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The Impact of COVID-19 on the Romanian Criminal Law. The Main Changes in the Legal Content of the Futility of Combating Diseases Offense

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Abstract: In this article we aim at highlighting the main changes that have occurred in the architecture of crimes against public health as a result of the COVID-19 pandemic. Therefore, the scientific endeavor aims at highlighting the intervention of the Romanian criminal legislator in the sense of reconfiguring the legal content of the crime to prevent diseases in the context imposed by the state of emergency demanded by the COVID-19 pandemic. We will analyze the changes and completions made in the matter of art. 352 of the Criminal Code through the Emergency Ordinance no. 28/2020 for amending and supplementing Law no. 286/2009 regarding the Criminal Code, this crime being considered to be particularly serious in the dramatic panorama created by COVID-19, which can seriously endanger important social values such as life and health.

Keywords: public health; COVID-19 pandemic; Criminal Code

1. Introductory Aspects

The COVID-19 pandemic created the context of the Romanian legislator's intervention on some articles of the Romanian Criminal Code, in order to defend, through criminal norms, the social value of public health, threatened by the rapid spread of this new type of virus.

In the present scientific article, we will highlight the changes in the criminal legislation, in the legal content of art. 352 of the Criminal Code – futility of combating diseases.

Thus, according to the **Emergency Ordinance 28/2020** for the amendment and completion of Law no. 286/2009 regarding the Criminal Code², the text of art. 352 of Criminal Code is amended as follows:

Art. 352. The futility of combating diseases:

“(1) Failure to comply with the quarantine or hospitalization measures ordered for the prevention or control of infectious diseases shall be punished by imprisonment from 6 months to 3 years or by a fine.

(2) Failure to comply with the measures regarding the prevention or control of infectious diseases, if the deed resulted in the spread of such a disease, shall be punished by imprisonment from one to 5 years.

(3) The transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

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² Published in Official Monitor no 228 of March 20, 2020.

(4) *If the deed provided in par. (2) is committed through guilt, the punishment is imprisonment from 6 months to 3 years or a fine.*

(5) *If by the facts provided in par. (1) and (2) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and the prohibition of exercising certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 5 at the age of 12 and the prohibition of exercising certain rights.*

(6) *If by the deed provided in par. (3) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 3 to 10 years and the prohibition of exercising certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 7 to 15 years and prohibition of the exercise of certain rights.*

(7) *If by the deed provided in par. (4) the bodily injury of one or more persons has occurred, the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and prohibition of the exercise of certain rights.*

(8) *The attempt at the crime provided in par. (3) shall be punished.*

(9) *Quarantine means the restriction of activities and the separation from other persons, in specially arranged spaces, of persons who are ill or suspected of being ill, in a manner that prevents the possible spread of infection or contamination.”*

3. A new article, Article 352¹, is inserted with the following content:

“Art. 352¹. Omission to declare information

The omission of the person to disclose to the medical staff or to other persons among those provided in art. 175 or a unit in which they operate some essential information regarding the possibility of coming into contact with a person infected with an infectious disease shall be punished by imprisonment from 6 months to 3 years or by a fine.”

We notice a substantial modification of the provisions of this text of law which, prior to the issuance of this Emergency Ordinance, regulated the offense of futility of combating diseases, as follows:

Art. 352: *“(1) Failure to comply with the measures regarding the prevention or control of infectious diseases, if it has resulted in the spread of such a disease, shall be punished by imprisonment from 6 months to 2 years or by a fine.*

(2) If the deed provided in par. (1) is committed through guilt, the penalty is imprisonment from one month to 6 months or a fine.¹”

In **Italy**, art. 438 of the Criminal Code, marginally entitled “Epidemic”, provides: *“Anyone who causes an epidemic by spreading pathogens is punishable by life imprisonment.”*

The Italian legislator responded to the COVID-19 pandemic by adopting Decree-Law no. 6² provides the sanctions applicable for violating measures to prevent and combat the spread of the virus, establishing, mainly, administrative sanctions, contraventions and in severe cases the application of penalties. It is forbidden to violate the isolation measures, in which case the sanctioning regime provided by art. 650 of the Italian Criminal Code: imprisonment for 3 months or a fine of up to 206 Euro.

¹ Art. 352 of Criminal Code, prior to the publication of the Emergency Ordinance in the Official Monitor of Romania no. 228 / 20. 03. 2020.

