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Review article

UNFORESEEABILITY AND ABUSE OF CRIMINAL LAW DURING THE COVID-19 PANDEMIC IN SERBIA

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ABSTRACT

The author deals with the problem of criminal measures and sanctions in the legislation of the Republic of Serbia during the Covid-19 pandemic. The executive branch of the government declared a state of emergency in the Republic of Serbia in March 2020. At the same time the so-called Crisis Headquarter was established with the authority to impose measures of criminal-legal nature. During the two-month state of emergency, through the Crisis Headquarter, the executive branch of the government was changing criminal laws and sanctions at an almost daily basis. It is debatable whether such laws meet the rule of law and the European Court of Human Rights standards. Many citizens failed to adapt their behavior to the imposed measures. On the one hand, the courts have fallen into the trap of double punishment, both for a crime and for a misdemeanor. On the other hand, justifications of the courts' decisions are also questionable, especially those containing references to statements made by members of the crisis team through the media. Furthermore, the Constitutional Court didn't rule on any of the numerous requests for constitutional review, but in September it came out with the view that since the state of emergency was over, its decision was unnecessary.

The paper is comprised of several units. In the first place, the author explains the process of legal changes by analyzing all the laws and rules that were passed by the end of 2020, as well as data related to the punishment of residents whose behavior was not in accordance with existing legal solutions. Bearing in mind the standards of the rule of law and the European Court of Human Rights, the author then explains that the measures implemented by the Serbian authorities do not meet the basic required criteria, primarily the foreseeability of the law, as well as that the laws were abused for the purpose of the election campaign. The special attention is paid to curfews and the complete ban on leaving homes for senior citizens well as ban of contacting with the family members, and then the lockdown of the rest of the population. The actions taken by the authorities during the epidemic resulted in violation of human rights of their citizens, and experience shows that the only court that citizens will be able to turn to will be the European Court of Human Rights. The author believes that with this understanding of the law and respect for its own citizens, the European Union can only be a distant idea.

Keywords*: curfews, double jeopardy, failing to act pursuant to regulations, human rights, foreseeability of the law*

1. INTRODUCTORY REMARKS

Coronavirus (COVID-19) is the newest dangerous contagious disease in the world, emerged at the end of 2019 and the beginning of 2020[1] and it is certainly challenge for democratic societies.[2] As Ben Stickle and Marcus Felson emphasize, "the COVID-19 pandemic of 2020 is unquestionably one of the most significant worldwide events in recent history, impacting culture, government operations, crime, economics, politics, and social interactions for the foreseeable future. One unique aspect of this crisis is the governmental response of issuing legal stay-at-home orders to attempt to slow the spread of the virus. While these orders varied, both in degree and timing, between countries and states, they generally began with strong encouragement for persons to isolate themselves voluntarily."[3] However, Republic of Serbia adopted an opposite solution – a mandatory isolation for entire population, with some exceptions.

Due to the pandemic caused by the coronavirus, the President of the Republic of Serbia, the President of the National Assembly and the Prime Minister passed the Decision on declaring a state of emergency on March 15, 2020, which lasted until May 6, 2020. The Assembly passed a Decision to abolish the state of emergency. The day after the declaration of the state of emergency, the Government, with the co-signature of the President of the Republic, passed the Regulation on measures during the state of emergency, which prescribes measures derogating from the constitutionally guaranteed human and minority rights.

This article is divided into several parts. In the first part, the author explains the process of legal changes by analyzing all the laws and rules that were passed by the end of 2020, as well as data related to the punishment of residents whose behavior was not in accordance with existing legal solutions. In the second part we

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1 Turanjanin, V.; Radulović, D., *Coronavirus (Covid-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, Iranian Journal of Public Health, Vol. 49, Suppl. 1, 2020, p. 4; Chan, H.Y., *Hospitals' Liabilities in Times of Pandemic: Recalibrating the Legal Obligation to Provide Personal Protective Equipment to Healthcare Workers*, Liverpool Law Rev, 2020, [https://doi.org/10.1007/s10991-020-09270-z].

