

# Procedural Aspects regarding the Crime of Thwarting the Fight against Diseases in the Context of the COVID-19 Pandemic in Romania

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**ABSTRACT:** The measure of quarantine or solitary confinement has been compared by some practitioners or contestants of the COVID-19 pandemic to house arrest, as they tried to implement the idea, in the collective thinking, that this measure is a security measure taken against a person accused of committing a crime and who has the capacity of defendant in a criminal case. Are isolation or quarantine a house arrest? Do these two measures represent a restriction on the person’s freedom of movement?

**KEYWORDS:** quarantine, isolation, freedom of movement, house arrest

## Introduction

The COVID-19 pandemic has brought to the attention of the authorities, practitioners and doctrinaires in law facts incriminated by the criminal law which, although included in the legislation starting with the nineteenth century, at the adoption of the first Criminal Codes, have not been also found in the judicial practice of the last decades. One historical fact is that the very high mortality caused by the COVID-19 pandemic has brought back into question the criminalization and sanctioning of the facts regarding the spread of an infectious disease. Crimes against public health have been sanctioned since the 19th century. Thus, the act of the mother carrying her son suffering from smallpox on the side of a public road, determining the infection of other children, two of whom died, was sanctioned in 1815 with the punishment of imprisonment (Ioan, 2020, <https://revista.universuljuridic.ro/zadarnicirea-combaterii-bolilor/>, 04.02.2022).

Although community-borne pandemics and epidemics (Spanish flu, swine flu also known as AH1N1 flu, or HIV / AIDS epidemics) took place in the 20<sup>th</sup> century, given the outbreak of the COVID-19 epidemic, the concerning mortality caused by this epidemic led to concerted action taken by states to tighten national and international legislation on joint efforts to limit the effects of the pandemic.

The incrimination of the facts regarding the spread of a contagious disease in Romania takes place for the first time in 1864, through the Romanian Criminal Code of that year, where art. 377 stipulated: *Anyone who fails to comply with the measures taken by the government regarding the isolation, prevention or seizure of imports in order to prevent the introduction or spread of a contagious (contagious) disease shall be punished by imprisonment for up to two years; and if, as a result of such a crime, any person has become infected, the penalty shall be imprisonment from two months to two years.* (Art. 377, Romanian Criminal Code in 1864, published in the Official Gazette, Part I no. 0 on October 30, 1864).

The crime of thwarting the fight against disease continues to be introduced in legislation by the following Romanian Penal Codes, prior to the Penal Code in force, respectively the Penal Code of 1936 and the Penal Code of 1968, with the mention that the latter Penal Codes legislate the facts referred to in dictating chapter, defined either in the form of *crimes* or *crimes against public health*, observing the introduction of a new concept, that of *Public Health*. The concern of the legislator to monitor the health of the entire population is notable, since the health of the population is the essential element for the existence and functioning of

a state, regardless of whether we refer to a definition of the state from a political, philosophical or legal point of view.

### **Quarantine and isolation - sanctions or measures to protect the person?**

Both the measures of quarantine and the isolation represent a temporary restriction on the freedom of movement in the context of the COVID-19 pandemic. In the application of the legislation adopted in the context of the pandemic, the following dispute arose: temporary restriction of freedom of movement always comes as a sanction, or infection or direct contact with a person infected with the new coronavirus is not a matter of will, an act punishable by a restriction on freedom of movement and the imposition of a measure of quarantine or solitary confinement. The question then arises: is the individual's freedom of movement more important than the right of others to health? John Stuart Mill stated, referring to the concept of individual freedom in his book *On Freedom* that the freedom of one person ends where the freedom of the other begins. Translated into law, this is equivalent to the principle that “Your right ends where my right begins.” The Romanian Civil Code provides that, art. 15: *No right may be exercised for the purpose of injuring or harming another or in an excessive and unreasonable manner contrary to good faith.* Thus, the freedom of movement of the individual is not above the right of other individuals to health, because the exercise of the individual right can have very serious consequences, so that the measure of quarantine or isolation can never be seen as a sanction, but as a measure to protect other legal subjects for whom the exercise of the right to free movement of a person suspected of being a carrier of the SARS-VOC2 virus would inflict serious harm, including death, as a result of infection with the infectious disease of the respectively diagnosed individual.

