

PREVENTING THE SPREAD OF THE COVID-19 DISEASE: CRIMINAL LAW ASPECT

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Abstract. *The outbreak of the contagious disease COVID-19 has led to major changes in everyday life. There is almost no segment of life and work that has not been affected. In this context, the paper analyzes the criminal law aspect of preventing the spread of COVID-19 in the Republic of Serbia, by presenting two criminal offences whose incrimination is important for pandemic control: Failure to comply with the Health Regulations during an Epidemic (Article 248 CC) and Transmitting a Contagious Disease (Article 249 CC). The work of judicial bodies during the pandemic will be presented and analyzed with reference to the statistical data issued by the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first pandemic year (2020). The statistical data will provide a clear insight into the phenomenological characteristics of this form of crime in Serbia, which will enable the formulation of recommendations for improving the response of the criminal justice system de lege ferenda.*

Key words: *COVID-19, criminal law, Failure to act pursuant to health regulations during a epidemic, Transmission of a contagious disease*

1. INTRODUCTION

The outbreak of the contagious disease COVID-19, caused by the SARS CoV2 virus, was declared a global pandemic by the World Health Organization (WHO) on 11 March 2020. This public health emergency led to major changes in everyday life (Bradbury-Jones, 2020: 2047). Lockdown measures were introduced worldwide to prevent the spread of the disease (Halford, Dixon, Farrell, Malleson, Tilley, 2020: 1). There is almost no segment of human life and work that has not been affected by the ongoing pandemic. In the context of human health protection, the paper will analyze the criminal law aspect of preventing the spread of the contagious disease COVID-19 in the Republic of Serbia, by presenting two

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criminal offences envisaged in the Criminal Code of the Republic of Serbia (hereinafter: CC RS)¹ whose incrimination has been important for suppression of the pandemic: Failure to Act pursuant to Health Regulations during an Epidemic (Article 248 CC RS) and Transmitting a Contagious Disease (Article 249 CC RS). The work of judicial authorities during the pandemic will be presented with reference to the statistical data issued by the Statistics Office of the Republic of Serbia concerning the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first year of the pandemic (2020). The statistical data will provide a clear insight into the phenomenological characteristics of this form of crime in the Republic of Serbia, which will facilitate the formulation of recommendations for improving the reaction of the criminal justice system in the conditions of the pandemic.

The paper is divided into several parts. In the first part, the author presents and analyzes the basic characteristics of the two criminal offences provided in the Serbian Criminal Code (CC) which are relevant for preventing the spread of the contagious disease COVID-19: Failure to Act pursuant to Health Regulations during an Epidemic (Article 248 CC) and Transmitting a Contagious Disease (Article 249 CC). The second part of the paper presents the phenomenological characteristics of these criminal offences, with specific reference to the statistical data of the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first year of the pandemic (2020). On these grounds, the author draws conclusions and makes recommendations for improving the response of the criminal justice system in prospective pandemics.

2. THE NORMATIVE FRAMEWORK FOR PREVENTING THE SPREAD OF THE CONTAGIOUS DISEASE COVID 19: CRIMINAL LAW ASPECT

The Criminal Code of the Republic of Serbia (CC RS) prescribes two criminal offences which are relevant in terms of preventing the spread of the contagious disease COVID-19: Failure to Act pursuant to Health Regulations during an Epidemic (Art 248 CC) and Transmitting a Contagious Disease (Article 249 CC).

These two criminal offenses fall into the group of criminal offenses against human health, envisaged in Chapter 23 (Offences against Human Health, Articles 246-259)² of the Criminal Code. The object of protection in these two criminal offences is people's health, and the consequence can occur in the form of endangerment (concrete or abstract danger) or injury (e.g., the spread of a contagious disease). It refers both to the commission of these criminal offences and omission to act in compliance with the prescribed legislative or regulatory acts governing public health. Any natural person or legal entity (the authorized person in a state body, company or organization responsible for implementing the prescribed protection measures) can be the perpetrator of these criminal offences (Jovašević, 2006a: 155-156).

