

## HUMAN RIGHTS DURING THE COVID-19 PANDEMIC IN HUNGARY WITH SPECIAL REGARD TO THE RIGHT TO HAVE CONTACT

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**Abstract** In Hungary, the government declared a state of danger in March 2020 as a consequence of the COVID-19 pandemic. The state of danger was lifted in June, but epidemiological preparedness and state of medical crisis were declared by a government decree. In November 2020, the state of danger was declared for the second time, while epidemiological preparedness was maintained. In February 2021, the state of danger was declared again. The list of the legal rules which changed and have been continuously changing because of the COVID-19 pandemic since March 2020 is extremely long and the new provision or the modifications have been heavily influencing the population's everyday life. The aim of this paper is to overview primarily the restrictions affecting human rights with special regard to the right to have contact as one of the patients' rights. Important issues of the parent-child contact affected by the COVID-19 pandemic is discussed, as well.

### Keywords

state of  
medical  
crisis,  
patients'  
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the right  
to have  
contact,  
in-health  
institutions,  
parent-child  
contact

## 1 Introduction

The state of danger has been declared three times in Hungary, in March 2020, in November 2020 and in February 2021. This devastating new phenomena, has thrust upon us entirely new medical, social and economical challenges. It is not hyperbole to state that people around the globe have had to adjust to an entirely new way of living. The list of the legal rules which changed, and which will continue to change because of the COVID-19 pandemic since March 2020 is extremely long. This article aims firstly to provide an overview about the rules which established the pillars of our new life, namely the rules on state of danger, state of medical crisis and epidemiological preparedness. The Hungarian Health Act, the Act No. CLIV of 1997, was also modified in a way that made it possible for the government to declare epidemiological preparedness and state of medical crisis in a governmental decree and to introduce several restrictions. These rules were new to the Health Act and allow for a wide range of restrictions.

The restrictions were very severe in some months and profoundly affected both human rights and patients' rights. The article focuses on the right to have contact, that is a fundamental right protected by the Hungarian Civil Code, namely Act No. V of 2013, and also one of the patients' rights protected by the Health Act. This right was restricted by the resolutions of the Hungarian Surgeon General. Significantly, visitation rights were prohibited several times in the in-health institutions, causing harsh consequences for a multitude of patients, their relatives and familymembers. This overview brings into sharp focus just how difficult it was (and remains) for the stakeholders involved, both patients and family members, as well as for the in-health institutions, to find effective regulations and procedures that would simultaneously work in harmony (to the greatest extent possible) to not only guarantee protection against the infection but also to protect the fundamental rights so that they were not infringed upon in any unnecessary and disproportional ways. During each of the three waves we experienced always shifting problems concerning the correct interpretation of these rules.

The final part of the article deals with the contact rights between parent and child who live apart. This may be a neuralgic family law problem even in times when there is no pandemic, but the epidemiologic situation has exacerbated the difficulties. People did not know exactly how they could protect their children and this

uncertainty, in turn, resulted in an ambivalent judiciary. For example, in February 2021, the Hungarian Constitutional Court issued a decision on a contact case focusing on the question whether one parent bore liability for not allowing her child to have weekend-contact with the separately living parent on the grounds that she was worried for the child's health.

The pandemic has caused major changes in the lives of people and both the pandemic and its consequences can be interpreted and discussed by employing the doctrines from several branches of science. I have chosen a small field, namely, a patient's right to maintain contact with others while confined to in-health institutions and children's right to contact in some periods of the pandemic in Hungary. Although this particular topic is but a tiny slice of the multitude of other problems that so many others faced, and continue to face as a consequence of COVID-19, still for those impacted it was, and remains, a real problem for the many people trying to cope in the shadow of very uncertain times. This paper primarily focuses on the first wave of the pandemic, when the COVID-19 virus was the subject of intensive discussions and life was particularly troubled. While addressing a limited segment of the population whose human rights were affected by COVID-19, my aim was to thoroughly analyse and provide insights into the detailed 'history' of how the concerned rights could be exercised. This overview focuses upon several resolutions of the Hungarian Surgeon General, the reports of the Hungarian Ombudsman and the decision of the Hungarian Constitutional Court. The resolutions were short-lived ones as one followed another in quick succession. The reports of the Ombudsman were in direct response to acute problems. Similarly, the Constitutional Court's decision, while addressing a problem existing at the time, may well have far-reaching implications that outlive the current crisis. However, these accessions to Hungary's recent 'legal history' aid in our understanding of just how fragile human rights can be, especially when tested in the crucible of unusual times.

## 2 The state of danger, the epidemiological preparedness and the state of medical crisis as the three pillars regulating the Hungarian legal situation during the COVID-19 pandemic

In summer 2021, as this paper was written, we have struggled through three painful waves of the COVID-19 pandemic. This section focuses on the main Acts which served as the bases for procedures that were put into place and that consequently impacted Hungary's everyday life during the three waves. In response to the first wave, on 11 March 2020 the government legislatively declared a state of danger<sup>1</sup> by way of Government Decree 40/2020 (11 March).<sup>2</sup> This legislative Act stated that the government declared 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". The Government Decree entered into force at 3 p.m. on the day of its promulgation.

