The COVID-19 pandemic and Hungarian substantive criminal law*

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I. Introduction

It can be stated without exaggeration that the COVID-19 pandemic[1] completely turned the whole world upside down in 2020.[2] As a result, section 53 of the Fundamental Law of Hungary was triggered when a state of danger was declared by Government Decree 40/2020 (11 March), which was in force until 18 June 2020. Government Decree 283/2020 (17 June) provides the legal framework for the control of the virus that, under section 228 (1) of Act CLIV of 1997 on Health (hereinafter: Health Act), introduced epidemiological preparedness by announcing a health crisis, the necessity of which shall be reviewed every 3 months. After that, a state of danger was introduced again by Government Decree 484/2020 (10 November), which was still in force in March 2021 during the third coronavirus wave.

The pandemic is also expected to result in a fundamental restructuring of the economy, a circumstance that may raise several entirely new legal problems or even previous ones, which have not been seen for generations or perhaps barely seen before. This situation also requires a response from the legal profession. This includes the criminal law profession, which shall also be obliged to take a position on otherwise rare events, such as the treatment of infringements related to the epidemic and representing a greater degree of danger to society.

Of course, the extraordinary situation required extraordinary legislation, which has not left Act C of 2012 on the Criminal Code (hereinafter: Criminal Code)[3] untouched. For instance, Act XII of 2020 on the containment of coronavirus introduced, with effect from 31 March 2020, the criminal offence of obstructing epidemic containment into section 322/A of the Criminal Code, which, as a sui generis criminal offence, can be understood as a quasi qualified case of violation of epidemic control regulations (which criminal offence will be discussed later in this article). According to the related Explanatory Memorandum,

> "the new statutory definition of obstructing epidemic containment shall punish the active obstruction of the measures initiated in the event of the legally and officially identified danger of the epidemic from being implemented. The reason for the increased dangerousness and, therefore, the more severe punishment (in contrast to the mere violation of epidemic control regulations) is that, in this case, the commission manifests itself not only in a formal violation of regulations but also in the obstruction of the concrete official control. The statutory definition does not evaluate the result, hence, to establish the crime, the failure or any disruption of control is not required. Neither using violence nor threatening it are statutory elements, which leads to the consequence that a real concurrence with the offence of violence against a public official occurs due to any violent or threatening action against public officers involved in civil defence. The social dangerousness of the act is significantly enhanced when committed by a group, which significantly increases the likely effectiveness of obstruction. Death, as a result, contained in the statutory definition as a qualifying circumstance essentially means unity between obstructive conduct of any type and homicide by negligence; the dogmatic distinguishing criteria in this regard are settled in case law. The legislator can achieve the earliest possible protection against such a crime by penalising preparation for it, and it intends to make use of this means in the present situation as well."

The Explanatory Memorandum added to the new statutory definition is particularly reassuring from the viewpoint that it underlines that criminal proceedings for this criminal offence may only take place due to active, positive conduct. According to Article 28 of the Fundamental Law, interpretation of a statutory definition shall take place in legal practice subject to an Explanatory Memorandum. It would be worth emphasising this circumstance in the statutory definition itself in which, conceptually, it is also possible to obstruct by an act of omission. For instance, if an apparently asymptomatic person in quarantine refuses to assist the procedure upon the call of the authority (to go with them voluntarily for testing).

I am primarily investigating the COVID-19 pandemic and its possible consequences under the criteria of criminal law in this work. After a short historical overview, primarily concentrating on the development of criminal prosecution of epidemic offences closely related to the topic, I will first and foremost discuss the interpretation of possible criminal of-

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[1] The new coronavirus is called SARS-CoV-2, which causes COVID-19 infection. On 30 January 2020, the Director-General of the World Health Organization (WHO) declared the outbreak of COVID-19 to be a Public Health Emergency of International Concern, see WHO from 27.2.2020, https://www.who.int/news/item/27-02-2020-a-joint-statement-on-tourism-and-covid-19---unwto-and-who-call-for-responsibility-and-coordination (17.6.2021).

[2] *Hodge/Hubbard*, Gonzaga Law Review 56 (2020), 159.

[3] The recent main source of Hungarian substantive criminal law is the Criminal Code (in force since 1 July 2013), which contains the entirety of substantive criminal law, since criminal law statutes in addition to those of the Criminal Code ("Nebenstrafrecht") do not exist. Regulatory (minor) offences are regulated in a different code; however, these infringements are not considered as criminal offences in the Hungarian legal system. For an overview, see *Karsai/Szomora*, Criminal Law in Hungary, 2nd ed. 2015, p. 20, 40.

fences (and certain qualifying circumstances) with particular reference to the question of their establishment and the specific problems that arise. It may be highlighted that the pandemic has a characteristic effect on the law of regulatory offences; however, I do not investigate this question in detail.

II. Legal history

Although academic writers are clearly of the opinion that, historically, the protection of public health has previously been provided, in general according to administrative norms,[4] criminal law instruments have not been negligible in the past, especially concerning epidemics. For example, under a decree issued in 1766 due to the devastating plague epidemic having a fatal impact during Maria Theresa's reign, "any intentional or negligent behaviour against the precautions relating to the epidemic was considered to be a criminal offence against life and physical integrity. Aggravated offences were punished with death by rope or bullet, but even in the most lenient case, two years' imprisonment with hard labour was imposed."[5]

Act V of 1878 (came into force in 1880, hereinafter the Csemegi Code) and Act XL of 1879 were among the first written criminal laws of Hungary and both contained criminal provisions on the violation of epidemic measures. Thereby, the position of the current legislature is that such crimes, even if they are minor offences, ultimately require a differentiated approach, as they constitute a less serious misdemeanour, and in most the cases, the most lenient version of offences, namely a contravention.