Article 248 of the Serbian Criminal Code regulates the criminal offense of Failure to Act pursuant to Health Regulations during an Epidemic, which reads as follows: “*Whoever,*

¹ Criminal Code of the Republic of Serbia, *Official Gazette*, no. 85/2005, 85/2005-corr., 107/2005-corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019; English version available at: https://www.mpravde.gov.rs/files/Criminal%20%20Code_2019.pdf

² For more on criminal offences against public health, see: Nikolić-Ristanović, Konstantinović-Vilić, 2018:94.

*during an epidemic of a dangerous contagious disease, fails to act pursuant to regulations, decision or orders setting forth measure for suppression or prevention thereof shall be punished by a fine or a term of imprisonment of for up to three years” (Article 248 CC RS). Therefore, the offense envisages penalties for inobservance of and non-compliance with the legal provisions, decisions or orders that stipulate relevant measures for suppression or prevention of contagious diseases and epidemics. In nature, this is a criminal offence with a blanket disposition, whose elements are prescribed in subject-specific health care legislative acts. In terms of the essential elements of crime, it is a deliberate offence which entails proving intent (*dolus*) (Lazarević, 2006: 658).*

Article 249 of the Criminal Code prescribes the criminal offense of Transmitting Contagious Diseases, specifying that “whoever fails to act pursuant to regulations, decisions or orders for suppression or prevention of contagious disease”, as a result of which “a contagious disease is transmitted, shall be punished by imprisonment of up to three years”(Article 249 CC RS). Therefore, the offence again refers to inobservance of and non-compliance with the prescribed legal provisions, decisions or orders for the suppression or prevention of contagious diseases. The object of protection in this criminal offense are measures for the suppression or prevention of contagious diseases. It is a blanket criminal offense, whose elements are prescribed in subject-specific health care legislative acts. An essential element proving the commission of this offence is the actual spread (transmission) of the contagious disease. The essential element in establishing the perpetrator’s guilt (culpability) is intent (Jovašević, 2006 b:565).

In some neighboring countries we may observe somewhat different and more elaborate legal solutions on this issue. In the Criminal Code of Republika Srpska (hereinafter: CC RepS),³ the provisions on public health are envisaged in Chapter 21 (Articles 194-208 CC RepS). Under Article 194(1) of the CC RepS, the criminal offense of Transmitting a Contagious Disease is committed by a person who does not comply with the regulations or ordinances by which a competent authority prescribes medical examinations, disinfection, isolation (quarantine) of patients or some other measures for suppressing or preventing contagious diseases in humans, and thus causes the transmission of an contagious disease, shall be punished by a fine or a term of imprisonment not exceeding two years. The same penalty shall be imposed on persons who fail to abide by the regulations or orders pertaining to the suppression or prevention of contagious diseases in animals which can be transmitted to humans (Article 194(2) CC RepS). If an incurable contagious disease is transmitted as a result of the criminal offences referred to in Article 194(1), the perpetrator will be punished by a term of imprisonment ranging between one and ten years (Article 194(3) CC RepS). If the criminal offences referred to in Article 194(1) and (2) have been committed out of negligence, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding six months. If the criminal offences referred to Article 194(1), (2) and (4) have resulted in a grievous bodily injury or a serious impairment of health of one or more persons, the perpetrator shall be punished by a term of imprisonment ranging between one and eight years for criminal offences referred to in Article 194(1) and (2), and by a term of imprisonment not exceeding three years for a criminal offense referred to in Article 194(4). If the criminal offences referred to in Article 194 (paragraphs 1 through 4) have resulted in the death of one or more persons, the perpetrator shall be punished by a

³ Criminal Code of Republic of Srpska, *Official Gazette of Republika Srpska*, br. 64/2017, 104/2018-CC Decision, 15/2021, 89/2021; available at http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/New2019/RSCC_64-17.pdf

term of imprisonment ranging between two and twelve years for criminal offences referred to in Article 194 (1) and (2), by a term of imprisonment ranging between two and fifteen years for the offence referred to in Article 194(3), and by a term of imprisonment ranging between one and eight years for the criminal offence referred to in Article 194(4). (Article 194 (5) CC RepS).