On 17 June 2020, the government promulgated Act No. LVIII of 2020 on the transitional provisions related to the termination of the state of danger.<sup>3</sup> The government terminated the state of danger on 18 June 2020, by way of the Government Decree 282/2020 (17 June) on terminating the state of danger declared on 11 March 2020<sup>4</sup> and concurrently the state of medical crisis<sup>5</sup> was ordered for the next six months. The Government Decree 40/2020 (11 March) on the declaration of state of danger was repealed. The epidemiological preparedness<sup>6</sup> was introduced by the Government Decree 283/2020 (17 June) on introduction of epidemiological preparedness.<sup>7</sup> This entered into force on 18 June 2020. This Decree ordered that the government should envisage the need to maintain the epidemiological preparedness every three months. According to Article 3 of this Decree, the legislative Act was to lapse on 18 December 2020.

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<sup>1</sup> *Veszélyhelyzet.*

<sup>2</sup> Hungarian Official Gazette 2020. 39.

<sup>3</sup> Hungarian Official Gazette 2020. 144.

<sup>4</sup> Hungarian Official Gazette 2020. 145.

<sup>5</sup> *Egészségügyi válsághelyzet.*

<sup>6</sup> *Járványügyi készség.*

<sup>7</sup> Hungarian Official Gazette 2020. 145.

At the beginning of the second wave, on 3 November 2020, the government declared the state of danger for the second time through Government Decree 478/2020 (3 November) on the declaration of state of danger.<sup>8</sup> This Decree entered into force on 4 November 2020. According to the Decree, “The Government hereby declares a state of danger in the entire territory of Hungary for the elimination of the consequences of the SARS-CoV-2 coronavirus pandemic causing massive disease outbreaks endangering life and property, and for the protection of the health and lives of Hungarian citizens.” Although the state of medical crisis was initially scheduled to terminate in mid-November, the government extended it by six months, until 18 June 2021. The extension was accomplished by Government Decree 584/2020 (15 December) on the modification of the Government Decree 283/2020 (17 June) on introduction of epidemiological preparedness.<sup>9</sup> According to the modified Article 3 of this Decree, the legislative Act was to lapse automatically on 18 June 2020.

Regarding the third wave, the government terminated the state of danger by way of Government Decree 26/2021 (29 January) on terminating the state of danger under Government Decree 478/2020 (3 November) on the declaration of state of danger.<sup>10</sup> This became effective from 8 February 2021. On the same day, the government declared the state of danger for the third time through enactment of the Government Decree 27/2021 (29 January) on the declaration of state of danger and enter into force of measures for the time of the state of danger.<sup>11</sup> This Decree entered into force on 8 February 2021. Accordingly, while the second state of danger was terminated the third one became effective on the same day.

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<sup>8</sup> Hungarian Official Gazette 2020. 237.

<sup>9</sup> Hungarian Official Gazette 2020. 279.

<sup>10</sup> Hungarian Official Gazette 2021. 15.

<sup>11</sup> Hungarian Official Gazette 2021. 15.

### **3 The right to have contact as a patient right during the pandemic**

#### **3.1 Patients' rights in the Health Act with special regard to the right to human dignity**

The patients' rights are regulated in two Acts, in the Health Act (Act No. CLIV of 1997) and in an independent Act on the Administration and Protection of Personal Data in the Health Care (Act No. XLVII of 1997). The two acts combined resulted in an extremely detailed regulation of the patients' rights, even when considered from an international comparative perspective (Dósa, 2018: 66). The Health Act contains the patients' rights (and obligations), which are defined as the right to healthcare, the right to human dignity, the right to have contact, the right to leave the healthcare facility, the right to information, the right to self-determination, the right to refuse healthcare, the right to become acquainted with the medical records, and the right to professional secrecy.

The right to dignity as a patients' right is regulated on two levels, primarily in the Fundamental Law of Hungary<sup>12</sup> in the general sense but also more specifically in the Health Act, which addresses patients' rights specifically during the administration of health care. This right, since it is protected under both international and European human rights covenants, is held to be an absolute right that cannot be restricted. This conclusion is bolstered under the European Convention on Human Rights (Zakariás, 2018: 208-209). The significance of the right to human dignity, both as a human right as well as a patient's right, emerges also from the fact that the Health Act fails to enumerate all rights included in the European Charter of Patients' Rights. However, all rights enumerated in the Charter may be deduced (Béky, 2013: 496) from the fundamental right to dignity. From the perspective of civil law, the right to dignity is one of the most important personality rights of the Civil Code. According to Article Section 2:42(2) of the Civil Code, which protects generally the personality rights, "everyone shall respect human dignity and the personality rights derived from it". The Health Act, in turn, protects this right by placing a focus on health care. Article 10(1), for example, states that patients' human dignity is to be respected during administration of health care. It contains a concrete list of items that healthcare providers must adhere to when treating a patient in order to respect the

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<sup>12</sup> Article II. Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.

right to human dignity. For example, as a rule, only the interventions necessary for the care of the patient may be performed in the course of health care; a patient's rights may be restricted only for the period of time justified by his state of health, and to the extent and in the way, as provided for by law; and, a patient may only be made to wait on grounds and for a duration which are reasonable according to Article 10(2), (3) and (6). While being regulated within the provisions relating to the right to have contact, nevertheless, a constituent component of the right to dignity is that the patient shall have a right to use his own clothes and personal belongings, unless otherwise provided by law (Sári Simkó, 2019: 8).