Chapter XXI of the Csemegi Code entitled "Crimes and misdemeanours against public health", in particular section 316, provided that anyone who violated the rules on quarantine or other supervisory rules ordered to prevent the further spread of that disease during a contagious disease was to be punished by imprisonment for up to six months. It constituted a qualified case if someone caught the disease due to the infringement of quarantine or supervisory rules. The qualified criminal offence was punishable by imprisonment in a low-security prison for up to three years. Therefore, the legal predecessor of violation of epidemic control regulations, punishable under section 361 of Criminal Code in a simple case, can be identified; however, the cited provision of the Csemegi Code did not explicitly use the term "epidemic". Furthermore, it is interesting to regulate in the form of a qualifying circumstance the infection with a contagious disease as a result that "someone", even the perpetrator him/herself, could have caught.

Section 93 of Act XL of 1879 on the Criminal Code of Contraventions ordered the punishment of, among others, those private medical practitioners and surgeons who did not accept their official secondment during an epidemic or refused to give first aid without good reason or, if no other doctor practised at his surgery, the further treatment asked by a person who had become ill as a result of the epidemic. According to the cited provision of the act, this specific offence committed by a person who has the necessary professional qualifications can be considered as a regulatory antecedent, partly of today's endangering by professional misconduct (section 165 of the Criminal Code) and partly of failure to render aid (section 166 of the Criminal Code). Sections 95 and 96 of the Criminal Code of Contraventions contained similar provisions in relation to pharmacists.

Section 99 of the Criminal Code of Contraventions can be highlighted; among other matters, it also established the criminal liability of the family head "whose family has been struck by an epidemic or contagious disease, if he did not seek medical help within twenty-four hours from the time he became aware of the nature of the disease".

Section 100 of the Criminal Code of Contraventions provided for a criminal offence, which may be committed as a combination of acts and omissions by the owners of hackney carriages or other means of transport, or their employees if they transported a person suffering from an epidemic disease then, knowing this circumstance, they continued to use it without disinfection. Again, we cannot identify a specific delict committed by medical professionals which the legislature penalised on the basis of a substantive breach of a specific, essential epidemic provision.[6]

Section 199 of Act V of 1961 on the Criminal Code of the People's Republic of Hungary, moving to a higher level of abstraction compared to the past, regulated the acts concerned in the framework of the same statutory definition, called breach of epidemic rules. It was committed by a person who breached or circumvented the rules of quarantine, epidemiological supervision, or control ordered to prevent the introduction or spread of a communicable disease serving as a ground for compulsory quarantine. It was more severely punished by the law if it was committed at the time of an epidemic. At that time, the criminalisation of transport operations relating to communicable animal diseases or hazardous pests causing damage to plants (e.g. Colorado beetle) was already present. Essentially, the same solution was maintained by section 284 of Act IV of 1978 on the Criminal Code, which was later modified only in connection with the scale of penalties, more precisely the legislative technique for determining them. The statutory definition is currently set out in section 361 of the Criminal Code.

III. Criminal offences at the time of pandemic (epidemic)

Under this heading, I deal with the statutory definitions in force in Hungary, which may be raised regarding the coronavirus epidemic.[7] Of course, in essence any other crime may

[4] See *Balogh*, Az egészség védelme a büntetőjogban (The protection of health in criminal law), 2006, p. 167.

[5] *Balázs*, Mária Terézia 1770-es egészségügyi alaprendelete (1770 Health Act of Maria Theresia), 2007, p. 83.

[6] See *Angyal*, A magyar büntetőjog kézikönyve. A testi sértés és a közegészség elleni bűntettek és vétségek (Handbook of Hungarian Criminal Law. Causing Bodily Harm and Offences Against Public Health), 1928, p. 100.

[7] This is a worldwide situation, thus "pandemic" is the more widespread expression to use, although when I am analysing the Hungarian regulations, I will use the expression "epidemic", in line with the legal definition of this criminal offence.

also be committed during the epidemic, thus only the most typical statutory definitions raising significant issues of legal interpretation shall be examined here. The recent amendments will be reviewed in a separate point.

1. Violation of epidemic control regulations

This criminal offence can be found in Chapter XXXIV of the Criminal Code, among the criminal offences against the order of public administration. The indirect legal subject of the offence is therefore the social interest relating to the proper functioning of public administration, and the offence is directly harming public health. In terms of our topic, the type of offence under section 361 b) is relevant, which is committed by a person who violates the rules on epidemiological isolation, observation, quarantine or monitoring ordered during the period of an epidemic.

Examining the material side of the offence, it is evident that there is no material object to it. When defining criminal conduct, it must be stressed that the statutory definition is a classic framework disposition, which is therefore filled with content by administrative rules. The main provisions that can be further specified with administrative decisions in practice are contained in the Health Act, beginning with section 56. According to subsection 1 of the cited provision of the Act, the aim of epidemiological activity is to prevent and combat infectious diseases and outbreaks and to enhance the resistance of the human body to infectious diseases. Subsection 2 sets out what kinds of individual and patient rights shall be limited in connection with the epidemiological activity, while subsection 3 lays down that epidemiological measures may be implemented even in the absence of patient consent.

The type of offence under section 361 (b) of the Criminal Code can only be committed at the time of an epidemic. As a result, the regulatory offence of failure to control communicable diseases, under section 239 (1) (a) of Act 2012 of II on Regulatory Offences, Proceedings of Regulatory Offences and the Registration System of Offences (hereinafter: Regulatory Offences Act), could not be established under the present circumstances, but criminal liability should be dealt with automatically. Even so, during the state of danger, the legislator decided to consider this activity as just a regulatory offence.[8]

Epidemiological isolation is governed by sections 63–64 of the Health Act. The essence of the concept is that the patient shall be isolated for the duration of the infection, which may take place in his/her home, at his/her place of residence, or in an infectious disease hospital department.