² Decree-law no. 6 / 23. 02. 2020, updated by Law no. 5 / March 2020 by GEO no. 61 / 09.03.2020.

According to the Decree-Law Anyone who violates the isolation measures provided by the D.P.C.M. (in accordance with art. 2, paragraph 1), by provisions of the regions or by ordinances of the mayor (in accordance with art. 3), is subject to the sanctioning regime of the fine (between 400 and 3000 Euro).

In **Spain**, although there is no offense in the Criminal Code of spreading infectious diseases, criminal law does not refer to the existence of intent or fault in the spread of the virus, so that citizens who transmit the disease by failing to comply with established protection measures, knowing or not are infected prosecuted. **Art. 556** of the Spanish Criminal Code (Luzos Pena, 2017, p. 248) regulates the criminal prosecution of those who show disrespect to public authorities and oppose their actions in the exercise of their functions.

2. Criminal Law Precedent

In the Criminal Code of 1969¹, the act of futility of combating diseases was regulated in art. 308 and consists in “*non-compliance with measures relating to the prevention or control of contagious diseases, if it has resulted in the spread of such a disease, shall be punished by imprisonment from one month to 2 years or by a fine.*”

The 2004 Criminal Code² regulated almost identically, but under another marginal name, at **art. 383**, the *crime of preventing the fight against diseases*, a criminal act consisting in “non-compliance with measures regarding the prevention or control of contagious diseases, if it resulted in the spread of such a disease, shall be punished by imprisonment from one month to one year or by fine.” We observe the reduction of the special maximum of the punishment, from 2 years to 1 year and the use of the terminology of “fine days” instead of fine.

The new Criminal Code, which entered into force in 2014, kept the incrimination of the fight against diseases in vain, the main changes in the legal content of this crime consisting in:

- Replacing the phrase “contagious diseases” with “infectious diseases”³;
- Increasing the special minimum of the punishment applied from one month to six months, in the standard version of the crime;
- The provision of futility of combating diseases offense and in a mitigating variant, if the crime is committed at fault, the punishment limits being reduced⁴.

¹ The revised 1969 Criminal Code, published in the Official Monitor, no. 65/16. 04. 1997.

² Published in Official Monitor of Romania no 575/29. 06. 2004, repealed by Law 286/2009 on the Criminal Code.

³ In the draft supplement of G.D. no 1186/2000 for the approval of the list comprising medical-surgical emergencies as well as group A infectious diseases for which the insured benefit from indemnity for temporary incapacity for work without contribution conditions, project published on the website of the Ministry of Health, on 28.04.2020, the introduction is mentioned, at point (condition) 37 – COVID - 19, http://www.ms.ro/2020/04/28/hotarare-a-guvernului-privind-completarea-anexei-la-hotararea-guvernului-nr-1186-2000-pentru-aprobarea-listei-cuprinzand-urgentele-medico-chirurgicale-precum-si-bolile-infeciocontagioase-din-grupa-a/?utm_source=rss&utm_medium=rss&utm_campaign=hotarare-a-guvernului-privind-completarea-anexei-la-hotararea-guvernului-nr-1186-2000-pentru-aprobarea-listei-cuprinzand-urgentele-medico-chirurgicale-precum-si-bolile-infeciocontagioase-din-grupa-a

⁴ See (Dobrinou, 2016, p. 841; Toader, 2014, p. 548)

3. Pre-Existing Conditions

3.1. The Object of the Offense

3.1.1. Special legal object - The crime of futility of combating diseases is regulated in art. 352 of the Criminal Code in the category of crimes against *public health*, the special legal object of this act consisting in social relations regarding the protection of public health against the failure to combat disease (Boroi, 2016, p. 653), by imposing the obligation to comply with measures to prevent or combat infectious diseases¹.

3.1.2. Material object - Regarding the material object of this crime, in the case of par. 1 and para. 2, usually the crime is devoid of material object but there may be situations in which the perpetrator's action is exercised directly, on a thing or body of a person, cases in which that object or human body will represent the material object of the crime as is provided in par. 1 and 2. (we can exemplify situations such as the situation in which the offender acts directly on the victim's body - hugging the victim *in a way that allows the spread of infection or contamination*; coughing voluntarily in the direction of the victim's face or offers an infected container, knowing this circumstance).