### **3.2 The right to have contact as a patients' right**

The regulation of the right to contact has the same levels in the Hungarian legal order. The Civil Code protects the right to have contact in the framework of the general protection of personality rights. Article 2:42(1) states that "everybody shall have the right, subject to limitations by law and by the rights of others, to exercise his personality rights freely, in particular among others the right to keep contact made by whatever ways or means." Under the aegis of the right to have contact, the Health Act contains several provisions that delineate concrete situations when patients' right to contact must be guaranteed and protected.

According to Article 11(2), in the course of the patient's stay at an in-patient facility, the patient has the right to maintain contact with other persons (in writing or verbally) and to receive visitors. The patient may prohibit not only the very fact of his treatment, but also any other information related to his treatment, from being disclosed to other persons. This right may only be disregarded in the interest of his care, at the request of his next of kin or a person who is obliged to care for him. If the patient is in a severe condition, which is defined in Article 11(3) as being "one who, due to his condition, is physically unable to look after himself, or whose pain cannot be controlled even with the use of medication, or who is in a state of psychological crisis", such person "shall have a right to have the person designated by him stay with him" (Article 11(3)). If a patient is a child, he or she has "a right to have his parent, legal representative, or a person designated by him or by his legal representative stay with him" (Article 11(4)). If a woman is in childbirth, she "shall have a right to designate a person of age to stay with her continuously during labour and delivery, and after delivery, to have her new-born baby placed in the same room

with her, provided it is not excluded by the mother's or the new-born baby's health condition." (Article 11(5)). Article 11(6) contains a special rule which emerges not only from the right to have contact but also from the freedom to practice one's religion. It provides that "The patient shall have a right to keep contact with a representative of the church corresponding to his religious beliefs" and also to freely engage in acts of worship.

According to Article 11(1), all of the above-mentioned rights may be exercised by the patient who is subject to the conditions existing in the in-patient institution and the fellow-patients' rights have to be respected and the undisturbed and smooth delivery of patient care has to be ensured. The detailed rules of the latter are defined in the regulations of the in-patient institutions, but those cannot restrict the content of these rights. The 'hospital regulations' may grant further rights for the patients. In other words, Article 11(1) sets minimum rights while health care institutions may expand upon those rights.

The importance of a patient having contact is self-explanatory. Nevertheless, sometimes it is not easy to balance the competing and often conflicting interests present in a complex and challenging hospital environment. While true in ordinary times, these challenges, such as weighing the interests of other patients, staff, visitors, and dealing with any limitations posed by the hospital facility itself, are compounded during a crisis such as the current pandemic. These restrictions are frequently cited as examples of the necessary limitations upon the right to contact (Dósa, 2018: 68). Although the regulations of the in-patient institutions may particularise the details concerning the rights contained in the Health Act, and may also provide further rights for the patients, these regulations sometimes fall short by not setting forth the specific features that fully embody the practice of contact rights such as, for example, the use of telecommunication facilities (Petkó, 2014).

### **3.3 The right to have contact in in-patient institutions during the COVID-19 pandemic with special regard to the right of visiting**

#### **3.3.1 The legal background**

On 8 March 2020, the head of the National Public Health Centre, the Surgeon General, ordered in a resolution<sup>13</sup> the prohibition of visiting patients in all in-patient institutions until and unless countermanded. The prohibition against patients having visitors did not affect the rights of the patients to have contact and communication by any other means but – as the resolution of the Surgeon General formulated – the institutions were obliged to undertake all measures which would most effectively mitigate the risks of spreading the infection. The resolution was immediately enforceable, and it obliged all concerned persons to cooperate in implementing the measures contained therein. The reasoning of the resolution referred to the above-mentioned right to have contact as set forth in the Health Act, and specifically to Article 11 (3)-(6) which, as previously discussed, guarantees the rights of a patient to have contact under various-described situations. These rights and these specific forms of having contact were not prohibited. Accordingly, one person could stay with the patient who was in a severe condition, the minor had the right to have his parent, legal representative, or a person designated by him or by his legal representative stay with him, a person designated by the patient could stay with the woman giving birth and the patient had the right to maintain contact with a representative of the church corresponding to his religious beliefs. The resolution also stated that in these specific cases it is important for the institution to take necessary precautions to guarantee increased protection against infection.

On 18 June 2020, a resolution<sup>14</sup> of the Surgeon General terminated the prohibition against visiting the patients in the in-health institutions. According to the resolution, which was immediately enforceable, there remained some restrictions. The visiting prohibition was maintained for patients who were infected with COVID-19, for persons who were in isolation, and also for the organizational units of the in-health institutions affected by COVID-19. The visitors had to wear a mask. The official webpage of the Hungarian Government on ‘coronavirus’ added to these general

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<sup>13</sup> File number 13305-8/2020/EÜIG.