The rules on epidemiological observation and epidemiological quarantine are governed jointly by sections 65–67 of the Health Act. These measures may be applied to a person who had contact with a person suffering from a particular infectious disease and is presumably in the incubation period of the disease as well. Observation is a less strict form, but the person concerned may still be limited in the exercise of his/her profession, right of contact, and freedom of movement (section 66 [1] of the Health Act). However, quarantine is a stringent observation or isolation based on specific requirements that shall be carried out at a place designated for that purpose (section 67 [1] of the Health Act).

Finally, in the framework of epidemiological monitoring, the person carrying the pathogen may be limited in his/her rights mentioned above. This most lenient form of measures can mean regular medical examination and refraining from visiting educational institutions, etc. (sections 68–69 of the Health Act).

Any variation must comply with the statutory definition of the criminal offence, provided that the restriction was ordered by a person in authority. Thus, violation of a so-called "voluntary home quarantine" shall not constitute an offence.

According to the nature of a framework disposition, the offence may be committed by action or by an omission as well. The violation of epidemic control regulations shall be committed by action if the person "sentenced" to an official quarantine leaves his/her home without permission. It shall constitute an omission if, for example, the person does not see a doctor immediately when more serious symptoms occur.

An attempt, contrary to the findings of those academic works that consider this phase even generally "possible in principle" as regards the criminal offence,[9] is only conceivable in the event of an active version of the offence; however, the occurrence does not seem very common in this case either. Nevertheless, in the event of an omission, as it is an immaterial crime, an attempt shall also be excluded in principle according to the correct interpretation.[10]

Anyone may be the perpetrator of such a criminal offence, thus not only by the person under quarantine but also by a person who enters the home of that person despite the prohibition.

By examining the subjective side, it can be established that the criminal offence may only be committed intentionally. Thus, if someone, for instance, does not know of their epidemiological observation because someone else removed the alert before his/her arrival on-site, by entering the home quarantine then, in the absence of intention, he/she does not commit an offence. The law does not provide for a negligent version, thus if a person has no knowledge of the epidemiological measure taken because he/she fails to exercise the prudence expected of him/her, he/she shall not be held criminally liable. It is conceivable that the solution provided for by the law may require legislative review during a serious epidemic, in terms of the numbers of cases and fatalities, such as the present one.

[8] Hungarian Government Decree 181/2020. (4 May), which came into force on the 7th of May 2020. Also see *Hollán*, MTA Law Working Papers 7 (2020), p. 7.

[9] *Sinku*, in: Belovics/Molnár/Sinku (eds.), Büntetőjog II. Különös Rész (Criminal Law II. Special Part), 2013, p. 598.

[10] *Gellér/Ambrus*, A magyar büntetőjog általános tanai I. (General Doctrines of Hungarian Criminal Law I.), 2nd ed. 2019, p. 363.

In view of the legal consequences, it should be noted that violation of epidemic rules shall be punished with confinement at most, hence on the system level, it is classified among the most lenient offences by the law at present, in contrast to the previous regulation which allowed for imprisonment (or another, more lenient penalty).

It is important to stress that the offence became so frequent that the legislature was forced to decriminalise it for the time of the health crisis, hence the bulk of the acts constitute the regulatory offence of violation of protective measures since 8 June 2020 (section 239/A of the Regulatory Offences Act).

2. Offences against life, physical integrity, and health

Naturally, in relation to the coronavirus epidemic, the basic material offences with a harmful result against life and physical integrity such as causing bodily harm (section 164 of the Criminal Code) and homicide (section 160 of the Criminal Code) cannot be ignored either.

The criminal offence of causing bodily harm can be of importance in relation to the epidemic, since it has a considerably broader meaning under criminal law than in the ordinary sense, as it can be carried out not only by causing bodily harm (e.g., abuse) but also by causing damage to health, i.e., illness. Thus, in a criminal law sense, causing bodily harm may be established, for instance, even if someone in cold weather pushes a victim on the shore, without causing injury, into a lake from which the victim contracts pneumonia due to the freezing water. Furthermore, legal academic writers similarly categorise cases of a sexually transmitted infection with an incurable venereal disease (for example, with HIV virus).[11]

Causing bodily harm is a so-called open statutory definition; therefore, to be met, a result (in our case, a disease) is definitely required. However, the perpetrator can only be held liable for it if a causal relationship[12] can be established between his/her activities and the abovementioned result. This is the case if, without the conduct, the result would not have occurred or would not have occurred in the form in which it finally occurred. The ontological existence of the phenomenon shall be examined on the basis of the so-called conditio sine qua non formula in practice, under which an antecedent cannot be regarded as a cause if, hypothetically eliminated, the result would have occurred in nearly the same form (place, date, method, etc.).[13] It is important that the further joint reasons (e.g., an existing disease, later complications etc.) do not fundamentally eliminate the causal relationship according to case law.[14] However, in its absence, the objective side of the material offence would not exist, therefore the completed criminal offence could not be established either. Thus, according to case-by-case decisions, "in a procedure for causing bodily harm, the lack of a causal relationship between the conduct subject to the prosecution and the occurred result leads to acquittal, regardless of all other circumstances, and it may render the investigation of unlawfulness and subjective guilt unnecessary."[15]

Causing bodily harm that causes a serious illness, i.e., an illness with a therapeutic duration beyond 8 days, may be established in the event of intentional or negligent culpability. However, in criminal proceedings for the complete crime of grievous bodily harm, the investigation of the subjective side, as indicated above, shall take place solely where the causal relationship is established (and only when proved beyond any reasonable doubt in practice).

