

Amendment of Criminal Legislation in the Context of the Current Covid-19 Coronavirus Pandemic

Clara Maria Oancea

KYC Analyst at SG EBS, Bucharest, Romania, p_claram@yahoo.com

ABSTRACT: Following the outbreak of the local COVID-19 coronavirus epidemic, the Romanian Government amended the criminal legislation by tightening the penalties for the crime of false statements (art. 326 Criminal Code), but also by completing the criminal content and increasing the punishment limits for the crime of thwarting the fight against diseases (art. 352 Criminal Code). In the specialty literature, the crime of thwarting the fight against diseases has not been widely debated, until recently the social need to apply it was minimal. At the same time, this crime does not seem to have been applied under the new Criminal Code, until the beginning of the current epidemic. However, in the context of the events that took place in the first 2 weeks of March 2020 on the territory of the country, new forms of crime were introduced and the punishment limits for the already existing ones were increased. Therefore, if until now the crime of thwarting the fight against diseases had a single form punishable by imprisonment from 6 months to 2 years or a fine, which punished only the acts consisting in non-compliance with measures to prevent or combat infectious diseases and only if they had as a result the spread of such a disease, starting with March 20, this crime is much better defined by the legislator and takes into account a series of criminal acts that the authorities have faced lately.

KEYWORDS: COVID-19, pandemic, Criminal Code, criminal content, amendment, thwarting, fight, disease, punishment, authorities

Some theoretical aspects regarding the prevention of disease transmission before the onset of the COVID-19 pandemic

Traditionally, criminal law theorists and practitioners have not paid much attention to highly contagious diseases (Coggon and Kessel 2013, 125). Broadly speaking, from the perspective of legislative technique, there are two methods by which the problem can be addressed (Francis, Francis 2012, 49-50). In a first variant, such conduct can be sanctioned by reference to a general norm (for example, the act of one person infecting another, with the effect of his death, can be qualified as a crime against life, by reference to one of the existing rules, such as homicide or culpable homicide). In a second approach, it is considered that the act of consciously exposing other people to contagious diseases, harms the public interest, an approach to which the Romanian legislator is oriented, through crimes such as thwarting the fight against diseases.

According to art. 352 para. (1) Criminal Code, in its basic form, the crime incriminates the intentional non-compliance of the measures regarding the prevention or control of the infectious diseases, if it had as a consequence the spread of such a disease. The applicable punishments were imprisonment from 6 months to 2 years or, as the case may be, a fine. In the assimilated form, characterized in the doctrine as an attenuated variant (Dobrinou 2016), non-compliance by fault of this type of measures is sanctioned with imprisonment from one month to 6 months or with a fine.

The norm resumes almost identically the provisions of the old Criminal Code, replacing only the notion of contagious disease with that of infectious disease - according to art. 308 from 1969 Criminal Code, failure to comply with measures to prevent or combat contagious diseases, if it resulted in the spread of such a disease, was punishable by imprisonment from one month to two years or a fine. Also, the separate incrimination of the guilty form does not represent, in essence, a change, since even under the regime of the old Criminal Code, the deed, being omissive, could be punished even in the case of fault, according to art. 19 para. 3 (Toader 2014, 547).

In order to be considered met the objective element of this crime, three aspects had to be proved, beyond any reasonable doubt: (i) that there were, at the time of the deed, a series of measures regarding the prevention or control of infectious diseases; (ii) that these measures have not been complied with and (iii) that there is a causal relationship between non-compliance and the spread of the disease.

As such, we must first understand what measures are in place to prevent or combat infectious diseases. They do not receive an express definition in the Criminal Code. Consequently, in the absence of express explanations regarding the semantic content of the notion, from the legislator, it is necessary to use the common (respectively technical) meaning of the terms (Scalia and Garner 2012, 74).