<sup>14</sup> File number 13305-59/2020/EÜIG.

restrictions the further requirement that only a healthy person could visit a patient in an in-health institution and that such visitor could have contact only with the concrete patient whom he or she visited. The visitor also had to keep a two-meter-distance from other patients. The institution was required to provide visitors with soap and water or hand-sanitizer (which the visitor was in turn required to use). If several patients shared a room, the maximum number of visitors had to be limited. By keeping the social distance, a representative of the church, a hairdresser or a podiatrist also could visit a patient.<sup>15</sup>

The second wave of COVID-19 triggered similar restrictions on visits at hospitals.<sup>16</sup> On 8 September 2020, the Surgeon General ordered<sup>17</sup> the prohibition of visiting patients also in in-health institutions. This order again was immediately effective until and unless countermanded. However, this order expanded upon the rights of patients to be visited by emphasizing the requirement for hospitals to correctly interpret the right to contact in compliance with the Health Act. The resolution, for example, clearly mandated that the in-health institutions should continuously guarantee the right to contact for the patients as articulated in Article 11(3)-(6) of the Health Act. In other words, the resolution mandated that hospitals had to guarantee these rights by providing proper protective equipment for patients suffering a severe condition and having terminal disease; that the person designated by him or her should stay with him or her; for the minor patient that his or her parent, legal representative, or a person designated by him or by his legal representative stay with him or her and a person designated by the patient could continuously stay with the woman giving birth. The resolution also provided that after calculating the risks, the institution could decide whether the right to contact should be provided and – on the other side – the right to have contact could be guaranteed if well-reasoned in further cases, as well. The Surgeon General literally drew explicit attention to the requirement contained in the Health Act concerning human rights with relation to the state of the medical crisis. According to Article 229(1) of the Health Act, in the event of a state of medical crisis, patients' rights as defined in this Act shall be exercised exclusively and to such an extent, if and when they do not endanger the effectiveness of disaster response and relief. The second

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<sup>15</sup> <https://koronavirus.gov.hu/cikkek/feloldottak-korhazilatogatasi-tilalmat> (last access 30 July 2021).

<sup>16</sup> <https://koronavirus.gov.hu/cikkek/teljes-koru-latogatasi-tilalmat-rendelt-el-korhazakban-az-orszagostisztifoorvos> (last access 30 July 2021).

<sup>17</sup> File number 42935-1/2020/EÜIG.

sentence of this Article underlines that the right of patients to human dignity must not be restricted.

Even during the second wave, the resolution released in September was withdrawn and the Surgeon General issued a new resolution<sup>18</sup> concerning the prohibition on visitation in in-health institutions. This resolution, as was true with the previous ones, was immediately effective until and unless countermanded. While the new resolution contained essentially the same rules as the earlier resolutions, the list expanded upon the group of protected persons to include patients suffering from mental disabilities. The resolution provided that patients with mental disabilities enjoyed the right to have his or her parent, legal representative, or a person designated by the patient or by the patients' legal representative to stay with the patient. This resolution remained in force during the third wave of COVID-19.

A new resolution was released on 19 May 2021. This new resolution withdrew the prohibition against visiting the patients in in-health institutions enacted in December 2020. However, it provided that patient rights contained in Article 11(3)-(6) (as explained previously) were to be retained in force. Patients treated from COVID-19 disease cannot receive visitors except in those limited cases stipulated in Article 11(3)-(6) of the Health Act. The resolution contained several requirements for any visitation allowed.<sup>19</sup> In particular, the person visiting the patient shall have a valid immunity certificate, or in case of not having the immunity certificate, the visitor shall have a negative SARS-CoV-2 PCR test result which was made after a sampling within 48 hours before the visit. The visitor is obliged to present either the immunity certificate or the test result as a condition to the visit. Strict limits were maintained on the number of visitors. One patient can be visited by one person and the visitor can stay with the patient for a maximum of one hour. The visitor is obligated to have his body temperature measured upon entry to the facility and the institution has to take steps to ensure that both the patients and their relatives cooperate in complying with these provisions. Outdoor visits are permitted so long as the patients' condition and the institution's circumstances make it possible and in this case the number of the visitors is not limited.

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<sup>18</sup> File number 42935-4/2020/EÜIG.

<sup>19</sup> <https://koronavirus.gov.hu/cikkek/orszagos-tisztifoorvos-hetfotel-feloldjak-korhazi-latogatasi-talalmat> (last access 30 July 2021)

### **3.3.2 Difficulties in connection with the correct differentiation between the right to have contact and the right to be visited in the in-health institutions**

Many problems emerged because in-health institutions were often very distrustful of the visitors and because the right of patients to be visited and to have other forms of contact was not distinguished in many concrete cases. These difficulties led to a circular letter<sup>20</sup> from the Surgeon General released on 10 November 2020, based literally upon the complaints surrounding the restrictions placed upon the patients' right to be visited. The circular letter, referring both to the Fundamental Act as well as to Article 229(1) of the Health Act, underlined that the detailed regulation of the patients' exercise of the right to have contact was the task of the in-health institutions who had a duty to ensure enforcement of the regulations. Further, patient rights were not to be infringed upon or curtailed, except when Hungary was in an official state of medical crisis. Even in case of the state of medical crisis the patients' right to dignity could not be restricted. The letter reiterated that although no patient could be visited under the aegis of the prohibition of visitation, nevertheless a special permission could be provided in well-reasoned cases when equity called for visitation to be granted. Because the dynamics of patients having terminal disease coming into close contact with their closest relatives led to a myriad of complaints, the legal requirements concerning these patients were detailed. The Surgeon General emphasized that in such cases the possibility of visitors (i.e., family, close kin and friends) having contact with and to say farewell to the dying person had to be respected as these contacts could not be placed on hold for days or even hours in view of the exigency of the circumstances. However, even under these circumstances, the provision of the proper protective equipment and the education according to the Proceeding Protocol<sup>21</sup> in place during the COVID-19 pandemic was obligatory for the visitors. Three such Protocols were released, the first on 1 April 2020, the second on 12 June 2020, and the third effective on 21 September 2020. Only the latest Protocol contains rules on the requirement for the obligatory education of employees in the health sector and visitors. According to this requirement, health employees and visitors must be educated regarding proper hand-hygiene, the proper use of the necessary individual personal protecting equipment,

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<sup>20</sup> File number 50491-1/2020/EÜIG.