2 In the field of criminal procedure law, one of the issues is use of the technical means at the main trial. See Turanjanin, V., *Video Surveillance of the Employees Between the Rights to Privacy and Rights to Property after Lopez Ribalda and Others v. Spain*, University of Bologna Law Review, Vol. 5, No. 2, 2020, p. 269. For example, if the presence of the defendant is difficult at the main trial due to the danger of spreading a contagious disease, the court may decide to ensure the participation of the defendant by technical means, if it is technically possible.

3 Stickle, B.; Felson, M., *Crime Rates in a Pandemic: the Largest Criminological Experiment in History*, American Journal of Criminal Justice, Vol. 45, 2020, p. 525. See further: Lundgren, M.; Klamberg, M.; Sundström, K.; Dahlqvist, J., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, Nordic Journal of Human Rights, Vol. 38, No. 4, 2020, pp. 305-318; M. Klatt, *What COVID-19 does to our Universities*, University of Bologna Law Review, Vol. 6, No. 1, 2021, p. 1.

will explain decision of the Serbian Constitutional Court on issues raised during the state of emergency. The third part is devoted to the curfews and the complete ban on leaving homes for senior citizens well as ban of contacting with the family members, and then the lockdown of the rest of the population. The author then, in the part IV, explains that the measures implemented by the Serbian authorities do not meet the basic required criteria, primarily the foreseeability of the law, as well as that the laws were abused for the purpose of the election campaign.

2. CRIMINAL AND MISDEMEANOR PROVISIONS AND STATE OF EMERGENCY

In the first place, it is necessary to start from the Criminal Code of the Republic of Serbia, which in Article 248 prescribes the criminal offense *Failure to act in accordance with health regulations during epidemic*:

Whoever during an epidemic of a dangerous contagious disease fails to act pursuant to regulations, decisions or orders setting forth measures for suppression or prevention thereof, shall be punished by fine or imprisonment up to three years.

This is a blanket criminal offence, which means that the content depends on other legal regulations that were passed during the epidemic. However, Serbia did not pass any laws, but regulations, as bylaws, which criminalized certain behaviors, and the most problematic was the Order of the Minister of Internal Affairs on the prohibition of movement (curfew), which will be discussed in more detail in the text below.

During the state of emergency, the Government of the Republic of Serbia passed a number of bylaws, which deeply encroached on the rights and freedoms of citizens guaranteed by the Constitution. In the first place, we are referring to the Regulation on measures during the state of emergency, which has been changed several times (hereinafter: the Regulation).[4] At the very beginning of Regulation, in Article 1, it is stated that the Regulation deviates from the constitutionally guaranteed

[4] Official Gazette of Republic of Serbia No. 31/20 (16/03/2020), Official Gazette of Republic of Serbia No. 36/20 (19/03/2020), Official Gazette of Republic of Serbia No. 38/20 (20/03/2020), Official Gazette of Republic of Serbia No. 39/20 (21/03/2020), Official Gazette of Republic of Serbia No. 43/20 (27/03/2020), Official Gazette of Republic of Serbia No. 47/20 (28/03/2020), Official Gazette of Republic of Serbia No. 49/20 (01/04/2020), Official Gazette of Republic of Serbia No. 53/20 (09/04/2020), Official Gazette of Republic of Serbia No. 56/20 (15/04/2020), Official Gazette of Republic of Serbia No. 57/20 (16/04/2020), Official Gazette of Republic of Serbia No. 58/20 (20/04/2020), Official Gazette of Republic of Serbia No. 60/20 (24/04/2020), Official Gazette of Republic of Serbia No. 65/20 (06/05/2020) and Official Gazette of Republic of Serbia No. 126/20 (23/10/2020).

human and minority rights during a state of emergency.[5] Finally, on May 6, 2020, the National Assembly adopted the Law on the application of regulations passed by the Government with the co-signature of the President of the Republic during the state of emergency[6] and which were confirmed by the National Assembly. In the text that follows, we will analyze the most important and most controversial provisions of these acts. Emphasis will be placed on banning the movement of the population, as well as on violating the principle of double criminality. It is important to note that the legal regulations entered into force on the day of their publication in the Official Gazette.