This should be emphasised in particular since, according to a piece of official information published on the internet warning of the dangers related to coronavirus, "[a person] who is aware of his/her disease (infection) and, although being conscious of this fact, violates the epidemic control regulations commits the felony of causing grievous bodily harm or, if his/her conduct results in the death of another person, the felony of causing bodily harm that causes death".[16]

The cited opinion may be entirely accepted insofar as the completed offence of causing bodily harm may be established on a theoretical/dogmatic basis by the transmission of coronavirus to another person. In the event of a therapeutic duration beyond 8 days, causing grievous bodily harm would be the correct qualification, namely, the felony, i.e., intentionally committed, version of the offence if the perpetrator was aware of his/her disease and desired or foresaw the infection of the victim as a consequence of his/her act (section 7 of the Criminal Code). However, the misdemeanour of causing grievous bodily harm by negligence may be established if the perpetrator recklessly trusted that he/she would not infect another person by his/her act, or if he/she was not aware of his/her illness because he/she failed to exercise the care or prudence expected of him/her (section 8 of the Criminal Code).

What makes it hard to establish the completed offence of causing bodily harm for the transmission of the coronavirus in practice is the establishment of causation, i.e., the problem of proving it. Since the coronavirus spreads by droplets, it can get directly from a sneeze or cough, or indirectly, sticking to a cold of dust floating in the air, into the other persons' body by inhalation.[17] However, its retrospective reconstruction in a criminal procedure may cause considerable difficulties, since, if during the period indicated in the indictment the victim not only met the alleged perpetrator, who left home quarantine without permission and intending to transmit the coronavirus to the victim but someone else too, it may arise immediately that, in fact, he/she was not infected by the suspect but by someone else. This may be a particularly well-

[11] See *Bittmann*, Österreichische Juristen-Zeitung 1987, 486.
[12] *Gellér/Ambrus* (fn. 10), p. 219–227. Also see *Ashworth*, Principles of Criminal Law, 2nd ed. 1995, p. 118–132, and *Allen*, Criminal Law, 14th ed. 2017, p. 48–69.
[13] See *Györgyi*, Jogtudományi Közlöny 23 (1968), 369.
[14] 3/2013. BJE I/5., BH 1993. 7., BH 2002. 169.
[15] BH 2008. 321.
[16] http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/kozrendvedelem/a-hatosagok-tovabbra-is-szamitanak-az (17.6.2021).
[17] See *Skolnik*, Manitoba Law Journal 43 (2020), 154.

founded defence during a mass epidemic, where anyone can be, even unknowingly, a virus carrier. The same situation may arise if the victim did not meet anybody or did not even leave his/her home, but a plastic object, exposed to the virus in the previous three days, was already there and from it the pathogen could have entered his/her body. In the case of droplet diseases, the possibilities are endless.

Under section 7 (4) of Act XC of 2017 on Criminal Proceedings (hereinafter: CP), facts not proven beyond reasonable doubt may not be admitted to the detriment of the defendant. Hence, it is likely that, even if a criminal procedure were to be initiated for the completed offence of causing bodily harm based on suspicion of infecting with coronavirus, the public prosecutor or the police authority would have no choice in many cases but to terminate the procedure under section 398 (1) (c) of the CP according to the doctrine of in dubio pro reo, as the commission of the criminal offence could not be established by way of evidence.

According to these facts, criminal liability for the completed offence of causing bodily harm could be established in such an extreme situation where the perpetrator and the victim were separated from any other person (for example, locked in a previously disinfected room) and it could be proved that the perpetrator was already a virus carrier while the victim was healthy when they entered the room, and the virus was not even lurking in his/her body. Later, when they would appear again, after more than 3 days, the victim's coronavirus test would also have to show a positive result.

For causing bodily harm by gross negligence (that is, when the commission of the conduct is in itself due to negligence), the above reasoning shall be applicable without exception; therefore, due to difficulties in proving the causal link in practice, the establishment of criminal liability is highly unlikely. However, the situation is different in relation to intentional conduct, not only in the completed form but also the attempt of an intentional criminal offence; moreover, the preparation of the offence of causing grievous bodily harm, shall be punishable by the law. In relation to attempting (section 10 of the Criminal Code) to cause grievous bodily harm, the statutory element of the offence is missing or it cannot be proved that it was caused by the perpetrator's conduct. In the case of preparation (section 11 of the Criminal Code), the perpetrator does not even begin to committ the crime; he/she only provides the necessary conditions for its commission.

Thus, attempting the felony of causing grievous bodily harm can be established, for instance, if the perpetrator infected by coronavirus leaves the officially ordered quarantine with the direct intent to infect his/her enemy, then visiting the victim he/she coughs on the victim or his/her household objects, maybe smuggles an object into the victim's apartment on which he/she intentionally applied the virus previously (for example with saliva). This may be the case if:

(a) the victim does not get the virus at all;
(b) although the victim gets the virus due to the act of the perpetrator, he/she stays asymptomatic;
(c) the victim gets the virus due to the act of the perpetrator and has symptoms as well, but he/she does not develop a disease that remains beyond 8 days;
(d) the victim does not get, or it is not established that he/she gets, the virus from the perpetrator but stays asymptomatic;
(e) the victim does not get, or it is not established that he/she gets, the virus from the perpetrator, has symptoms, but he/she does not develop a disease that remains beyond 8 days;
(f) the victim does not get, or it is not established that he/she gets, the virus from the perpetrator and develops a disease that remains beyond 8 days.

