient explanation, cancelling selection procedures for Court Presidents and other court managers, even where there are suitable applicants supported by their peers, has continued.<sup>134</sup> For instance, in January 2021 a new Supreme Court President was elected for nine years without the involvement of a judicial body and inconsistently with international standards.<sup>135</sup> The UN Special Rapporteur on the independence of judges and lawyers called this election an "attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers".<sup>136</sup>

Under Hungarian law, the public prosecutor is competent to initiate actions in front of the Kúria to declare a preliminary request made by a judge of a lower criminal court unlawful. The Kúria has since delivered a judgement agreeing with the public prosecutor without reservations, stating that suspending a criminal case to request a preliminary ruling on questions that are irrelevant to the pending case is illegal.<sup>137</sup> Recently the CJEU has ruled that in this way the Supreme Court had improperly disciplined a lower court judge.<sup>138</sup> The CJEU stated that "limitations on the exercise by national courts of the jurisdiction conferred on them by article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law."<sup>139</sup> In his Opinion of April 2021, the CJEU Advocate General Pikamäe had already determined that the law giving such power to the public prosecutor, as well as the Kúria's judgment declaring a preliminary request as unlawful, were in violation of EU law.<sup>140</sup> Amongst other changes that have strengthened the powers of the Kúria and its president, since 1 April 2020, lower level courts have been required by law to explain why they do not follow the interpretation of legal provisions given by the Kúria in its published decisions. Such deviation is a ground for an extraordinary remedy before the Kúria.<sup>141</sup>

<sup>131</sup> Council of Europe, 355th meeting, 23-25 September 2019 (DH): H46-11 Baka group v. Hungary (Applications No. 20261/12, 22254/14), Supervision of the execution of the European Court's judgments CM/Notes/1355/H46-11, available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168097cfbe](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168097cfbe), para 7.

<sup>132</sup> Hungarian Helsinki Committee, Disciplinary action threatens judge for turning to cjeu/, 7 November 2019, available: <https://helsinki.hu/en/disciplinary-action-threatens-judge-for-turning-to-cjeu/>. See also: V Makszimov, Hungarian prosecutor-general denies wrongdoing despite EU court ruling, 25 November 2021, available: [https://www.euractiv.com/section/politics/short\\_news/hungarian-prosecutor-general-denies-wrongdoing-despite-eu-court-ruling/](https://www.euractiv.com/section/politics/short_news/hungarian-prosecutor-general-denies-wrongdoing-despite-eu-court-ruling/).

<sup>133</sup> European Commission, 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary SWD(2021) 714, 20 July 2021, available: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf), p 7.

<sup>134</sup> Id, p 6.

<sup>135</sup> Id, p 5.

<sup>136</sup> Id, p 6; Letter of the UN Special Rapporteur on the independence of judges and lawyers, 15 April 2021, available: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26371>.

<sup>137</sup> Judgment of 10 September 2019 (Bt.838/2019). See press release: Criminal proceedings may be suspended in order to facilitate a lawful and thorough decision on the merits, 11 September 2019, available: [https://kuria-birosag.hu/hu/sajto/buntetoeljaras-menetenek-megakasztasa-jogszeru-es-alapos-erdemi-dontes-meghozatalanak?fbclid=IwAR1DEofrVZp2vgufIZ-AB\\_I2p9AKcUW\\_h2cHGRHeShkmv6tO1OmMWafBM](https://kuria-birosag.hu/hu/sajto/buntetoeljaras-menetenek-megakasztasa-jogszeru-es-alapos-erdemi-dontes-meghozatalanak?fbclid=IwAR1DEofrVZp2vgufIZ-AB_I2p9AKcUW_h2cHGRHeShkmv6tO1OmMWafBM).

<sup>138</sup> Judgment of 23 November 2021 (ECLI:EU:C:2021:949), available: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=249861&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=1296815>.

<sup>139</sup> Id, paragraph 76.