<sup>21</sup> Proceeding protocol of the National Public Health Centre of Hungary in connection with the new coronavirus identified in 2020. Published in 21st September 2020.

especially the correct method and order of putting the PPE on and then off, as well as the breath-hygiene and the coughing etiquette. The last Protocol provided that the in-health institutions were tasked with ensuring these requirements were fulfilled.

### **3.4 The legal position of women giving birth during the COVID-19 pandemics**

#### **3.4.1 The legal background**

The Health Act, as discussed in Section 3.2, guarantees that any woman in childbirth shall have a right to designate a person of age to stay with her continuously during labour and delivery (Article 11(5)). The decisions of the Surgeon General, discussed earlier, confirm that the woman's rights stipulated in Article 11 (5) must be protected during the COVID-19 pandemic, such that the woman giving birth fully retains her right to designate a person to stay with her continually while giving birth. The designee could be the father but also another person. The Medical Professional Board of Ministry of Human Resources released a recommendation in March 2020 confirming that there is one exception from the prohibition of visitation, namely, only one person may be with the mother when she is giving birth. This designee may remain in the building of the institution during the entirety of labour and delivery. If the labour and delivery is planned to be carried out with the help of a doula, a decision must be made regarding whether the doula or the relative of the mother should remain with her. Other visitors are not permitted to be in the building, not even in the foreground of the labour-room. Except for the birth mother's sole designee, other visitors are strictly prohibited. The birth mother even is instructed that she is not permitted to meet with relatives or friends outside the building where the mother undergoes labour and delivery. As is apparent, these rules are very strict.

### **3.4.2 Difficulties in connection with the right of the mother to have only one person with her**

As several times the interpretational problem emerged whether any person may stay with the woman during the labour and delivery, or whether it had to be meant as visitation which was prohibited, the Commissioner for Fundamental Rights (Ombudsman) of Hungary released an opinion<sup>22</sup> which was actually an answer for the letter of a non-governmental organization. The opinion of the Hungarian Ombudsman was requested because of complaints pertaining to the prohibition of “birthing with father” that existed in several in-health institutions. The Ombudsman’s opinion emphasized that the in-health institution is obliged to comply both with the regulations of the Health Act and also the extant resolution of the Surgeon General pertaining to the visitation rights and other measures during the times of COVID-19 pandemic. Accordingly, while the in-health institutions are framing their regulations, all those requirements have to be taken into account. Therefore, the regulations instituted by each in-health institution should aim to strike an appropriate balance between the competing and conflicting requirements (goals) of, on the one hand, helping to ensure the efficient termination of the state of medical crisis while on the other hand also guaranteeing the patients’ right to have contact by duly taking into consideration the principles of reasonableness and proportionality. However, the Ombudsman’s opinion also referred to the Surgeon General’s statement that it was the responsibility and decision of each individual in-health institution to make its own determination whether it had the capacity to provide the proper protecting equipment for the father to be present during the birthing process.

A complex investigation<sup>23</sup> was initiated by the Ombudsman in order to try to bring some clarity and resolution to these concededly complicated issues. In particular, what can be done to eliminate or at least mitigate the unreasonable and unnecessary restrictions concerning the above-mentioned rights of women giving birth. The main questions were the following: who may bring a decision restricting the patients’ rights on epidemiological grounds during the pandemic; who is responsible for providing proper protecting equipment supporting the right to have contact; what does ‘proper’ mean concerning the protecting equipment; do the maternity wards of

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<sup>22</sup> On 16th June 2020.

<sup>23</sup> A/B-2594-2020.

in-health institutions have such protective equipment and whether the suspension of ‘birthgiving with father’ was truly a necessary and proportional measure in the in-health institutions which led to the concrete complaints being made. The investigation has not ended yet.

### **3.5 Parents and their baby after the birth of child and contact between parents and their premature baby in the in-health institution during the COVID-19 pandemic and some difficulties**

The second phrase of Article 11(5) of the Health Act stipulates that the woman has a right “after delivery, to have her new-born baby placed in the same room with her, provided it is not excluded by the mother’s or the new-born baby’s health condition.” As discussed above, this provision was not affected by the resolutions enacted by the Surgeon General in the course of the COVID-19 pandemic.

As the ‘rooming-in’ placement of the mother and the new-born baby did not qualify as ‘contact’, the possibility was maintained during all three waves. In March 2020, the Medical Professional Board of Ministry of Human Resources released a recommendation concerning the most important extant neonatal issues. It declared that the prohibition of visiting did not restrict the parents’ rights to visit the new-born child in the hospital. However, this recommendation cautioned of the possible future need of stricter regulations should the pandemic worsen and require such tightening.