The reason for case (f) is that due to the lack of causation or proof thereof, the establishment of the completed intentional offence of causing grievous bodily harm fails, but attempting to cause bodily harm, in terms of intent, can also be established in this case. This case can also be explained by the doctrine of novus actus interveniens (breaking the chain of causation).[18]

In the same way, the offence may be committed not only with direct but also with indirect intent, for instance, when the perpetrator, infected with coronavirus and having persistent symptoms, leaves quarantine deliberately without any protective equipment (e.g., mask, gloves) to visit a shop, not necessary for sustenance, where he/she sneezes at another customer. In this case, the perpetrator does not desire, but under the circumstances, acquiesces to the fact that others can receive the infection from him/her. However, in relation to the said example, it may arise that sneezing, in contrast to purposeful coughing directed at the victim, in itself shall not be regarded as an *act* in a criminal law sense, that is effective and wilful human conduct. This is because it would be quite challenging to explain the wilful nature of a sneeze. This may not mean escape from criminal liability, as the perpetrator by leaving the apartment ordered as the place of residence, against his/her apparent symptoms, without any protective equipment, essentially committed blameworthy conduct by which he/she put him-/herself in a position that later had a dangerous consequence for society. In this case, the criminal offence shall not be established upon the culpability existing at the time of sneezing (which is not really an act in a criminal law sense, as we have seen), but upon the culpability existing at the time of leaving the apartment (which is beyond doubt an act) according to the doctrine, actio libera is causa.

Furthermore, the case may be classified in relation to offences as a mixed form of guilt. Basically, liability due to an attempt can be dismissed. In the case of the simple type of a criminal offence with a mixed form of guilt, it shares the legal status of negligent delicts, therefore an attempt can be excluded under the law. If a result, constituting a qualifying circumstance, that is covered by the perpetrator's negligence, occurs, as, for example, in relation to causing bodily harm that causes death mentioned in the above call of the authorities, an attempt can also be excluded according to legal litera-

[18] *Gellér/Ambrus* (fn. 10), p. 223.

ture, since the result governed by the law as a qualifying circumstance is based on the result of the simple type of the offence.

In relation to the stage of attempt, it must be highlighted that it may qualify if committed via an unsuitable object (section 10 [3] of the Criminal Code). On the one hand, many people do not get the COVID-19 infection, or if they get it, they stay asymptomatic. Hence, in relation to a person with an outstanding immune system, it may occur that he/she was not a suitable passive subject of the offence of causing bodily harm in concreto. On the other hand, it is possible that the attempt may be committed in relation to a person who previously contracted the coronavirus, thus, at least according to the present state of research, he/she cannot be infected again. However, this may not preclude the establishment of criminal liability but merely gives the court further opportunity to reduce the punishment without limitation or not to impose any penalty. It has to be noted that recent case law inclines to rob the concept of the attempt made on an unsuitable object,[19] which, since it is a category of the stage doctrine expressly laid down by the legislature, should nevertheless be avoided according to the correct theoretical interpretation.[20]

For the sake of completeness, I note that, in the case of causation between COVID-19 transmitted by droplet infection and the death of the victim then, according to the position of cited authority, not only the offence of causing bodily harm that causes death but even intentional homicide may be established, provided that the perpetrator coughs on the victim with the a priori intent of desiring his/her death. Although, in the majority of such cases, it is not only difficult to prove the causation, but it can also be controversial on a dogmatic basis under the doctrine of adequate causation, since, in relation to coughing, death as a possible consequence would only occur to a few, not even among medical practitioners. The situation may be different in the case of a victim suffering from serious diseases, therefore having a fragile immune system, a circumstance known to the perpetrator as well. Thus, if the coronavirus-infected but young, vigorous, therefore asymptomatic perpetrator, desiring the death of the seriously ill elderly victim, introduces the virus to his/her body by coughing or otherwise, the offence of intentional homicide (or even a qualified case of it, such as base purpose, for example with the motive of acquiring an inheritance) may already be established.

Homicide, similarly to causing bodily harm, is an open statutory definition, hence it may be committed by omission, in relation to which the same rules apply during an epidemic as otherwise. I will therefore dispense with their detailed presentation by observing that news of elderly, ill persons left alone and found dead has been already received from Spain.[21] Such a case under Hungarian criminal law, in relation to relatives or even nurses, shall be evaluated as homicide by omission.

From the relevant chapter of the Criminal Code the establishment of endangering by professional misconduct may occur in relation to medical professionals (section 165 of the Criminal Code). The simple type of this offence does not require a harmful but only a directly dangerous result.[22] Thus, there is no need for an evidential procedure on causation between the act of the perpetrator and the serious illness or death, etc. of the victim. On the material side, it is enough to demonstrate in the criminal proceedings that the perpetrator and the victim came into direct personal contact (for example, during an operation or other treatment), and a realistic possibility to transmit coronavirus was created. However, for the establishment of criminal liability, on the subjective side, it is essential that the misconduct should be intentional/negligent. Indeed, if the perpetrator, in the absence of symptoms and tests, is unaware of the fact that he/she caught the disease, he/she naturally may not be punished due to his/her innocence.

Nevertheless, another option in relation to the coronavirus epidemic, would be failure to assist (section 166 of the Criminal Code) and failure to comply with the obligation to provide care (section 167 of the Criminal Code) from Chapter XV of the Criminal Code. The former offence may be imposed on any layperson who fails to provide the assistance expected of him/her to a person in need of immediate hospital care due to his/her symptoms caused by the virus. A failure to meet an obligation to provide care can be committed against an adult victim in need of care typically by his/her relatives, provided that only a dangerous result occurred. In relation to a minor, the same act may be punished as endangering a minor laid down in Chapter XX of the Criminal Code (section 208 [1] of the Criminal Code).

3. Offences against public peace

Of course, much news is published about coronavirus, and it is hard to decide, at the time of its release, how accurate it is. Whether real or even fake news (hoax), it can disturb people's peace of mind in an extraordinary way, which may indirectly impede epidemic control efforts as well. In light of the above, the timely detection and evaluation of such offences is also an overriding social interest during the coronavirus epidemic. Under this heading, two offences, namely fearmongering (section 337 of the Criminal Code) and threatening with public danger (section 338 of the Criminal Code),

[19] To the old (and from a theoretical point of view still correct) solution see BH 1978. 266., for the new opinion of the Hungarian Supreme Court see EBH 2012. B.4.