<sup>140</sup> Court of Justice of the European Union, PRESS RELEASE No 60/21, 15 April 2021, Advocate General's Opinion in Case C-564/19, available: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/cp210060en.pdf>.

<sup>141</sup> See sections 561(3)(g), 648(d), 649(6), 652(1) of Act XC of 2017 on the Code of Criminal Procedure and sections 346(5), 406(1), 409(3) and 424(3) of Act CXXX of 2016 on the Code of Civil Procedure. European Commission, 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary SWD(2021) 714, 20 July 2021, available: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf), p 4, footnote 20 at which the European Commission indicates:

"Council of Bars and Law Societies of Europe notes that these rules were introduced without consulting the judiciary, that the availability and searchability of the precedents published by the Kúria is not up-to-date, with individual decisions being published in various publications, and that it is not clear whether only the ratio decidendi of decisions is to be followed or also obiter dicta. In its view, the new rules will reduce the judges' autonomy with regard to the interpretation of the law in the light of the circumstances of the concrete case."

It is within this context as a whole that Hungary's recourse to emergency powers must be considered, given the particular importance of continuous and independent judicial oversight and scrutiny of emergency powers during the COVID-19 pandemic. Judicial oversight becomes even more important in times of emergency or crisis, and yet it is precisely in those situations that it is frequently limited or threatened,<sup>142</sup> as appears to have occurred in Hungary.

The purportedly COVID-19-related Authorization Acts as well as the Transitional Act introduced in Hungary, have only exacerbated barriers to access to justice because they fail to facilitate swift and effective judicial review of decrees introduced during – and responding to – the pandemic. For instance, they fail to establish a short deadline, in line with the urgent nature of emergency measures, within which the Constitutional Court shall adjudicate complaints brought in front of it in relation to emergency decrees. These decrees may therefore expire before the Constitutional Court arrives to determine such complaints. This has indeed already been the case with regard to three emergency decrees which the Court refused to review,<sup>143</sup> even though they were about to be reinstated by a subsequent state of danger.

An additional factor which may undermine the effectiveness of judicial oversight is the fact that emergency decrees can currently be issued under both a state of danger and a state of medical crisis, blurring the lines of whether a decree derives from and establishes a precise public health-related objective. This may lead to confusion when it comes to applying constitutional standards to review particular decrees. On top of these two frameworks, the Hungarian government is also currently ruling by decree under a state of crisis caused by mass migration, further undermining the availability, possibility and effectiveness judicial review.

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<sup>142</sup> International Commission of Jurists, Courts and COVID-19, 5 May 2020, available: <https://www.icj.org/wp-content/uploads/2020/05/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf>, 1.

<sup>143</sup> Hungarian Helsinki Committee, Hungary's Emergency Regimes Introduced Due to the COVID-19 Pandemic, 24 February 2021, available: [https://helsinki.hu/wp-content/uploads/HHC\\_Hungary\\_emergency\\_measures\\_overview\\_24022021.pdf](https://helsinki.hu/wp-content/uploads/HHC_Hungary_emergency_measures_overview_24022021.pdf). See also Z Szenté & G Gardos-Orosz, Chapter 8. Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?, 2022, available: <https://www.bloomsburycollections.com/book/pandemocracy-in-europe-power-parliaments-and-people-in-times-of-covid-19/ch8-using-emergency-powers-in-hungary-against-the-pandemic-and-or-democracy?from=search>, pp 165, 167, 170 and in particular footnote 44.