Restrictions on the rights and freedoms of citizens were already announced in Article 1 of the Regulation. Article 2 of the Regulation allows ministries to impose certain measures which would restrict citizen's rights and freedoms. Based on this article, the Minister of the Interior issued an Order on restriction and prohibition of movement of persons on the territory of the Republic of Serbia. The order prohibits the movement of persons over 65 years of age in populated areas with more than 5,000 inhabitants and persons over 70 years of age in populated areas with up to 5,000 inhabitants. The ban did not refer only to Saturday, for the period from 04:00 to 07:00 in the morning. All other persons are prohibited from leaving apartments, rooms and facilities in residential buildings and houses from 5 pm to 5 am on working days, as well as from 1 pm on Saturdays until 5 am on Mondays. After that, the mantra about *the importance of the next two weeks* was repeated, and the ban on movement was extended until the beginning of May, when the government abolished it under the public pressure – just before the elections.

The Regulation on Amendments of the Regulation on Measures during the State of Emergency of 9 April 2020 transferred the quarantine of citizens to the Regulation, by adding Articles 1a and 1b. Namely, in order to suppress and prevent the spread of the infectious disease COVID-19 and protect the population from that disease, during the state of emergency it was forbidden to move in public places, i.e. outside apartments, rooms and other residential objects in residential buildings, as well as outside the household: for persons from 70 years of age in populated areas up to 5000 inhabitants, and persons over 65 years of age in populated areas over 5000 inhabitants, except on Fridays from 04 to 07 o'clock in the morning. Persons under the age of 65 were initially banned from leaving the houses from 5 pm to 5 am on working days, as well as from 5 pm on Friday until 5 am

5 Official Gazette of Republic of Serbia No. 34/2020, 39/2020, 40/2020, 46/2020 and 50/2020.

6 Official Gazette of Republic of Serbia No. 65/20 (06/05/2020).

on Monday.[7] As a result of a public pressure, provisions on taking pets for a walk were added to the Regulation. For this purpose, the movement was, exceptionally, at the time of the ban, allowed to persons under 65 years of age, in the period from 11 pm to 1 am the next day, as well as on Saturdays and Sundays from 8 am to 10 am, for 20 minutes, up to a maximum of 200 m distance from the place of residence or stay. During this time, it was forbidden for more than two persons to move together or stay in a public place in the open. The ban did not apply to minors and their parents, i.e. guardians and foster parents.

At the same time, Article 1b of the Regulation prohibited movement in all parks and public areas intended for recreation and sports. Funerals could be held, but only with the presence of a maximum of ten people and with a mandatory distance of two meters. Particularly interesting is the provision of paragraph 1 of Article 4d of the Regulation, which prescribed extremely high fines for violating the provisions of Articles 1a and 1b - a fine in the range of 50.000,00 RSD (approximately 425,00 EUR or 520,00 USD) to 150,000.00 RSD (approximately 1.270,00 EUR or 1.550,00 USD). It is really theoretically problematic here how to determine the fine that will be imposed due to the violation of the movement ban. An even more problematic provision is the provision of paragraph 2, which explicitly stipulates that a misdemeanor procedure will be initiated and completed due to the committed misdemeanor, even if criminal proceedings have been initiated against the perpetrator for a criminal offense that includes the characteristics of that misdemeanor, regardless of prohibition from Article 8, paragraph 3 of the Law on Misdemeanors. This provision clearly stipulates that against a perpetrator of a misdemeanor proceedings for the misdemeanor cannot be initiated, or if already initiated cannot be continued if a person has already been found guilty of a criminal offense which includes characteristics of the misdemeanor.

In the following amendments to the Regulation, the permission to move during the ban was extended to persons with developmental disabilities and autism, but only if accompanied by one adult, up to a maximum of 200 meters from the place of residence or stay. Only three days later, a new amendment to the Regulation was passed, which extended the ban on movement during the Easter holidays as follows: during the Easter holidays, persons under the age of 65 are prohibited from moving from 5 pm on Friday, April 17, until 05 am on Tuesday, April 21, but during this period, in addition to the already prescribed time for taking pets

[7] Exceptions were licensed health workers, members of the Ministry of the Interior, the Ministry of Defense, the Serbian Army and security services, who are on duty, persons licensed by the Ministry of the Interior, crew members of cargo motor vehicles, cargo ships, railway staff vehicles, crews and cabin crew of aircraft, which perform international transport in road, rail, water and air transport; as well as persons who urgently needed medical assistance, with a maximum of two accompanying persons.

for a walk, it is also allowed to take them out on Monday, April 20 from 08 to 10 am.