When compared to the Criminal Code of Republic of Serbia (CC RS), the criminal offense of Transmitting a Contagious Disease is more thoroughly defined in the Criminal Code of Republika Srpska (CC RepS), including a wider range of penalties reflecting different degrees of culpability. Notably, Article 194(4) CC RepS envisages that the criminal offence of transmitting a contagious disease may also be committed negligently (without intent).

Article 195 of the CC RepS envisages the criminal offence of Failure to comply with Sanitary Regulations during an Epidemic. Thus, during an epidemic of a contagious disease in humans, any person who fails to comply by the regulations, ordinances and decisions which order measures for its suppression or prevention, shall be punished by a fine or a term of imprisonment not exceeding two years (Article 195(1) CC RepS). The same punishment shall be imposed against anyone who, at the time of an epidemic of a contagious animal disease transmissible to humans, fails to abide by the regulations, ordinances and decisions ordering measures for its suppression or prevention (Article 195(2) CC RepS). If the offences referred to in Article 195(1) and (2) have been committed out of negligence, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding one year (Article 195(3) CC RepS).

Article 196 of the CC RepS envisages the criminal offence of Failure to Apply Measures for Prevention of Contagious Diseases Article, which particularly refers to institutions and authorized person in hospitals, maternity wards, boarding schools, schools, companies and other organizations, cleaning and foodstuff handling services. Any person in these institutions, acting in contravention of sanitary regulations, who fails to apply hygienic measures or employs or keeps employed a person suffering from a contagious disease, and thus causes the transmission of a contagious disease, shall be punished by a fine or a term of imprisonment not exceeding one year (Article 196(1) CC RepS). If the offense referred to in Article 196 (1) has been committed negligently, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding six months (Article 196(2) CC RepS). In case the offences referred to in Article 196(1) and (2) have resulted in a grievous bodily injury or a serious impairment of health of one or more persons, the offender shall be punished by a term of imprisonment ranging between 1 and 5 years for the offences referred to in Article 196(1) and a term of imprisonment not exceeding 3 years for the offence referred to in Article 196(2) (Article 196(3) CC RepS). In case the offences referred to in Article 196 (1) and (2) have resulted in the death of one or more persons, the perpetrator shall be punished by a term of imprisonment ranging between 2 and 12 years for the criminal offence referred to in Article 196(1) and for a term of imprisonment ranging between 1 and 8 years for the offence referred to Article 196(2) (Article 196(4) CC RepS).

Therefore, we may observe that these legal provisions of the CC RepS envisage the possibility of negligent commission of the prescribed criminal offences. *Prima facie*, this legal solution seems to be useful because it regulates a wider range of illegal activities which are sanctioned by criminal legislation. However, a question arises whether it is really justified in terms of the relationship between these criminal law provisions and the misdemeanor law provisions in the area of human health protection. This legal issue was

particularly important during the COVID-19 pandemic. As noted by Šikman and Bajičić (2021), strict application of these criminal law provisions would be ineffective; considering the extent of non-compliance with the prescribed measures for suppression or prevention of the Corona virus epidemic, it would only result in people's resistance and lead to massive violations of the prescribed measures. For instance, "if we look at the application of two basic prevention measures (the mandatory wearing of masks and keeping physical distance), we may observe that the prescribed measures were either not applied or were applied in the wrong way (e.g. wearing a mask under the chin). If all these forms of behaviour were covered in the prescribed criminal offences, the fragmentary character of criminal law would definitely be lost and, thus, the purpose of its existence. The above implicitly leads to the conclusion that these criminal law provisions, considering the extensive character of the prescribed essential elements of crime, are not applicable in the conditions of a pandemic, such as the current COVID-19 pandemic" (Šikman, Bajičić, 2021: 84).