The Hungarian Ombudsman was requested to issue an opinion on this issue because parental contact with the premature child had been severely restricted in several in-health institutions and an absolute visiting prohibition had been ordered in several neonatal intensive wards. According to the experiences presented by a non-governmental civil organization, varying forms of restrictions had been introduced in the Hungarian neonatal intensive wards. Another complaint alleged that the normal and recommended methods of caring for the premature babies had been suspended or was not being complied with. The Ombudsman’s opinion cautioned of the need to strike an appropriate balance between the fundamental rights of patients, children and parents and the requirement to effectively terminate the state of medical crisis. However, the opinion also confirmed that the methodologies and procedures instituted during the crisis were being driven by science and experts and

accordingly procedures and their implementation had to remain consistent from institution to institution. According to the definite viewpoint of the Ombudsman, the regulations of the concerned in-health institutions have to abstain from any unnecessary and/or disproportional limitations with respect to the different forms of having contact in the context of the prohibition against visiting.

Although the Health Act declares this right as a woman's right, the reality is more complicated and nuanced. This is a patients' right, a parental right but first and foremost the child's right. This conclusion follows from the wording contained in both the UN Convention on the Rights of the Child (UNCRC) and the EACH (European Association for Children in Hospital) Charter. The UNCRC protects the child's best interests and the EACH, as a non-governmental organization, presented a Charter containing ten points. According to Article 2 of the Charter, children in hospital shall have the right to have their parents or parent substitute with them at all times.

#### **4 Children's and parents' right to contact during the COVID-19 pandemic**

##### **4.1 Measures affecting the children's and parents' right to contact during the COVID-19 pandemic**

Even if parents and children are not infected, several measures were instituted which made everyday life much more difficult, even for families where parents cared for their own children in their own household together. However, in families where the child lived with one parent while still maintaining contact with the other parent living separately from the child, complying with the constantly changing measures posed significant challenges for the whole family.

During the first wave of the pandemic, the Hungarian Government ordered a lockdown by the Government Decree 71/2020 (27 March), which entered into force on 28 March 2020. Article 1 obliged everybody to minimize the social contact as much as possible with all other persons and to keep the at least one-and-a-half metres distance from all persons, except for people living in one household. According to Article 3, everybody was allowed to leave his or her permanent or temporary residence, or own flat for well-grounded reasons, as that phrase was

defined in the Decree. Article 4 enumerated the well-grounded reasons, which included the parental rights and obligations. Although this Decree was scheduled to elapse on 11 April 2020, it remained in effect until 18 June 2020.

During the second wave a new decree was instituted, namely the Government Decree 484/2020 (10 November) on the second wave of the protecting measures applicable during the state of danger. The Decree, which entered into force on 11 November 2020, imposed a curfew between 8 p.m. and 5 a.m., together with the obligation that everybody had to remain at home until 8 p.m. An independent chapter contained the provisions concerning the curfew and the behaviour on public premises. According to Article 3(1), everybody was obliged to stay at his or her permanent or temporary residence or quarters except for the concrete cases listed in the Decree, which included working and various other activities. Significantly for our purposes in this article, however, the Decree did not mention, and had no provisions for protecting the parent-child relationship or the parental rights and obligations. The Decree was planned to be effective until 11 December 2020, but it was prolonged several times. The provisions concerning curfew were modified at the end of March 2021, so from 7 April 2021 the length of the curfew was shortened from 8 p.m. to 10 p.m. (from 10 p.m. to 5 a.m.). Effective 24 April 2021 the curfew again was shortened, lasting from 11 p.m. until 5 a.m., and effective 1 May 2021 it changed yet again to 12 p.m. The curfew was revoked in its entirety from 23 May 2021. This Decree still remains in force, although its provisions have been profoundly modified several times (more than 30 times in total).

#### **4.2 Problems concerning the exercise of the right to contact during the COVID-19 pandemic**

Contact between the child and the separately living parent is a legal institution which results in many problems in everyday life even in non-pandemic times. The problems are multi-faceted, but some typical reasons include high levels of conflict between the parents, the difficulties between one parent and the child, and the fact that families have to adapt to the continuously changing circumstances among the family members, social and working conditions, etc. The COVID-19 pandemic has only heightened and intensified these difficulties, adding to the uncertainties surrounding the contacts between the child and the separately living parent, and increasing the amount of stress for families faced with these issues. Many people had a fear of

being infected, especially in the spring of 2020 during the first wave of the pandemic, when this new disease was suddenly thrust upon us. The uncertainties then were even greater than they are presently. Children's lives were impacted to the same extent, and sometimes perhaps even more, than the adults.

According to the Civil Code regulating the contacts between the child and the parents, there is a possibility (and in a concrete case also the obligation, of course) for one parent to inform the other parent of any circumstance preventing the contact with the child. This obligation to inform must be carried out without delay. If a contact is missed for a reason that is not the fault of the right holder, a new contact must be re-established for the earliest suitable date (Article 4:182 of Civil Code). The application of this provision was discussed intensely, primarily in the course of the first wave of the pandemic, as parents were unsure about their exact rights and obligations, especially if either one of the parents or the child had any fear from being infected or if it seemed possible (or likely) that the child's health would be endangered by having contact with one or the other parent. Family members, the judiciary, legal professionals, and others involved in family law matters were uncertain in these cases because the language of the legal acts were difficult to interpret and apply in concrete cases.