Thus, the notion of measure regarding the prevention or control of diseases implies an active conduct on the part of the state authorities in order to define its content. The concept of measure, in the context of the current Criminal Code, either refers to precautionary measures, in case of culpable homicide or bodily injury, or to the measure of removal from Romanian territory, non-compliance with a protection measure, non-compliance with measures on custody of a minor or to legal measures of safety and security at work, tends to refer to the idea of a measure taken with a normative or individual character, at any level of the state authorities (John 2020, 2). It turns out that in order to speak of the non-compliance of some measures, two conditions are imposed: that these measures be formalized and derive from a public authority and that the person who violates them falls within the group of recipients of the norm. As such, violation of simple common sense measures to combat the spread of disease, such as wearing a mask by people with specific symptoms or avoiding congestion, cannot justify engaging in criminal liability (John 2020, 2). In essence, it is a criminal norm-framework (in white), as noted in the doctrine, showing that it meets all the conditions of predictability imposed by the requirements of the principle of legality (Streteanu and Nițu 2014, 95).

In the specialty literature it is considered that any form of formalization of the measures taken, able to be brought to the public's attention, is sufficient to be considered met this element of the crime, not being necessary that it comes from a certain authority or to meet certain formal conditions, beyond those already imposed by primary legislation (John 2020, 2). In particular, it is not necessary for these measures to be formalized in a law or in an act with the force of law. Thus, in addition to Order no. 414/2020 of the Minister of Health (published in the Official Gazette no. 201 of March 12, 2020), the main normative acts establishing measures to combat the spread of diseases are the decisions of the National Committee for Special Emergency Situations, which can be consulted at https://www.cnsct.ro/index.php/legislatie_cov?limit=20&limitstart=0 and those of the Technical-Scientific Support Group on the management of highly contagious diseases in Romania.

The *actus reus* of the crime consists in the non-compliance of the prevention measures, in the previously explained sense. We have already shown that the doctrine has supported the thesis that it is an omissive crime (Toader 2014, 547). However, being a criminal norm-framework in which the material element is defined generically, by the term non-compliance, it can take various forms (Streteanu and Nitu 2014, 95), the mentioned solution should be nuanced, the omissive or commissive character being given by the fulfilling norm (John 2020, 2).

Thus, if the obligation is one that orders a certain conduct, from which the recipient of the norm refrains, the crime will be omissive. Otherwise, if the protection norms forbid a certain conduct, but the recipient does it, the crime will be commissive (Dongoroz 1939, 309) For example, if a person in solitary confinement at home leaves his home, without this conduct being covered for a justifiable cause, the crime will be commissive (John 2020, 2). In the case of a compulsory vaccination obligation, for example, the rule is omitted. In conclusion, the deed can be committed both by action and by inaction (Dongoroz 2003, 530).

In this context, we will mention, briefly, the fact that, as was correctly noted in the doctrine, the active subject is not circumstantial (Bodoroncea 2016, 1181). Although, instinctively, the first tendency would be to believe that the recipients of the norm are only the

people already infected, in reality the sphere of active subjects will also be determined by the compliant norm (John 2020, 2). For example, since legal persons may also be active subjects of this crime (Bodoroncea 2016, 1181), a restaurant that does not comply with the conditions imposed by the protection measures may be criminally liable. Similarly, an uninfected person who, through his conduct, contributes to the spread of the infection can be penalized. For example, we can imagine the situation of the mother who throws the quarantined child out of the house. Depending on the way in which the supplementary norm is formulated, it can respond either as perpetrator or as improper instigator to the crime provided by art. 352 C. Pen (John 2020, 2).

The last material element that had to be analyzed is the condition that the non-compliance has as a consequence the spread of a disease, a condition that made the crime a result. We consider that the notion of the spread of the disease only required proving that it had been transmitted to at least one person. This interpretation is part of the reason of the law, because the infection of another individual can produce chain effects, if the carrier transmits the pathogen and the social danger persists in the case of infection of a single person (John 2020, 2).