In the case of par. 3 in art. 352, we consider that there may be a material object consisting in the body of the victim. It is important that the victim is not infected prior to the perpetrator's action.

The material object in the case of paragraphs 5, 6 and 7 of Article 352 is the very body of the victim or victims of the crime, of the person or persons who suffer bodily injury or who have been killed by the perpetrator.

4. Subjects of the Crime

The **active subject** can be any person, natural or legal², not being circumstantial. It is irrelevant if the active subject of the crime is infected at the time of the crime, being sufficient to act by failing to comply with measures to prevent and combat the transmission of infectious diseases.

In order to be an active subject of this crime, as provided in par. 1 and para. 2, the perpetrator must not comply *with quarantine or hospitalization measures ordered by the authorities on him or not to comply with measures regarding the prevention or control of infectious diseases established by law*.

For example, amid the COVID-19 pandemic, state bodies have instituted quarantine and hospitalization measures as well as measures to prevent or combat infectious diseases through decisions of the National Committee for Special Emergency Situations³ and the Technical-Scientific Support Group on the management of highly contagious diseases in Romania⁴.

¹ See (Dobrinouiu, 2016, p. 841; Toader, 2014, p. 548)

² We can exemplify the situation of a company that produces disinfectants and which, by not complying with production rules, launches on the market a substance inefficient for the purpose of disinfection or a hospital institution that does not comply with hygiene rules established by regulations.

³ The name of the National Committee for Special Emergency Situations was modified in the National Committee for Emergency Situations (CNSU) by Emergency Ordinance no. 68 of 14 May 2020 for the amendment and completion of some normative acts with incidence in the field of emergency management and civil protection, Published in Official Monitor of Romania no. 391 of 14 May 2020.

⁴ Decision no. 2 / 24. 02. 2020, established quarantine and isolation at home of persons coming from Lombardy and Veneto; Decision no. 6 / 9. 03. 2020 imposing hygiene rules on public catering units; Decision no. 10 / 14. 03. 2020 established the measure of isolation at home for all asymptomatic persons coming to Romania from countries where at least 500 cases are confirmed and quarantine for persons arriving from areas identified by the Technical-Scientific Support Group on disease

The active subject is detailed in the variants of the crime provided in par. 3 and para. 6, can only be a person who knows she is infected.

The Main Passive Subject is the State

The secondary passive subject is the person whose physical integrity, health, life, have been endangered or harmed by the action of the perpetrator.

In the case of paragraphs 2 and 3, we consider that the **secondary passive subject** is circumstantial, and can only be the person or persons infected as a result of the spread of the disease or by the intentional transmission by the offender.

The secondary taxable person in the case of paragraphs 5, 6, 7 shall be the person who has suffered bodily injury or been killed as a result of the perpetrator's action.

If the deed is committed against a person who has the quality of civil servant, another crime will be retained which naturally absorbs, in its content, the crime of futility of combating diseases.

In the judicial practice it was noted that *“the act of the defendant who, while the local policeman B___ I___ G_____ was trying to prevent his departure from UPU C___ - N_____, threatened him with the transmission of the infectious disease COVID-19, by intentional coughing, after removing the protection, in the direction of his face, from a distance of about 1-2 m, thus causing a state of fear to the local policeman, who stopped and retreated slightly behind, meets the constituent elements of the crime of outrage, according to art. 257 para. 1 and 4 Criminal Code, the art. 206 para. 1 Criminal Code”¹*. The defendant's action to take off his protective mask and intentionally cough at the police officer in order to prevent him from stopping him from leaving the area, which could cause him a state of fear by infecting the COVID-19 virus, realizes the material element of the crime of outrage.

Criminal participation is possible in the form of co-authorship, complicity and instigation.

In order to have co-authorship, for the variants of the crime that have a qualified active subject, it is necessary that all co-perpetrators meet the requirements of circumstance at the time of the act, otherwise they are criminally liable in another form of criminal participation.

Improper participation was considered in the judicial practice: “placement on the Romanian market, in almost all large sanitary units in Romania, between June 1, 2010 - May 16, 2016, of inefficient biocidal products in terms of bactericide, fungicide, sporicide, mycobactericide, intentionally facilitating the non-observance by the members of the m_____ specialized personnel of the measures regarding the prevention and combating of nosocomial diseases (b___ infectious diseases), the latter committing the deed without guilt, resulting in the spread of nosocomial diseases”.²

management highly contagious on the territory of Romania (GTSSCBIC), GTSSCBIC Decision no. 9 / 10. 03. 2020 restricting cultural, scientific, artistic, religious, sports and entertainment activities with the participation of more than 100 people.