In order to improve the response of the criminal justice system in such circumstances, these authors point to the need to change the existing legal provisions of the Criminal Code of the Republic of Srpska pertaining to the subjective element of the criminal act. They consider that an acceptable legal solution would be to prescribe criminal law punishment only for the commission of intentional criminal acts, while negligence would remain part of the misdemeanor legislation. "On the one hand, it would ensure the principle of *ultima ratio* of criminal law and enable the application of criminal legislation in judicial practice. On the other hand, considering the *de facto* non-compliance with the prescribed norm, this position supports the thesis that it is not necessary to "decriminalize" these forms of behaviour. It is essential to clearly and precisely determine what is considered to be a criminal offense and to apply such a norm in practice. The effectiveness of state reaction to this form of crime substantially depends on the adequate legal norm and its adequate application. It will ensure appropriate criminal law protection of public health, which will contribute to the overall activities aimed at preventing and suppressing the current COVID-19 pandemic and similar situations in the future" (Šikman, Bajičić, 2021: 84).

This *de lege ferenda* proposal can be evaluated as positive because it contributes to a more comprehensive criminal law protection against the pandemic of various contagious diseases. Thus, only the most serious forms of violation of health protection measures have to be sanctioned by the criminal law norms while less serious ones should be regulated by misdemeanor law. This promotes the principle of legal certainty and ensures the protective function of criminal law, as the last means of protecting the most important social values.

3. PHENOMENOLOGICAL CHARACTERISTICS OF CRIMINAL ACTS RELATED TO THE PREVENTION OF SPREADING COVID-19 CONTAGIOUS DISEASE

As already noted, this part of the paper presents the basic phenomenological characteristics of the two criminal offences pertaining to the suppression and prevention of spreading contagious diseases, with specific reference to the statistical data of the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these offences in the first year of the pandemic (2020).

Table 1 Number of reported perpetrators and dismissed criminal reports (2020)

| Criminal offence | Total number of criminal report | Number of reports against known offenders | Women | Criminal reports dismissed | Investigation suspended/terminated |
|------------------|---------------------------------|---|-------|----------------------------|------------------------------------|
| Art. 248 CC | 880 | 877 | 163 | 441 | / |
| Art. 249 CC | 8 | 8 | 4 | 7 | / |

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)⁴

The statistical data contained in Table 1 show that, in the year 2020, there was a total number of 880 reported cases for the commission of the criminal offense envisaged in Article 248 CC, 877 of which were filed against known offenders and 163 reports were filed against female offenders. Interestingly, more than 50% of reported cases (441) were dismissed and there was no record on suspended/terminated investigation proceedings. In the same period, there were only 8 criminal reports on the offence of transmitting a contagious disease (Article 249 CC), 7 of which were dismissed. Such a difference in terms of reported offences is expected because the prerequisite for the criminal offense envisaged in Article 249 CC is that the perpetrator must be aware that he/she is infected and that he/she is transmitting the contagious disease to another person through his actions.

Table 2 Number of indictments, convictions and suspended criminal proceedings (2020)

| Criminal offence | Total number of indicted offenders | Women | Convictions | Suspended/terminated criminal proceedings/ |
|------------------|------------------------------------|-------|-------------|--|
| Art. 248 CC | 370 | 52 | 343 | 11 |
| Art. 249CC | 8 | 1 | 7 | / |

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)

Table 2 shows a similar trend when it comes to persons indicted and convicted of these criminal offences. In the observed period, a total of 370 offenders were charged with the criminal offense of non-compliance with health regulations during the epidemic (Article 248 CC), 343 of whom were convicted, while criminal proceedings were suspended/terminated in 11 cases. In the same period, only 8 offenders were accused of committing the criminal offense of spreading a contagious disease (Article 248 CC RS), 7 of whom were convicted.