## b. Freedom of Expression and Media Freedom

The right to freedom of expression and opinion is protected under the ECHR and ICCPR and includes the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds without interference by public authorities.<sup>144</sup> The functioning of a free, independent, and pluralistic media is also a necessary element of the rule of law.<sup>145</sup> Moreover, in the context of a global pandemic such as COVID-19, ensuring the continued operation of free and independent media is a necessary component of States' obligations to ensure the adequate provision of health information.<sup>146</sup> The European Federation of Journalists has found that the Hungarian Government used the COVID-19 pandemic to exert further control over access to information, as it limited access to press conferences by only responding to pro-government media inquiries and placing a ban on local health sector representatives from talking to the media. Instead the government made use of a central "operative unit", through which all pandemic-related questions were channeled.<sup>147</sup>

The media play a critical role in informing the public about COVID-19 and creating a platform for public debate and education. The Office of the United Nations High Commissioner for Human Rights (OHCHR) stated that:

"[f]reedom of expression and access to information and a civic space where a public debate can be held constitute important safeguards for ensuring that States parties resorting to emergency powers in connection with the COVID-19 pandemic comply with their obligations under the Covenant."<sup>148</sup>

As the Council of Europe has affirmed, "[t]he freedom of expression, including free and timely flow of information, is a critical factor for the ability of the media to report on issues related to the pandemic." The Secretary General of the United Nations, António Guterres, has also said that "no one during this pandemic can take the place of the media to transmit information and analysis to the public, and to counter rumors and misrepresentation."<sup>150</sup>

A rights-compliant COVID-19 response should therefore ensure access to and availability of adequate and up-to-date information about all aspects of COVID-19, as well as respect the public's right to be informed of ongoing efforts and measures to respond to the virus.<sup>151</sup>

<sup>144</sup> Article 10(1) ECHR and Article 19(2) ICCPR.

<sup>145</sup> International Commission of Jurists, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, available: <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>, art. 9 (j).

<sup>146</sup> International Commission of Jurists, *Living Like People Who Die Slowly*, September 2020, available: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>, Section IV, pp 105-109; UN Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, U.N. Doc. E/C.12/2020/1 (7 April 2020): <https://undocs.org/E/C.12/2020/1> ("CESCR COVID-19 Statement").

<sup>147</sup> European Commission, *2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary* SWD(2021) 714, 20 July 2021, available: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf), p 18.

<sup>148</sup> UN Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* CCPR/C/128/2, 30 April 2020, available: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>, para 2(f).

<sup>149</sup> Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis A toolkit for member states* SG/Inf(2020)11, 7 April 2020, available: <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>, p 6.

<sup>150</sup> U.N. Secretary General, *Remarks on Press Freedom and Tackling Disinformation in the COVID-19 Context*, 4 May 2020, available: <https://www.un.org/sg/en/content/sg/statement/2020-05-04/secretary-generals-remarks-high-level-dialogue-press-freedom-and-tackling-disinformation-the-covid-19-context-bilingual-delivered-scroll-down-forenglish-and-french>.

<sup>151</sup> See Human Rights Watch, *Human Rights Dimensions of COVID-19 Response*, 19 March 2020, available: <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#> and Amnesty International, *COVID-19: How human rights can help protect us*, 20 March 2020, available: <https://www.amnesty.org/en/latest/news/2020/03/coronavirus-how-human-rights-help-protect-us/>.

It should allow for and facilitate public debate and exchange of information on matters related to emergency measures and pandemic-related restrictions.

The Corruption Research Centre Budapest in Hungary has published a research report finding that Hungary had both the scarcest COVID-19 information availability and the highest number of COVID-19 deaths per million in Europe. At the end of November 2021, Hungary reported a record number of daily infections.<sup>152</sup> The research suggests that there may be a direct link between the alleged knowing concealment of COVID-19 related information and higher numbers of COVID-19 related deaths in countries like Hungary.<sup>153</sup> This vividly illustrates the interconnectedness of the rights to health, life and freedom of expression.