The mental and legal uncertainties were intensified when new rules concerning the enforcement of contact orders entered into force on 1 March 2020. While issues surrounding the enforcement of contact orders had previously been within the purview of the public guardianship authorities, starting in March 2020, the court assumed these responsibilities in non-contentious proceedings. Furthermore, as the courts were suddenly thrust into the position of having to make decisions based upon new provisions instituted in March and April 2020, both these new rules and the special requirements surrounding the COVID-19 pandemic were the subject of intensive debate. According to the Act No. CXVIII of 2017 on the non-contentious proceedings, the request for the enforcement of the contact order may be submitted to the court if the contact order of the court or public guardianship authority was breached. Article 22/B(4) specifies the behaviours which constitute a breach of the contact order. According to the list, either parent breaches the contact order if for a reason for which he or she is liable does not comply with his or her obligation concerning the contact in due time, does not substitute the contact in time prescribed in the contact order, hinder the contact without due reason or

circumvents the undisturbed contact in any other way. The reference to the ‘reason for which he or she is liable’ was not used in the earlier effective regulation. Consequently, the issue emerged whether liability may attach under this new provision if one of the parents postpones the contact upon a ground connected to COVID-19.

### **4.3 The decision of the Constitutional Court on the right to contact during COVID-19 pandemic**

In February 2021, the Constitutional Court issued decision 3067/2021 (II.24.), which addressed issues arising from the confluence of constitutional law, family law and health law issues, all intertwined in the middle of the pandemic.

The central facts that gave rise to the case are as follows. The father submitted a request for enforcement of contact to the court, as the mother of their common child attending kindergarten did not give over the child for the contact at the weekend (from Saturday 9 a.m. until Sunday 18 p.m.) in due time, on 21 March 2020, upon the ground of the ‘coronavirus’ situation. The court of first instance ruled that although the mother technically did breach the contact order, nevertheless she was not liable as under the particular circumstances of the case her decision was in the child’s best interests. In reaching this judgment, the court relied not only upon the Government Decree 40/2020 (11 March) on the declaration of state of danger (discussed above), but also the fact that according to the then available common knowledge, the COVID-19 spread by droplet infection, personal contact or touching objects and by minimizing these acts the infection can be avoided more effectively. The court’s judgment also underlined that the mother behaved as a responsible parent considering the child’s medical interests, especially because the father lived in the county of Pest, which was the most affected area of Hungary at that time.

The court of the second instance agreed with the judgment and its reasoning by referring to the fact the concrete contact would have happened in an ‘interim’ (gap) period of time as although the state of danger had already been declared the lockdown was not ordered yet, as the Government Decree 71/2020 (III. 28.) entered into force only a week later. The court emphasized that although there was no curfew yet in place, the governmental authorities continually advised the public that it

should remain in their homes except only in pressing cases. Furthermore, at the time, in the infancy of the COVID-19 pandemic, very little was known about the virus and information about the protocol for contact cases was sparse. In sum, it was a period of chaos and confusion. As the father didn't suffer irretrievable impairment as a result of the missed contact, and because the mother had asked the father for his cooperation and understanding and even offered alternative methods for having contact with the child prior to the denial of contact, the court was convinced that the mother's technical breach of the contact order should nevertheless not lead to imposition of liability. The father petitioned the Constitutional Court requesting for the annulment of the lower court judgments.

The Constitutional Court analysed the issues on the merits and annulled the judgments. The reasoning was multifaceted. Primarily, the Constitutional Court analysed the parent and child rights to contact as fundamental rights,<sup>24</sup> and in doing so grappled with the issue of whether the restriction of the fundamental right was justifiable and in conformance with the Fundamental Law.<sup>25</sup> The Constitutional Court held that the COVID-19 pandemic, and the various governmental measures instituted in an effort to combat the spread of the virus, did not, generally speaking, render contact between the parent and the child impossible and that the social distancing requirement cannot be applied to the relationship between the child and parent, if the parent lives separately from the child.<sup>26</sup> The Court recognized that the pandemic may influence the contact, primarily in cases when the parent or the child fall sick, falls into isolation or the personal and direct contact poses a concrete risk upon objective criteria, among other things, upon the ground of the health status or personal circumstances of the concerned persons, or the method and duration of travelling if no precautionary measures are taken.<sup>27</sup>

The Constitutional Court also evaluated the facts that no curfew was in force at the time of the concrete contact, neither of the concerned persons was infected with COVID-19 (or at least no such information emerged) and neither of them was endangered. Although the Board agreed with the statements of the court of second instance concerning the facts surrounding COVID-19 as they were understood in

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<sup>24</sup> Decision 3067/2021. (II. 24.) AB of the Constitutional Court, Reasoning [16]-[29].

<sup>25</sup> Decision 3067/2021. (II. 24.) AB of the Constitutional Court, Reasoning [30] and following.

<sup>26</sup> Decision 3067/2021. (II. 24.) AB of the Constitutional Court, Reasoning [34].

<sup>27</sup> Decision 3067/2021. (II. 24.) AB of the Constitutional Court, Reasoning [35].

March 2020, it reached the conclusion that those were general factors, and no evidence was presented that those factors would have been decisive in the concrete case. Accordingly, the Constitutional Court annulled the judgments, concluding they struck an unfair balance among the different fundamental rights.