[20] *Gellér/Ambrus* (fn. 10), p. 367–369. Also see *Wörner*, Der fehlgeschlagene Versuch zwischen Tatplan und Rücktrittshorizont (Unsuitable Attempt Between the Plan of Action and the Possibility of Abandonment), 2010.

[21] *González/Troya*, El País from 23.3.2020, https://elpais.com/sociedad/2020-03-23/el-ejercito-halla-cadaveres-de-ancianos-en-residencias-de-mayores.html (17.6.2021)

[22] Hungarian criminal law distinguishes between abstract, indirect and direct types of danger. The cause of the direct danger is closest to the harmful result, but even that does not necessarily mean that an injury has occurred, see *Gellér/Ambrus* (fn. 10), p. 216–219.

may be of decisive relevance. The definition of fearmongering was, as we will see, even modified by the legislature as a result of COVID-19.

Naturally, fearmongering occurs much less frequently in "peacetime" than in a state of danger. However, from the beginning of the epidemic until 15 July 2020, 134 criminal proceedings were initiated for this criminal offence in Hungary.[23]

The statutory elements of the original wording of fearmongering are the commission at a site of public danger on the one hand and before a large audience on the other. The former means an objective situation where one or more non-specified or a larger number of specified persons or things of considerable value may be endangered.[24] The latter is manifested before a non-specified larger number of persons who are present at the time of commission, the number of which cannot be determined by a simple glance, or there is a possibility (for example, due to the constant change of the persons who are present) that a larger or non-predetermined number of persons become aware of the statement.[25] Furthermore, under section 459 (1) (22) of the Criminal Code, a large audience also means that a criminal offence is committed through a media product, media service, reproduction, or publication on an electronic communications network (for example, on the internet).

When these two cumulative statutory elements are present, fearmongering may be committed not only by the claim or dissemination of any untruthful fact but also by distortion of any truthful fact (misrepresentation). The misrepresentation of any truthful fact not only means the shocking, sensationalised presentation of facts; in order to establish it, the perpetrator must combine originally true facts with untruthful elements, in which way they reach the level of an untrue statement in their overall impact.

For example, a young man edited an article from a news agency on his computer on the evening of 17 March 2020, using the agency's headline, and in fact claimed that a hospital chief doctor said there was an "epicentre" of the coronavirus in a neighbouring town, Balassagyarmat. According to the forged article, a severely infected man arrived at the hospital from the village of Érsekvadkert, so whoever was around him was most likely infected. The perpetrator sent the hoax on his phone to one of his friends, who forwarded it in good faith to his acquaintances, thus the untrue information soon spead over the internet. The only true part of the claim was that an infected person was actually treated at that hospital, but it reached the level of a completely false claim due to the false additions.[26]

In is important to emphasize that "[the] statement or dissemination of true facts may not constitute a crime, even if it is capable of causing disturbance or unrest in a larger group of persons at a site of public danger".[27]

There is a further condition that the statement (own pronouncement) or dissemination (transmission of a statement received from another person, for example, on Facebook by the use of the "share" button) must be capable of causing disturbance or unrest in a larger group of people. Hence, the statutory definition covers something that is dangerous in the abstract; the actual occurrence of disturbance or unrest need not be investigated in the criminal proceedings; the potential of the act is sufficient, and this is already subject to judicial discretion.

At the time of the coronavirus epidemic, the most decisive factor is the applicability of the site of public danger. Since such an interpretation may arise according to which, subject to the announcement of the state of danger, the whole of Hungary is a site of danger, until its termination, the statutory element therefore does not require further assessment and proof. However, according to the correct interpretation, this cannot be stated, because the site of danger is a specific situational element where a dangerous situation has or may occur, which displays the unity of place and time. Thus, in my opinion, in abstracto, all parts of the whole country in general may not be regarded as a site of public danger, not even at present, as it must always be examined in concreto. A place considered to be a focal point in terms of a viral infection, for example, the building of a hospital treating persons with respiratory diseases, may be regarded as a site of danger, while a large park or sports field that has been abandoned for days may not.

In response to the COVID-19 situation, the statutory definition of fearmongering has been amended with effect from 31 March 2020, and it may now be committed not only at a site of public danger (punishment: 3 months–3 years of imprisonment) but also during the period of a special legal order (that is, during the state of danger in Hungary from 11 March to 18 June 2020, punishment: 1–5 years of imprisonment).[28] This amendment was heavily criticised since, according to some views, the criminal offence could also be committed by spreading true facts during the state of danger. The Constitutional Court therefore examined the new regulation and, in its Decision 15/2020. (VII. 18.) AB ruled that the new criminal law regulations on fearmongering, to be applied during a special legal order, are not in conflict with the Fundamental Law. At the same time, the decision established as a constitutional requirement that the provision on the offence of fearmongering only sanctions the disclosure of a fact which that the perpetrator should have known was false at the time the act was committed or which was distorted by the perpetrator himself, and which is capable of preventing or frustrating civil defence during the special legal order. In its decision,

[23] koronavirus.gov.hu from 15.7.2020, https://koronavirus.gov.hu/cikkek/az-uj-koronavirus-helyzettel-osszefuggo-buntetougyek-statisztikai (17.6.2021).
[24] BH 1988. 304.
[25] BH 1983. 108.
[26] The perpetrator was finally sentenced to suspended imprisonment by the Municipal Court of Balassagyarmat. See https://jogaszvilag.hu/napi/eliteltek-egy-ferfit-alhirterjesztes-miatt/ (17.6.2021).
[27] *Belovics*, in: Belovics/Molnár/Sinku (fn. 9), p. 543.
[28] Thus, this new solution of the Criminal Code is an example for expansion of criminal law. See *Silva Sánchez*, Goltdammer's Archiv für Strafrecht 2010, 307.