The dearth of access to COVID-19 related information is interrelated with the widespread failure to protect and respect freedom of expression in Hungary. The poor state of freedom of expression was already manifest prior to the pandemic but has been further restricted by COVID-19 related responses of Hungary.<sup>154</sup> In particular, Hungary's first Authorization Act amended the Criminal Code<sup>155</sup> to extend the application of "scaremongering", that is "imparting or conveying false information"<sup>156</sup> about the pandemic.<sup>157</sup> It provided more stringent sanctions by criminalizing a broad range of conduct "capable of obstructing the efficiency of protection efforts" during the application of a special legal order, with an increased penalty of up to five years' imprisonment.<sup>158</sup>

This provision lacks a clear scope and precision of applicability, in contravention of the principle of legality and the requirement that any measures restricting freedom of expression must be clearly established in law, and thereby increasing the risk of violation of the freedom of expression.<sup>159</sup> The Guidelines of the Committee of Ministers of the Council of Europe on freedom of expression and information in times of crisis also affirm that States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis.<sup>160</sup>

<sup>152</sup> Z Simon, Moderna Edges Pfizer in Study of Five Covid Vaccine, 25 November 2021, available: <https://www.bloomberg.com/news/articles/2021-11-25/moderna-edges-pfizer-in-hungarian-study-of-five-covid-vaccines>.

<sup>153</sup> Corruption Research Centre Budapest, Data Concealment and Mortality in Covid-19 Pandemic An illustrative Figure and a Hypothesis, 29 April 2021, available: [http://www.crcb.eu/wp-content/uploads/2021/05/2021\\_research\\_notes\\_01\\_210429\\_02.pdf](http://www.crcb.eu/wp-content/uploads/2021/05/2021_research_notes_01_210429_02.pdf).

<sup>154</sup> Article 19, Hungary: Conclusions of the Joint International Press Freedom Mission, 3 December 2019, available: <https://www.article19.org/resources/hungary-conclusions-of-the-joint-international-press-freedom-mission-to-hungary/>.

<sup>155</sup> Article 337, Act C of 2012, available: <https://net.jogtar.hu/jogszabaly?docid=a1200100.tv>.

<sup>156</sup> Amnesty International, Hungary 2020, available: <https://www.amnesty.org/en/location/europe-and-central-asia/hungary/report-hungary/>.

<sup>157</sup> Authorization Act, §10(2).

<sup>158</sup> Council of Europe, Memorandum on freedom of expression and media freedom in Hungary, 30 March 2021, available: <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e>, para 13.

<sup>159</sup> Hungarian Helsinki Committee, EU Court: criminalising helping asylum-seekers breaches EU law, 16 November 2021, available: <https://helsinki.hu/en/cjeu-stop-soros-law-judgment/>.

<sup>160</sup> Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, 26 September 2007, available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805ae60e](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e).





Another such decree introduced during the course of the pandemic criminalizes the use of unauthorized drone footage of a private property, after investigative journalists used such recordings in 2020 to report on public spending which was of public interest.<sup>170</sup> The same decree also amended the Constitution to restrict the definition of “public funds” to State funding, revenue and liabilities, with the effect of further decreasing transparency and oversight on state spending. The Venice Commission has observed that this decree might result in Hungarian authorities considering the inner workings of the newly established foundations and their revenue and expenditure as “private”. This creates a risk that they can be shielded from civil society and media scrutiny, and may not be subject to freedom of information requests by individuals and the media, thus undermining the state’s obligations in relation to transparency and freedom of information.<sup>171</sup> Thus during a pandemic at a time at which transparency and freedom of information are critical.

Such severe restrictions of the freedom of expression and media expression do not appear to be compliant with the requirements of necessity and proportionality. These restrictions have serious consequences particularly when taking into account the extent to which media freedom has deteriorated in Hungary in the

past decade, through “[t]he combined effects of a politically controlled media regulatory authority and distortionary state intervention in the media market [which] have eroded media pluralism and freedom of expression”.<sup>172</sup> The above analysis shows that individually and cumulatively measures taken by the Hungarian Government during the COVID-19 pandemic have further restricted freedom of expression and critical comment on questions of public importance within Hungary. By exercising emergency powers in order to justify the adoption of these measures, the government has failed to comply with or adequately consider international law standards with which such measures clearly conflict.