¹ Decision no. 298/2020 of 21-Apr-2020, Cluj Napoca District Court, notification with the plea agreement (art. 483 NCPP) (Criminal), Source: Sintact.

² Criminal sentence no. 104/2018 of 16-Jan-2018, Bucharest District Court 5, deception (art.244 NCP) (Criminal), Source: Sintact.

5. Constitutive Content

5.1. The Objective Side

5.1.1. The Material Element

The material element of this crime may consist of:

a) Failure to comply with quarantine or hospitalization measures ordered to prevent or combat infectious diseases. Failure to comply with these measures may consist of an action or inaction, the offense may be commissive or omissive.

For the existence of the crime, in this variant, it is necessary that these measures be regulated in legal norms. Failure to comply with social norms not provided for by the authorities in normative acts will not meet the requirement of the existence of this crime.

b) Failure to comply with the measures regarding the prevention or control of infectious diseases, if the deed resulted in the spread of such a disease. The aspects commented on the analysis of the material element of the first paragraph of art. 352, with the mention that, in order to engage criminal liability, it is mandatory to meet the requirement of spreading the disease.

c) The transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease.

And in this case, the crime can be commissive or omissive. For the existence of this variant of the crime, it is necessary for the perpetrator to know that he is infected.

Transmission can be made by any means, directly or indirectly, to an uninfected person.

It is important that the victim is not infected at the time of transmission by the perpetrator and if he is infected he does not know this circumstance. Otherwise, both will be criminally liable for the crime of futility of combating diseases in this variant.

If the method of transmission is itself a crime, the competition of offenses will be retained.

5.1.2. The immediate consequence consists in the realization of the material element of the standard and aggravating variants of the crime, respectively the violation of the quarantine or hospitalization measures ordered for the prevention or control of infectious diseases; the illness of a person as a result of a breach of measures relating to the prevention or control of infectious diseases, if the act resulted in the spread of such a disease; infection of a person as a result of the intentional transmission of the disease by the perpetrator; personal injury or death of a person as a result of culpable violation or disregard of the aforementioned measures.

We consider that crime of futility of combating diseases is dangerous - in the standard version, provided by article 352 par. 1, the crime existing regardless of the production of any result, being sufficient to endanger public health. The same is the situation in the case of par. 3. In the aggravating variants of the crime (par. 2, 5, 6, 7) conditioned by the production of a result (spread of the disease, production of a bodily injury, death of the victim), the crime is the result¹.

¹ See (Ioan, 2020).

5.1.3 The Causal Relationship

In order to incur criminal liability, it is important to establish with certainty that there is a causal relationship between the perpetrator's action and the outcome of the act. The possible confusions existing in the unequivocal determination of the causal link between the deed and the result will be solved depending on the concrete circumstances of committing the deed and the form of guilt of the perpetrator.

Determining the causality between the act of the active subject and the result produced, as well as the form of guilt, are important to determine whether crime of futility of combating diseases control was committed in the standard variant or in one of the aggravated variants or a more serious crime is retained: murder, culpable homicide, serious bodily injury, or a contest between the analyzed crime and other crimes.

5.2. The Subjective Side

The facts provided in par. 1 and para. 2 may be committed with direct or indirect intent.

In the case of the variant provided in par. 3, the form of guilt is the intention, the legislator stipulating the condition of the perpetrator knowing that he is infected.

In the assimilated version, the form of guilt is guilt. By law, we propose the amendment of par. 4, as follows: If the facts provided in par. (1) and (2) are committed through fault, the punishment is, in the case of par. 1 imprisonment from 3 months to 1 year or a fine. And in the case of par. 2, imprisonment from 6 months to 3 years or a fine.

The guilt of the perpetrator in the variant of the crime regulated by art. 352 para. 5 is premeditated, compared to the more serious result - bodily injury, death of the victim, the perpetrator acting with outdated intent.

6. Forms. Punishment

6.1. Forms

Preparatory acts of crime of futility of combating diseases are possible but have not been incriminated by the legislator.

The attempt at the crime provided in art. 352 para. 3 is punished.