### **Procedural aspects regarding the crime of thwarting the fight against diseases**

Regarding the assimilation of the measure of quarantine or solitary confinement with house arrest, the European Court of Human Rights ruled in the case of Terheş against Romania ruling that the measure of quarantine in a state of emergency does not represent house arrest. The Court unanimously rejected the complaint as inadmissible on May 20, 2021, arguing that the quarantine measure could not be treated as a house arrest, since the measure was a general measure addressing the general population. The Court also observed that the applicant had not been subjected to any particular measures, that he could not in any way justify the impact of the quarantine measure on his personal life. The Court also held that the applicant had not been deprived of the opportunity to leave the residence for various reasons whenever the legal situation required it, and also that the applicant had not been subject to any individual supervision by the Romanian authorities (Bulletin of the case law of the European Court of Human Rights 2021).

The importance of the decision of the European Court of Human Rights is of interest to both national courts and the courts of other states, as no one can invoke the defense of personal interests to the detriment of a national interest, that of protecting the health of a population.

The breach of the quarantine measure constitutes, as previously mentioned, an act incriminated by the Criminal Code in art. 352 Crimes against public health, Thwarting to fight diseases. The original text of the law provided a sentence of imprisonment from 6 months to 2 years or a fine for non-compliance with measures to prevent or combat infectious diseases, if it resulted in the spread of such a disease.

Art. 352 of the Criminal Code was amended in 2020 by O.U.G no. 28/2020 as follows (see Hegheş 2020, 91-92):

*“(1) Failure to comply with quarantine or hospitalization measures adopted to prevent or combat infectious diseases results in imprisonment from 6 months to 3 years or a fine.*

(2) *Failure to comply with measures to prevent or combat infectious diseases, if the act has resulted in the spread of such a disease, shall be punishable by imprisonment from one to five years.*

(3) *The transmission, by any means, of an infectious disease by a person aware of having this disease is punishable by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.*

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

5) *If by the facts provided in par. (1) and para. (2) the bodily injury 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*

(6) *If by the facts provided in par. (1) and para. (2) the death of one or more persons took place, the punishment is imprisonment from 5 to 12 years and the prohibition of the exercise of certain rights.*

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

(8) *If by the deed provided in par. (4) the bodily injury of one or more persons took place, 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.*

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

(10) *Quarantine means the restriction of activities and the separation from other persons, in specially arranged spaces, of sick or suspicious persons, in a manner that prevents the possible spread of infection or contamination."*

We observe in the new text of the law that the violation of the quarantine measure is punishable by imprisonment of up to 15 years, depending on the consequences of violating the ban to leave the quarantine. The minimum penalty for the violation of the quarantine measure is from 6 months to 3 years and is similar to the penalty provided by the Penal Code for the crime of escape: (1) Escape from the lawful state of detention or detention shall be punished by imprisonment from 6 months to 3 years. (Art. 285 Penal Code).

One can observe the disproportion in the assessment of the degree of social danger done by the legislator in sanctioning the two criminal acts. Violation of the quarantine measure is punishable by similar penalties for crimes of medium to high severity. Escape is a crime that in some cases even leads to recidivism, the active subject of this crime being a prisoner definitively convicted of a crime, serving a custodial sentence and not considered to have been executed legally (Cristiean 2017, 129-130).

Considering the degree of social danger posed by the active subjects of the two crimes analyzed comparatively, we can conclude that a person who left the place of quarantine and for whom this act did not have serious consequences, respectively, the infection of other persons, does not represent a social danger as great as a detainee definitively convicted of a crime, who leaves the place of detention. And yet, the punishment is the same: imprisonment from 6 months to 3 years

Drawing a parallel between the measure of quarantine and house arrest, we can observe that the violation of the measure of quarantine results in the infringer acquiring the status of active subject for the crime of thwarting the fight against disease, punishable by criminal penalties far greater than escape, while the violation by the defendant of the measure of house arrest does not retain in his charge the quality of active subject of the crime of escape, which is what the legal doctrine covers (Oprea 2015, 156). Or, we consider in this comparative analysis that the assessment of the social danger represented by the subjects of the violation of

the two measures is again disproportionate, the legislator not taking into account the danger created and life, integrity or health of a person to a much greater extent than a breach of the quarantine measure.