Several parallel and separate opinions were published. The decision was brought at a plenary session (14 members) and two judges attached his or her parallel opinion while four judges had separate opinions based upon diverse reasonings. One separate opinion dealt with the COVID-19 pandemic and disagreed with the decision. According to this opinion, the mother's behaviour had to be adjudged based upon the information available on 21 March 2020, when the contact was to happen. Based on that information, her actions were reasonable, and so she should not be held liable for not allowing the father contact. The separate opinion focused on the central tenet that early on in the crisis little was known about the virus. Stories in the news were confusing and conflicting, leading to a general state of frustration and irritation. Additionally, during that perilous time, with infections spreading and mounting, there were no medical cures available to help heal those infected and obviously no vaccination regime. In March 2020, the population had severe fears and the official communications tried to convince people that they should stay at home and leave their home only in very urgent cases. As a summary, this opinion concluded that in light of the exigent circumstances the courts should balance the conflicting interests and evaluate them in the light of the events extant during the pandemic.<sup>28</sup>

## **5 Conclusion**

The Health Act, in conjunction with the other mentioned legal sources mentioned in this article, collectively work well to protect the patients' rights to health. This is a reasonable conclusion even with the caveat that Article XX of the Fundamental Law protects only the right to physical and mental health and does not echo the health definition of WHO, which includes social integration, as well (Kereszty, 2012: 129). The relatively sparse knowledge about patients' right was criticized already in the 2010's by several experts (Kereszty, 2012: 130-131 and Kovácsy, 2012: 117, 120-121) and the COVID-19 has exacerbated the situation. The right to keep contact is

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<sup>28</sup> Decision 3067/2021. (II. 24.) AB of the Constitutional Court, Reasoning [76].

a fundamental right which is closely intertwined with other rights, such as the right to be informed of the features of healthcare services delivered by the healthcare providers, on the accessibility and order of use of such services, as well as on the scope and assertion of the rights of patients. As analysed in this article, many problems emerged from the fact that the pandemic has made it very burdensome, sometimes almost impossible, for the public to navigate its way through the myriad of new issues that developed on a daily basis. This was particularly true in the health care setting. Both patients and relatives find themselves in the position of the ‘weaker party’ in health care despite heroic efforts from the healthcare workers.

Adults and children alike have the right to be well-informed about their rights, obligations and indeed all issues affecting them. Both the UNCRC and also Article 4 of the EACH Charter mandate that children and parents shall have the right to be informed in a manner appropriate to age and understanding and require that steps should be taken to mitigate physical and emotional stress. The right of children to be informed properly and in a child-friendly manner is an integral component of exercising the right of participation, which is one of the cornerstones of the UNCRC. It is important to underline the significance of being informed. In the case of pandemics, this means being informed not only about patient rights, but also about the pandemic itself.

The notion of being fully informed also applies in cases that do not involve patients involved with an in-health institution. As we have seen, the dynamics caused by the pandemic have dictated not only the public’s everyday (where we can go, when we can go there, whether we have to wear masks, what distances we must keep etc.) routine but have also dramatically impacted the physical and mental health of the family members. The decision of the Hungarian Constitutional Court serves as a good example of the intense fear people have of being infected. In the concrete case the caring parent had a fear from the COVID-19, but the child may have also a fear from it. We do well to remember that when the Board brought the judgment, the vaccination process had already began and people could have hope in the future.

Uncertain weeks (and eventually months) followed one another during the COVID-19 pandemic, especially within the first wave. Neither the legislator, nor the public could live within ‘transparent’ circumstances and we could – and unfortunately even nowadays can – count with the change of the circumstances. The legislative acts

were constantly changing, sometimes not only from month to month, but rather from one hour to another. This explains why both the Hungarian Ombudsman and the Constitutional Court have been involved in resolving and interpreting issues of contact concerning persons staying in the in-health institution or at home. Many books, articles and papers have already been published by scholars and also others reflecting the different occurrences with relation to the pandemics. These volumes are imprints mirroring the mood which the smaller or larger community had in a definite period of pandemic. In the early summer of 2020, for example, Hungarian intellectuals of different professions published their fears, visions and expectations for the then future (Kőrössi & Zámbo, 2020: 5-294) and it may assist to understand how uncertain the situation indeed was in Hungary at that time.

### Legislation, Acts, Regulations or Court Decisions

Act No. CLIV of 1997 on Health

Act No. LVIII of 2020 on the transitional provisions related to the termination of the state of danger

Act No. V of 2013 on Hungarian Civil Code

Act No. XLVII of 1997 on the administration and protection of personal data in the health care

Charter of European Association for Children in Hospital (EACH) (1988)

European Charter of Patients' Rights (2002)

European Convention on Human Rights (1950)

Government Decree 26/2021 (29 January) on terminating the state of danger under Government Decree 478/2020 (3 November) on the declaration of state of danger

Government Decree 27/2021 (29 January) on the declaration of state of danger and enter into force of measures for the time of the state of danger

Government Decree 282/2020 (17 June) on terminating the state of danger declared on 11 March 2020

Government Decree 283/2020 (17 June) on introduction of epidemiological preparedness

Government Decree 40/2020 (11 March) on the declaration of state of danger

Government Decree 478/2020 (3 November) on the declaration of state of danger

Government Decree 584/2020 (15 December) on the modification of the Government Decree 283/2020 (17 June) on introduction of epidemiological preparedness

Resolution of the Hungarian Surgeon General File number 13305-59/2020/EÜIG

Resolution of the Hungarian Surgeon General File number 13305-8/2020/EÜIG

Resolution of the Hungarian Surgeon General File number 42935-1/2020/EÜIG

Resolution of the Hungarian Surgeon General File number 50491-1/2020/EÜIG

The Fundamental Law of Hungary (25 April 2011).

UN Convention on the Rights of the Child (1989).

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