the Constitutional Court found that fearmongering, according to the disputed statutory provision, concerns a narrow scope of communications: it prohibits the communication to the general public of knowingly false or distorted facts, but only if it is performed during the period of special legal order, in a manner capable of hindering civil defence. However, the prohibition is only applicable to stating knowingly false or distorted facts; it does not apply to critical opinions. The threat under criminal law therefore does not extend to facts, the untrue nature of which the perpetrator was unaware of. If, on the other hand, someone states knowingly false facts that could hinder civil defence, it is necessary and proportionate to restrict freedom of expression on the basis of the public interest in defence. In my opinion, this decision was correct since a state of danger, for example, is an absolutely rare and special situation where intimidating other citizens can represent such a high danger for society to consider it as a criminal offence. The Constitutional Court also interpreted criminal liability for fearmongering in a restrictive way that is not against the principle of nullum crimen sine lege.[29]

Threatening public danger, which is also called "bomb alert" in ordinary talk, is a criminal offence that not only occurs in specific but also in ordinary situations. From the beginning of the epidemic, until 15 July 2020, 29 criminal proceedings had been initiated for this criminal offence.[30] Threatening with public danger, in contrast to fearmongering, may only be committed by the statement of inherently untrue facts capable of disturbing public peace. There has been a debate in judicial practice in recent years on the issue of whether, in the event of a false report to governmental authorities and the threat (claim) relating to it, this criminal offence or the offence of threatening to commit a terrorist act (section 316 of the Criminal Code), which is punishable by a significantly more severe penalty, may be established. The matter has been decided by the case law:[31] that only a concrete, serious threat provides a basis for the offence of threatening to commit a terrorist act, which requires the specific commission of the felony of a terrorist act. Threatening to explode a bomb placed in a building that is visited by a large number of people if the perpetrator did not place explosives in the building and does not even possess any, may be capable of establishing the misdemeanour of threatening public danger. However, this opinion of the court is highly debatable, since the statutory definition of threatening to commit a terrorist act does not require the mentioned criterion.

4. Offences against property

In relation to criminal offences against property (Chapter XXXVI of the Criminal Code), given that commission at a site of public danger analysed in the previous point has been regulated as a qualifying circumstance, theft (section 370 of the Criminal Code), embezzlement (section 372 of the Criminal Code) and fraud (section 373 of the Criminal Code) may require particular attention.

Naturally, in terms of our topic, a detailed analysis of these criminal offences is unnecessary; therefore, with regard to the commission at a site of public danger, I would point out on the one hand that the same may also apply here as mentioned above in connection with fearmongering, hence the existence of this qualifying circumstance must always be examined in concreto. In case of delicts against property, a careful assessment is also significant, as committing an offence below a statutory value (not exceeding HUF 50,000, c. EUR 140) shall constitute a regulatory offence (against real property, section 177 of the Regulatory Offences Act) or a criminal offence if it is committed at a site of public danger. As such if the theft is referred to an administrative authority where this circumstance may occur, it is necessary to refer the case to an organ of the criminal justice system without delay.

It is relevant to recall, in relation to the evaluation of theft, the debate at the time of the snowstorm in Hungary in March 2013. Although metres of snow fell over almost the entire territory of the country at that time, under the correct interpretation, Hungary could not automatically be regarded as a site of public danger; only those specifically defined areas, at that time, where and when the victims could not proceed with their vehicles due to the massive snowdrifts left uncleared, therefore they left their cars behind, which were later pillaged by thieves. Nevertheless, this situation also brought the legislature to action, as it led to the amendment of the Criminal Code by Act XLV of 2013 on imposing stricter penalties for theft committed at a site of public danger. Unfortunately, it can be expected that this qualified type of theft will be invoked increasingly frequently during the state of danger.

In my opinion, embezzlement may occur less frequently at a site of public danger, however, it cannot be discounted that the victim, for example, because he/she wants to take his/her children home, entrusts his/her property to an acquaintance passing by, who later appropriates it.

In connection with fraud, the possible establishment of its qualifying circumstance is not only relevant, but also the deplorable situation that those criminal circles trying to benefit from the frightened population are already active since the declaration of the state of danger. For instance, according to the information provided by the prosecution service dated 23 March 2020, the Siófok District Prosecution Office made a motion in criminal proceedings, initiated for the attempt of fraud causing greater damage, to arrest a woman who wanted to cheat an entrepreneur out of five million forints by stating that their employees must be vaccinated and their premises must be disinfected.[32] Naturally, in doctrinal terms, this repulsive act qualifies as "simple" fraud based on the damage caused (or in a favourable case, if the criminal offence was

[29] See *Gropp*, Strafrecht, Allgemeiner Teil (The General Part of Criminal Law), 4th ed. 2015, p. 598, p. 101.
[30] koronavirus.gov.hu from 15.7.2020, https://koronavirus.gov.hu/cikkek/az-uj-koronavirus-helyzettel-osszefuggo-buntetougyek-statisztikai (17.6.2021)
[31] EBD 2012. B.14.
[32] Magyarország Ügyészsége from 23.3.2020, http://ugyeszseg.hu/letartoztatasban-a-koronavirus-ellenivakcinara-hivatkozo-csalard-no/ (17.6.2021).

simply at the stage of an attempt, the damage it intended to cause). By imposing the penalty, it shall undoubtedly be assessed by the court as an extremely strong aggravating circumstance that the perpetrator wanted to benefit by taking advantage of the vulnerable situation of the victims due to the epidemic.