A final clarification must be made in the matter of the assimilated variant. There has been much discussion in foreign doctrine about the knowledge of the person who transmits the disease that he suffers from it (Herring 2014, 365, 378). Regarding the crime of thwarting the fight against diseases, it is irrelevant whether the person knew that he was suffering from a disease or not. It is only relevant to prove that it had an obligation to comply with a measure relating to the prevention or control of infectious diseases, which it intentionally or through fault did not comply with. The form of guilt refers to the existing obligation, not to a possible illness, because not only an infected person is criminally liable in the context of current legislation (John 2020, 2).

Modification of the criminal legislation in the context of the COVID-19 pandemic

In the specialty literature, the crime of thwarting the fight against diseases has not been widely debated, until recently the social need to apply it was minimal. At the same time, this crime does not seem to have been applied under the regime of the new Criminal Code, until the beginning of the current epidemic (according to the searches made in the databases idrept.ro and ROLII.ro). However, in the context of the events that took place in the first 2 weeks of March 2020 on the territory of the country, new forms of crime were introduced and the punishment limits were increased for the already existing ones.

Following the outbreak of the local coronavirus epidemic COVID 19, the Romanian Government amended the criminal legislation by tightening the penalties for the crime of false statements (art. 326 Criminal Code), but also by completing the criminal content and increasing the punishment limits for the crime of thwarting the fight against diseases (art. 352 Criminal Code).

Thus, by Emergency Ordinance no. 28/2020, published in the Official Gazette of Romania number 228 of 20.03.2020 (the date from which it takes effect), Article 326 of the Criminal Code on false statements was amended, by increasing the special minimum in the case of standard crime, which will be punished with imprisonment from 6 months to 2 years or with a fine, but also by introducing an aggravated form of the crime, if it is committed to hide the existence of a risk of infection with an infectious disease, which will be punished with imprisonment from 1 to 5 years or with a fine.

Regarding the crime provided in art. 352 of the Criminal Code on the thwarting the fight against diseases, in the context of the events that occurred since the outbreak of the COVID-19 coronavirus epidemic in the country, new forms of crime were introduced and the punishment limits were increased for the existing ones.

In this regard, paragraph 1 was amended by incriminating, separately from the occurrence or not of any consequence, non-compliance with the measures taken by the authorities regarding

quarantine or hospitalization for the prevention or control of infectious diseases, which will be punished by imprisonment from 6 months to 3 years or with a fine.

The legislator also defined the notion of quarantine, which means the restriction of activities and the separation from other people, in specially arranged spaces, of sick or suspicious people, in a way that prevents the possible spread of infection or contamination.

In paragraph 2, the legislator established an increase in penalties for persons who, not respecting the measures ordered by the authorities regarding the prevention or control of infectious diseases, if the deed resulted in the spread of such a disease, the deed being punished with imprisonment from 1 to 5 years.

If the deeds sanctioned by the first 2 paragraphs have caused bodily injury to one or more persons, the punishment is imprisonment from 2 to 7 years and prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 5 to 12 years and the prohibition of exercising certain rights.

On the other hand, if the act provided for in paragraph 2 is committed through fault, the punishment is reduced, respectively imprisonment between 6 months and 3 years or a fine, but if it results in bodily injury to one or more persons, the punishment is imprisonment from 1 at 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 the prohibition of the exercise of certain rights.

In this situation, we appreciate that the legislator understood to regulate an aggravated form of complex crime, which will absorb in its content, as the case may be, bodily injury or culpable homicide, both in their basic forms and in aggravated forms, in which the result occurs in relation to two or more persons. As such, it will not be possible to retain a competition between the crimes regulated by art. 192 and art. 196 and this variant of the crime (John 2020, 3).

In paragraph 3, a new criminal act has been added, consisting in the transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease, who will be punished with imprisonment from 2 to 7 years and the prohibition of exercising certain rights. If by this act the bodily injury of one or more persons 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 occurred, the punishment is imprisonment from 7 to 15 years and prohibiting the exercise of certain rights. For the deeds sanctioned by par. 3 the attempt is also punished.