Table 3 Number of convictions according to the type of punishment (2020)

| Crime | Total | Women | Attempt | Imprisonment/ house arrest | Fine | Suspended/c onditional sentence | Secondary sentence |
|-------------|-------|-------|---------|-------------------------------|------|---------------------------------------|-----------------------|
| Art. 248 CC | 344 | 44 | / | 43 / 132 | 44 | 124 | 4 |
| Art. 249 CC | 7 | 1 | / | 1 | / | 3 | / |

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)

⁴ Statistical data on reported, accused and convicted perpetrators of criminal offenses from Article 248 and Article 249 of the Criminal Code of the Republic of Serbia were collected from the Statistical Office of the Republic of Serbia - Adult offenders, <https://publikacije.stat.gov.rs/G2022/Pdf/G20221189.pdf>, accessed 25.07.2022.

The statistical data contained in Table 3 show different types of criminal sanctions which were imposed for the commission of these crimes in this period. The most frequently imposed sanctions for the commission of the offense envisaged in Article 248 CC were imprisonment (43)/house arrest (132), and suspended/conditional sentence (124); only 4 offenders were awarded a secondary sentence. The collected statistical data on the criminal offense referred to in Article 249 show that the most frequently imposed sanction for spreading the COVID-19 disease was a suspended/conditional sentence (3). Such data can be explained by the nature of this criminal acts and the time of commission, primarily given the fact that the state of emergency was in force in the Republic of Serbia in the period from 15 March to 6 May 2020. In the situation of a declared pandemic, it is quite expected that the sentence of house arrest would be the most frequently imposed sentence for criminal offences against public health, particularly considering that both crimes are punishable by a term of imprisonment of up to three years. Interestingly, in the observed period, there are no records in the available data that there were any attempted criminal acts pertaining to Article 248 and 249 of the CC.

At the end of this overview of the basic phenomenological characteristics of criminal offences pertaining to the prevention of spreading the contagious disease COVID 19, it should be noted that criminal reports, charges and convictions for the criminal offense envisaged in Article 248 CC prevailed in the period under observation, whereby the prevailing number of offenders were men. At that time, the commission of this criminal offence attracted a lot of public attention in the circumstances of the escalating pandemic and the growing death rate.

4. CONCLUSION

The outbreak of the COVID-19 pandemic in late 2019 affected almost all aspects of life in the next couple of years. In order to suppress and prevent the spread of the pandemic, states worldwide introduced various prohibitions, restriction and measures during the state of emergency (ban on movement, gatherings; restrictions on contacts between people; lockdowns, keeping physical distance, mandatory mask-wearing; etc.). The media reported daily on the number of people who contracted COVID-19, hospitalized patients, critically ill patients, and the overall death rate. All this information led to panic and continuous fear among the population. In the circumstances of panic, fear and general confusion, many people chose not to abide by the prescribed prohibitions or recommended health measures (for various reasons) and, thus, consciously or unconsciously contributed to the transmission of COVID-19 contagious disease.

In order to improve the response of the criminal justice system *de lege ferenda*, the author examined the legal provisions envisaged in Article 248 (Failure to comply with Health Regulations during an Epidemic) and Article 249 (Transmitting a Contagious Disease) of the Criminal Code of the Republic of Serbia (CC RS). In the context of examining the phenomenological characteristics of these criminal offences, the author provided an insight into the judicial practice of Serbian courts during the first year of the COVID-19 pandemic (2020), by exploring the statistical data issued by the Statistics Office of the Republic of Serbia on the number of criminal reports, indictments, and convictions for the commission of these offences in the period under observation.

On the basis of the collected data, we may conclude that the number of reported criminal offences envisaged in Article 248 of the CC was drastically higher (880 reported cases) than the number of reported offences envisaged in Article 249 of the CC (only 8 reported case). Such a difference in terms of reports is expected considering that the prerequisite for the existence of the criminal offense from Article 249 CC is the perpetrators awareness that he/she is infected and that his/her actions contribute to spreading a contagious disease to others. Notably, from the total number of criminal reports submitted under Article 248 CC (877), more than 50% of reported offences (441) were dismissed. Even a higher percentage is observable in terms of the criminal reports submitted under Article 249 CC (7 out of 8 cases). Notably, there is no record on the number of terminated investigation proceedings but the data show that a vast majority of criminal offences were committed by men (163 women in 877 reports submitted under Article 248 CC, and 4 woman in 8 reports submitted under Article 249 CC).