5. Offences damaging the budget

The problem, raised by a popular Hungarian online newspaper in the article "Going to be the country of defrauders of sickness benefit?", published on 20 March 2020, is that numerous employees claimed sickness benefit from their general practitioner, without actually being sick, as they were afraid to go into the workplace due to the virus.[33] In the criminal assessment of such cases, committed under an employment relationship, attention must be paid to the fact that, under section 126 (1) of Act I of 2012 on the Labour Code (hereinafter: LC), the employer grants 15 working days sick-leave to each employee per calendar year for their period of inability to work. For this period, under section 146 (4) of the LC, the employee receives 70 % of their basic wage, which is still paid by the employer. In such cases, therefore, it is not a criminal offence damaging the budget, but plain fraud that can be established against the employee claiming sick leave but actually being healthy. However, from the 16th working day onwards, it is no longer a benefit under the LC but sickness benefit, under section 43 (1) of Act LXXXIII of 1997 on the Services of the Compulsory Health Insurance System (hereinafter: HIA), that is granted in the event of inability to work, the amount of which is, as a general rule, 60 % of the sickness benefit base under section 48 (7) (a) of the HIA. Nevertheless, sickness benefit is no longer paid by the employer but basically by the state, hence its improper use may constitute an abuse of social security, social or other welfare benefits (section 395 of the Criminal Code) in the case of an amount between HUF 50,000 and 500,000, but above HUF 500,000 it constitutes budget fraud (section 396 of the Criminal Code).[34] The social expectation of refraining from committing these criminal offences, of course, significantly decreased due to the state of danger. However, establishing a ground for immunity, such as necessity (section 23 of the Criminal Code), is out of the question since there was so far no imminent danger that could not be averted by any other means. If this situation would amount to extraordinary levels, it is possible that mass criminal prosecutions could be offset by extraordinary measures (for example, by amnesty).

6. Offences against a military obligation

Temporary civil defence service may be ordered under section 51 (1) of Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts (hereinafter: DMA). This could take place in a state of danger under section 57 (3) of the DMA for the obliged person assigned to a civil defence organisation occasionally for up to 15 days. The criminal law aspect of such a situation is the violation of a civil defence obligation (section 429 of the Criminal Code). The criminal offence can be committed clearly by omission by a failure to comply with the duties prescribed in the framework of civil defence service; for example, if a healthcare professional would refuse to work during temporary civil defence service. This criminal offence may also be committed by negligence. Section 433 (2) expressly highlights that the criminal offence of violation of civil defence obligations may also be committed during a state of danger.

IV. Conclusion

This article has presented the most important issues that can be raised in Hungarian substantive criminal law arising from the COVID-19 epidemic.

Based on the historical background, we can state that written Hungarian criminal law has regulated epidemic violations since 1880, although a higher level of abstraction, regulating the acts concerned in the framework of a consistent statutory definition, was only enacted in 1961.

At the beginning of the COVID-19 pandemic, the violation of epidemic regulations (e.g. leaving the official quarantine) was regulated as a criminal offence, but these activities became so frequent that the legislature was soon forced to decriminalise this crime for the duration of the epidemic, hence the bulk of the acts have been categorised as only regulatory offences since 8 June 2020.

In a case of allegedly causing bodily harm, it is quite a hard task to prove causation, since the coronavirus mostly spreads by droplets. However, the situation is different in relation to an attempted criminal offence, where criminal liability can be established if e.g. an infected perpetrator coughs on the victim with an intent to cause illness.

In the field of offences against public peace I dealt in detail with fearmongering and threatening with public danger. It is important to stress that fearmongering may be committed not only by the claim or dissemination of any untruthful fact but also by distortion of any truthful fact (misrepresentation) at a site of public danger, which element should be always examined in concreto. In response to the COVID-19 situation, the statutory definition of fearmongering has been amended, hence it can also be committed during the period of a special legal order such as a state of danger. The new regulation was examined by the Constitutional Court, which ruled that the new criminal law regulations on fearmongering are not in conflict with the Fundamental Law.

Naturally, de lege ferenda, future legislation is also subject to statistics on the spread of the virus. For example, reactivating the criminal offence of price gouging, formerly known in Hungarian criminal law, might be conceivable if masks, tests, or later vaccines, the price of which was fixed by the government but were in short supply were on sale at a higher price.[35] The criminalization of the omission of protec-

[33] *Joó*, hvg.hu from 20.3.2020, https://hvg.hu/itthon/20200320_tappenz_haziorvos_koronavirus (17.6.2021)

[34] See *Tóth*, MTA Law Working Papers 2 (2015), 18 et seq.

[35] See *Gál*, Journal of Eastern-European Criminal Law 7 (2020), 165.

tive measures constituting a regulatory offence currently (e.g., wearing a mask) may also arise. In this regard, a new ground of justification can also be envisaged in order to declare immunity for those persons who would use force to persuade persons not complying with the rules to do so, etc.

Finally we can state that the COVID-19 pandemic represents a significant detriment in the life of the whole of society, since, in order to protect lives and health, we have to give up several activities that seemed natural in the past; we could even exercise our right to free movement in a very limited form during the state of danger. We can only hope to endure the period until an efficient vaccine is available for the whole society to protect against the virus with the lowest possible human sacrifice. Until then, we have to be prepared for this extraordinary situation to last for a longer time, which means, obviously, a recession for the economy. This circumstance, for instance, due to the loss of a number of jobs, may have criminogenic effects as well.[36] Thus, after the positive crime trend of recent years, it unfortunately cannot be ruled out that the number of criminal offences will increase again due to the global crisis. Law enforcement authorities and participants in criminal justice must also take such a scenario into account. However, at present, the main tasks are to minimise losses, cure those who have the disease, and slow down the spread of the epidemic. Naturally, in addition to the priority of all these goals, the application of criminal law can only play a complementary role. At the same time, as set out in this study, a number of criminal law issues may arise during the pandemic, as action must be taken against infringements without any delay. Such activities, if they succeed, may also facilitate the achievement of the primary goals listed. It is in the common interest of all of us that this should be so.

[36] See *Peršak*, European Journal of Crime, Criminal Law and Criminal Justice 28 (2020), 214.