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<sup>170</sup> NAIH Decision 4228/2020 of 10 June 2020.

<sup>171</sup> European Commission, 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary SWD(2021) 714, 20 July 2021, available: [https://ec.europa.eu/info/sites/default/files/2021\\_rlr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rlr_country_chapter_hungary_en.pdf), p 20.

<sup>172</sup> Council of Europe, Memorandum on freedom of expression and media freedom in Hungary, 30 March 2021, available: <https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-hungary/1680a1e67e>, para 40.

### c. Civic Space and Freedom of Assembly

Under article 21 ICCPR and article 11 ECHR, limitations on the exercise of right to freedom of peaceful assembly must be in accordance with law. This requires that such restrictions are sufficiently precise and foreseeable in their application for people to regulate their conduct accordingly. They must also be necessary and proportionate to one of the enumerated legitimate aims, such as public health, and be non-discriminatory. At the brink of the COVID-19 pandemic, guidance the UN Office of the High Commission of Human Rights called on States “to consider how protests may be held consistent with public health needs, for example by incorporating physical distancing”, and to “constantly assess [...] restrictions [...] to determine whether they continue to be necessary and proportionate.”<sup>173</sup>

More generally, the UN Human Rights Committee has affirmed in its General Comment on the right to peaceful assembly that any restriction on this right “should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned”.<sup>174</sup> In addition, the “prohibition of a specific assembly can be considered only as a measure of last resort” and “[b]lanket restrictions on peaceful assemblies are presumptively disproportionate.”<sup>175</sup>

arian administration adopted a blanket ban on all assemblies, demonstrations and protests. This was later adapted into the Transitional Act in highly imprecise legal terms which could be interpreted very broadly to restrict the enjoyment of freedom of association, expression and assembly during the application of a special legal order.<sup>176</sup> In November 2020, the second Authorization Act once again imposed a blanket ban on outdoor assemblies in public spaces, equipping police with broad powers to stop and arrest assembled groups or protesters as well as impose hefty fines up to 1,400 Euros against participants of banned protests.<sup>177</sup>

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<sup>173</sup> OHCHR, Civic Space and COVID-19: Guidance, 4 May 2020, available <https://www.ohchr.org/Documents/Issues/CivicSpace/CivicSpaceandCovid.pdf>.

<sup>174</sup> Human Rights Committee, General Comment No. 37: on the right to peaceful assembly (article 21), September 2020, available: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f-GC%2f37&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f-GC%2f37&Lang=en), para 38.

<sup>175</sup> Id, paras 37-38.

<sup>176</sup> Act LVIII of 2020.

<sup>177</sup> Act CIX of 2020, available: <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK20242.pdf>; European Centre for Not-For-Profit Law, Hungary Tightens COVID-19 Restrictions, 13 November 2020, available: <https://ecnl.org/news/hungary-tightens-covid-19-restrictions>.

The grounds purportedly justifying this absolute ban are unclear, particularly when considering the discriminatory and non-universal enforcement of these measures by authorities since the beginning of the COVID-19 pandemic. For example, when, in May 2020, thousands of far-right Neo-Nazi supporters gathered in Deák Square without authorization, chanting “gypsy crime”, the police reportedly protected the illegal assembly by closing traffic.<sup>178</sup> By contrast, when car demonstrations were organized by an independent Hungarian MP and demonstrators honked their horns as a symbol of protest observing social distancing measures, they were met by hefty fines for allegedly disrupting the safety of traffic.<sup>179</sup>

While terraces for bars and restaurants reopened by decree of 24 April 2021, which lifted restrictions on outdoor and indoor events such as sports<sup>180</sup> and cultural events, the ban on peaceful assemblies and demonstrations remained in place.<sup>181</sup>

The message which has been communicated to the general public through these severe restrictions which have been implemented haphazardly and selectively is that any disfavored opinion concerning COVID-19 can and will be stifled or punished at the Government’s prerogative. The contradiction between what the Government provided as the reason for the ban (protection of public health) and the impact of the measure in practice (suppression of dissent) suggests that not all of its restrictions are directed at the pursuit of the purported aim. The blanket though unevenly applied restriction therefore amounts to an illegitimate and unlawful restriction on the right to freedom of assembly.