A similar trend may be observed in terms of the number of indicted and convicted persons. In the observed period, there were 370 indicted offenders for the criminal offense of non-compliance with health regulations during the epidemic (Art. 248 CC); 343 offenders were convicted while criminal proceedings were suspended (terminated) in 11 cases. As for the criminal offense of spreading a contagious disease (Art. 249 CC), there were only 8 accusations and 7 convictions were recorded. In terms of criminal sanctions, the most frequently imposed sanctions for the non-compliance with health regulations (Art. 248 CC) were imprisonment (43)/house arrest (132 offenders) and conditional sentence (124 offenders). The most common sanction imposed for spreading COVID-19 disease (Art. 249 CC) was a suspended/conditional sentence (3 out of 7 offenders), which may be explained by the state of emergency that was in force from March to May 2020. Notably, in the observed period, there were no records about any attempted criminal acts pertaining to Article 248 and 249 CC.

Pursuant to the provisions of the Criminal Code of the Republic of Serbia, the observed criminal acts can only be committed intentionally. The criminal legislation of the Republika Srpska includes slightly different legal provisions, which is unexpected considering that Serbia and Republika Srpska have the same legal tradition. Namely, relevant provisions of the Criminal Code of Republika Srpska envisage that these criminal offences may also be committed negligently. In the criminal law literature, there are opinions that negligent actions pertaining to this subject matter should be qualified as misdemeanors (Šikman, Bajčić, 2021). Such a proposal can be evaluated as a positive one because it contributes to a more complete criminal law protection against the pandemic of various contagious diseases. Thus, only the most serious forms of violation of health protection measures have to be sanctioned by the norms of criminal law while less serious ones should be regulated by misdemeanour law. Such a legal solution promotes the principle of legal certainty and ensures the protective function of criminal law, as the last means of protecting the most important social values

The pandemic is still ongoing and the question is when it will end. Until then, every single individual has the responsibility to protect one's own health and the health of other people because social solidarity is one of the most powerful weapons that we may resort to in suppressing pandemics and defeating similar adversities in the future.

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SPREČAVANJE ŠIRENJA ZARAZNE BOLESTI COVID 19 – KRIVIČNOPRAVNI ASPEKT

Pojava zarazne bolesti COVID 19, izazvane virusom SARS CoV2, dovela je do velikih promena u svakodnevnom životu. Gotovo ne postoji segment života i rada koji nije pretrpeo promene usled pandemije. U radu će biti analiziran krivičnopravni aspekt sprečavanja širenja zarazne bolesti COVID 19 u Republici Srbiji, kroz prikaz inkriminacija dva krivična dela, od značaja za suzbijanje pandemije – krivično delo nepostupanje po zdravstvenim propisima za vreme epidemije (čl. 248. KZ) i prenošenje zaraznih bolesti (čl. 249. KZ).

Kako bi se prikazao rad pravosudnih organa u vreme pandemije, biće prikazani i analizirani statistički podaci Republičkog zavoda za statistiku u pogledu broja prijave, optuženja, osuda i izrečenih krivičnih sankcija za ova krivična dela, u prvoj godini pandemije (2020. godina). Na ovaj način, steći će se jasan uvid u fenomenološke karakteristike ovog oblika kriminaliteta u Republici Srbiji, što će omogućiti formulisanje preporuka za poboljšanje reakcije krivičnopravnog sistema u uslovima pandemije.

Ključne reči: *nepostupanje po zdravstvenim propisima za vreme epidemije, prenošenje zaraznih bolesti, COVID 19, krivično pravo.*