This aggravated variant has a special active subject - the person who knows that he suffers from an infectious disease, but the wording is deficient and can raise application problems (John 2020, 3). Although the rule does not provide, the text should also be interpreted in reference to para. 1 and 2. In this sense, through the logical-systematic interpretation, the text will also be applied to infectious diseases for which prevention or control measures have been taken. Otherwise, compared to the broad meaning of the norm of infectious disease, it would be possible to sanction with a punishment of 2 to 7 years of some people suffering from a common respiratory virus, but, although there is no clear legal obligation to isolate oneself at home, they leave him (John 2020, 3).

Through the same Emergency Ordinance, a new article was introduced, 352¹, which sanctions, with a prison sentence of 6 months to 3 years or a criminal fine, the omission of any person to disclose to medical staff or other persons from those provided in Article 175 of the Criminal Code or a unit in which they operate, essential information on the possibility of having come into contact with a person infected with an infectious disease.

Therefore, if until now the crime of thwarting the fight against diseases had a single form punishable by imprisonment from 6 months to 2 years or a fine, which punished only the facts consisting in non-compliance with measures to prevent or combat infectious diseases and only if they had as a result the spread of such a disease, starting with March 20, this crime is much better defined by the legislator and takes into account a series of criminal acts that the authorities have faced lately.

Conclusions

As we well know, no one can justifiably invoke ignorance of Romanian laws, much less criminal laws, and in the current social context the attention of the authorities and criminal investigation bodies will certainly turn to rapid and drastic sanctions of these facts.

By sanctioning all cases in which the quarantine or hospitalization measures ordered for the prevention or control of infectious diseases are disregarded, regardless of the production or not of a result, a better protection of the social values protected by law is ensured, being sufficient for the Prosecutor's Office to demonstrate that this non-compliance occurred in one form or another in order to attract criminal liability to the persons responsible for committing the acts.

Moreover, such a regulatory option is not unique, but similar to that adopted in other legal systems, such as Canada, where it is necessary to prove only that a person has been significantly endangered by infection.

In addition, in the context of the pandemic that Romania is facing, of the intense media coverage of the prevention rules, of the constant increase of the degree of involvement of the civil society in combating the epidemic and of the increased risk of increasing the number of patients, I consider that the new punishments set by the legislative modification ensures a sufficient degree of prevention and deterrence in committing behaviors with a high degree of antisociality, such as refusing to protect medical staff or presenting in very crowded public places, by violating isolation at home.

Also, the current regulation of the crime allows easier taking of the preventive measure of house arrest against persons who refuse to submit to preventive measures, in conjunction with art. 223 para. (2) with art. 218 para. (1) C. pr. pen. Such a preventive measure may prove appropriate in certain concrete cases.

References

- Bodoroncea, G. 2016. *Criminal Code. Commentary on articles, 2nd ed.* Bucharest: C.H. Beck Publishing House.
- Cogon, J., Kessel A.S. 2013. *Criminal Law, Philosophy and Public Health Practice.* Cambridge: Cambridge University Press Publishing House.
- Dobrinou, V. 2016. *The new Criminal Code commented. The special part, 3rd. ed.* Bucharest: Universul Juridic Publishing House.
- Dongoroz, V. 1939. *Criminal law.* Bucharest: Bucharest Publishing House.
- Dongoroz, V. 2003. *Theoretical explanations of the Romanian Criminal Code, vol. IV, 2nd ed.* Bucharest: All Beck Publishing House.
- Francis, L.P. and Francis J.G. 2012. *Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust.* Criminal Law and Philosophy.
- Herring, J. 2014. *Criminal law. Text, cases, and materials, 6th ed.* Oxford: Oxford University Press Publishing House.
- John, George Cristian. 2020. *The failure to fight disease.* Romania: www.universuljuridic.ro.
- Scalia, A., Garner B.A. 2012. *Reading law: the interpretation of legal texts.* SUA: West Publishing.
- Streteanu, F. and Nițu D. 2014. *Criminal law. The general part, vol. I.* Bucharest: Universul Juridic Publishing House.
- Toader, T. 2014. *The New Penal Code. Comments on articles.* Bucharest: Hamangiu Publishing House.