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<sup>178</sup> Index, Far-right groups of supporters marched over the victims of the Deák Square murder, 28 May 2020, available: [https://index.hu/belfold/2020/05/28/oro\\_mi\\_hazank\\_demonstracio](https://index.hu/belfold/2020/05/28/oro_mi_hazank_demonstracio).

<sup>179</sup> Eatvos Karoly Intezet, Concentration Of Power Salvaged: Coronavirus Stocktaking: Assessing the Crisis Management of the Hungarian Government from the Perspective of Constitutional Law, 30 July 2020, available at: <http://www.ekint.org/en/constitutionality/2020-07-30/concentration-of-power-salvaged-coronavirus-stocktaking-infographic>, p 7-8.

<sup>180</sup> P Churm, EURO 2020 fan-zone opens in Budapest ahead of Hungary vs Portugal game, 12 June 2021, available: <https://www.euronews.com/2021/06/12/euro-2020-fan-zone-opens-in-budapest-ahead-of-hungary-vs-portugal-game>.

<sup>181</sup> Government Decree 176/2021 (IV. 15.) on certain emergency measures, available: <https://net.jogtar.hu/jogszabaly?docid=A2100176.KOR&dbnum=1>; Government Decree 264/2021 (V. 21.) amending the Government Decrees governing the protection measures to be applied in the event of an emergency, with a view to the fifth stage of the phasing-out of protection measures, 25 May 2021, available: <https://net.jogtar.hu/jogszabaly?docid=a2100264.kor>.

## V. Conclusions and Recommendations

The Government's overreach in ruling by emergency decrees permeates beyond the areas discussed in this briefing paper and has implications across every aspect of life in Hungary, including for the protection of human rights.

The decrees discussed in this briefing paper are only some of many that have been issued and transitioned into ordinary law since the first state of danger was declared in March 2020, across all sectors of governance. Most decrees appear to have been adopted without a clear and legitimate objective to tackling the COVID-19 pandemic have a common shared characteristic: they directly or indirectly benefit the executive's apparent political objectives. The inadequate institutional and constitutional frameworks within which such emergency powers have been used make the unhindered exploitation of emergency powers by the Hungarian Government dangerously easy.

### 1. Recommendations to Hungary

1.1 Limit the scope of emergency frameworks and powers to the extent strictly necessary under international law to respond to the ongoing pandemic. To be legitimate and lawful, the COVID-19 related restrictions applied by Hungary must be connected to the protection of public health, necessary, proportionate and fully consistent with international law.

1.2 Repeal arbitrary emergency decrees that impose unnecessary and disproportionate restrictions on human rights, and repeal any legal instrument whereby such decrees have been incorporated into ordinary law.

1.3 Terminate the "state of crisis caused by mass immigration", and ensure human rights defenders civil society organizations have access to and can provide assistance to migrants and refugees without being criminalized or otherwise obstructed.

1.4 Ensure that COVID-19 related states of emergency and related exceptional measures are not used to restrict freedom of expression, including freedom of the media, unless to the extent strictly necessary and proportionate to a compelling public health purpose.

1.5 Take all necessary steps to provide unfettered and unhindered access to COVID-19 related information, while respecting data protection.

1.6 Repeal the amendment to the Criminal Law on "scaremongering" which disproportionately interferes with human rights.

1.7 Ensure fair and equitable access to COVID-19 vaccinations to everyone within the Hungarian jurisdiction, irrespective of documentation or citizenship status.

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