Last but not least important, with regard to the criminal sanction of the crime of thwarting the fight against disease, the way to amend the criminal law is also under critique, since a criminal law adopted for general situations, such as the Criminal Code, through a legislative procedure specific to a consolidated democracies, is amended by an emergency ordinance, adopted in the context of an epidemic - a particular situation, marked by uncertainty in what regards the applicability of new sanctions.

There are numerous situations in which defendants in the cases regarding the crime of thwarting the fight against diseases were acquitted, the motivation in the law being, in most cases, that the deed is not provided by law. Other cases of acquittal were motivated in law by certain decisions of the Constitutional Court which declared the measures adopted during the pandemic of COVID-19 as unconstitutional, which we list below, as unlimited ones:

- DECISION No. 458 of June 2020 regarding the exception of unconstitutionality of the provisions of art. 25 paragraph (2) of Law no. 95/2006 on health care reform and of art. 8 paragraph (1) of the Government Emergency Ordinance no. 1/2020 on emergency stocks, as well as some measures related to the establishment of the quarantine published in the Official Gazette no. 581 of 02.07.2020
- DECISION no. 392 of June 8, 2021 regarding the exception of unconstitutionality of the provisions of art. 3 para. (2), of art. 4 para. (1) the second part and of art. 72 para. (1) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, of art. 72 para. (2) of the same law, with reference to art. 42 paragraph (3) of the Government Emergency Ordinance no. 21/2004 on the National Emergency Management System, as well as the provisions of the Government Emergency Ordinance no. 192/2020 for the amendment and completion of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, as well as to amend letter a) in art. 7 of Law no. 81/2018 on the regulation of telework activity published in the Official Gazette no. 688 of July 12, 2021.
- DECISION no. 672 of October 20, 2021 regarding the notification of unconstitutionality of the Decision of the Romanian Parliament no. 5/2020 to endorse the institution of lockdown and the measures taken during this, in order to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette no. 1030 of 28.10.2021
- DECISION no. 50 of February 15, 2022 regarding the exception of unconstitutionality of Law no. 55/2020, about certain measures to prevent and combat the effects of the COVID-19 pandemic, as a whole, as well as to amend provisions of Art. 5, paragraph (2) letter d) in this law, especially, as well as the Emergency Ordinance of the Government no. 192/2020 to change and amend Law no. 55/2020 about certain measures to prevent and combat the effects of the COVID-19 pandemic, as well as to change letter a) in art. 7 of Law no. 81/2018 on the regulation of telework activity, as a whole, published in the Official Gazette no. 291 of 25.03.2022

In all the decisions mentioned above, the Constitutional Court found that the limitation and restriction of the exercise of certain constitutional rights took place in violation of legal provisions, by acts of public authorities with legal force inferior to the law, which contradicts art. 53 para. (1) of the Romanian Constitution: *The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.*

## Conclusions

The offense of thwarting the fight against disease is not assimilated to house arrest, and cannot be assimilated to any restriction on the person's freedom of movement. The current criminal legislation which incriminates and sanctions the crime of thwarting the fight against disease is a questionable one, considering that there is not enough judicial practice to increase the punishments of the law or to incriminate new deeds, in a temporary pandemic situation.

The Romanian criminal jurisprudence counts few convictions with execution at this moment, from the thousands of criminal cases registered in court regarding the crime of thwarting the fight against diseases. We can conclude that the intention of the legislator to protect a general interest in the health of the population was differently assessed by the courts, which considered that the acts of those accused of thwarting the fight against disease are not likely to pose a significant social danger.

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