6.2. Punishment

The applicable sanctioning regime differs depending on the variants of this crime, as follows:

Art. 352 (1) imprisonment from 6 months to 3 years or with a fine.

Art. 352 (2) imprisonment from one to 5 years.

Art. 352 (3) imprisonment from 2 to 7 years and the prohibition of exercising certain rights.

Art. 352 (4) imprisonment from 6 months to 3 years or a fine.

Art. 352 (5) imprisonment from 2 to 7 years and prohibition of exercising certain rights or imprisonment from 5 to 12 years and prohibition of exercising certain rights.

Art. 352 (6) imprisonment from 3 to 10 years and prohibition of exercising certain rights or imprisonment from 7 to 15 years and prohibition of exercising certain rights.

Art. 352 (7) imprisonment from one to 5 years and prohibition of exercising certain rights or imprisonment from 2 to 7 years and prohibition of exercising certain rights.

7. Conclusions

This scientific approach aims at highlighting the main changes in an exceptional period caused by the COVID-19 pandemic in criminal law. The intervention of the legislator responds to the need to intensify and emphasize measures to protect the value of public health.

We agree with the opinion expressed in the French literature, in the sense that these criminal legislative changes feature a “criminal crisis law” which is characterized by: resistance to the epidemic, the intervention of the criminal legislator through repressive measures, themselves evolving and aimed at achieving a temporary result, coming out of force when the situation prior to the moment that required their adoption will be reached.

We welcome the initiative of the legislator to toughen the penalties in case of committing such a particularly dangerous act for the society, a deed which, although included in the category of crimes against public health, can endanger life itself. Also, we cannot ignore the disastrous effects of such a deed on the state economy, a fact already felt in Romania.

These legislative changes occurred amid the danger of the spread of COVID-19. Faced with the devastating effects of such a pandemic and the increased danger of those who do not intentionally or through no fault of the measures instituted by the state in order to prevent mass infection, the wording of art. 352 and after leaving the states of emergency and alert. Thus, we propose that the penalties be toughened, like the laws of other European states (Italy) which even provide for life imprisonment. The attempt must be punished in the case of all variants of the crime committed with intent.

This is how a crisis situation grants to crime rarely encountered in judicial practice and very little analyzed in the literature and in doctrine, a special effervescence that requires increased attention. Far from being a sufficiently addressed topic, the crime of futility of combating diseases will probably give rise to many controversial aspects in future judicial practice, given the multitude of criminal cases that have as object this criminal act committed in Romania over a short period of time, only two months, but also the specific situations of each case, situations that will certainly provoke the literature and doctrine in the sense of in-depth research of the elements of the constitutive content of this crime.

8. Bibliography

Boroi, A. (2016). *Drept penal. Partea specială. Curs universitar*. C.H. Beck: Bucharest.

Conte, Philippe (2020). Le droit pénal de crise: l'exemple du virus Covid-19. *Lexisnexis SA - Droit Pénal/ Lexisnexis SA - Criminal Law*, No. 5.

Dobrinioiu, V. (2016). *Noul Cod penal comentat/The new commented Criminal Code, 3rd Edition, revised and added*. Bucharest: Universul Juridic.

Ioan, G. C. (2020). *Zădărnicierea combaterii bolilor/The futility of combating diseases*. Retrieved from Premium Universul Juridic: <https://www.universuljuridic.ro/zadarnicirea-combaterii-bolilor/3/>.

Luzos Pena, D. M. (2017). *Codico penal y legislacion complementaria/Criminal code and complementary legislation, 5th Ed.* Madrid: Editorial Reus.

Toader, T. (2014). *Noul Cod penal/New Criminal Code.* Bucharest: Hamangiu.

Decree-law no. 6 / 23. 02. 2020, updated by Law no. 5 / March 2020 by GEO no. 61 / 09.03.2020.

GEO no. 8/2020 for the amendment and completion of Law no. 286/2009 on the Criminal Code, Published in the Official Monitor. 228 of March 20, 2020.

Decision no. 298/2020 of 21-Apr-2020, Cluj Napoca District Court, notification with the plea agreement (art. 483 NCPP) (Criminal), Source: Sintact.

Criminal sentence no. 104/2018 of 16-Jan-2018, Bucharest District Court 5, deception (art.244 NCP) (Criminal), Source: Sintact.