A few days later, restrictions on leaving homes for people older than 65 were even more tightened. Namely, in addition to the provision which allows them to go out on Fridays from 04 to 07 in the morning, it was decided that this was allowed only for the purpose of buying groceries. However, this category of persons was allowed to go out on Tuesdays, Fridays and Sundays in the period from 6 pm to 1 am, for a period of 30 minutes and in a diameter of 600 meters from the place of residence or stay. For persons under the age of 65, the timespan during which it was not allowed to leave the residence was extended from 5 pm to 6 pm. Then, the ban was lifted for the construction workers hired on properly registered building construction and civil engineering construction sites. Also, blind, deaf or persons with hearing difficulties, as well as persons who, due to the existence of similar impairments, cannot move independently, could move accompanied by one companion, in the period when movement was allowed. The ban did not apply to persons who were elected, appointed or employed in a state body, autonomous province body or local self-government body if their presence was necessary for the functioning of competent state bodies, autonomous province bodies or local self-government bodies with the provision that all preventive measures related to preventing the spread of infectious diseases (keeping social distance, disinfection and use of protective equipment, i.e., masks and gloves) were applied. At the request of the competent state body, the body of the autonomous province or the body of the local self-government unit, the Ministry of the Interior issued a special permit for these persons to move.

The new amendment to the Regulation of April 24 allowed persons over 65 years of age to go out every day for 60 minutes, but the period in which they were previously allowed to go out has not changed. The ban on going out has also been extended during the Labor Day holidays, from 6 pm on Thursday, April 30, until 5 am on Monday, May 4. Taking out the pets allowed from 8 am to 10 am on Friday, May 1. On May 6, 2020, the Law on the Validity of regulations passed by the Government with the co-signature of the President of the Republic during the state of emergency was enacted and then confirmed by the National Assembly. In this way, a set of different regulations with criminal provisions gained the force of law quite illegally. This legal text repealed the regulations, which stipulates that the provisions of those ordinances are applied to the offenders for criminal offences committed during the state of emergency even after the state of emergency has ceased (Article 2).

3. REACTION OF THE CONSTITUTIONAL COURT OF SERBIA

The reaction of the Constitutional Court of the Republic of Serbia was, we can freely say, mild and it came too late. Decision No. Iuo-45/2020 on several issues related to restrictions on the rights and freedoms of citizens during the state of emergency was issued by the Constitutional Court only on September 17, 2020, more than five months after the end of the state of emergency, and more than seven months after the filing of the constitutional appeals. The decision is mostly declaratory, and it states: first, that the provisions of the Regulation and Order regarding the violation of the *ne bis in idem* principle at the time of application were not in accordance with the Constitution and the ratified international treaty; second, that the proceedings for establishing the unconstitutionality and illegality of the provisions of Articles 1a, 2 and 3 of the Regulation are being suspended; third, that the procedure for determining the unconstitutionality of the Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia is suspended; fourth, the requests for suspension of the execution of individual acts and actions undertaken on the basis of the disputed provisions of the said acts are rejected.

At this point, attention should be drawn to the disputed Article 2 of the Regulation, which enabled the issuance of the Order. Namely, the Constitutional Court pointed out that this provision of the Regulation determined as possible measures of deviation from human and minority rights during the state of emergency, in order to suppress and prevent the spread of a contagious disease. The Constitutional Court has taken the position that in this case it is not a matter of delegating competencies to state administration bodies, but leaving the activation of measures and their operational implementation on the ground to the competent bodies in charge of enforcing laws and other regulations in the field of protection against infectious diseases for the purpose of expediency. According to the Constitutional Court, this approach of the Government enabled, depending on the development of the factual situation on the ground, which no one could have predicted with certainty, that concrete measures be implemented only where it was necessary and, in the extent, it was necessary, which is one from the basic constitutional preconditions for the introduction of measures derogating human and minority rights. Furthermore, according to the same position, each measure adopted by the Minister of the Interior was in fact adopted with the prior consent of the Government, because all proposals for adequate measures were considered at Government sessions and adopted only after obtaining consent. The Constitutional Court considers that this leads to the conclusion that the Government together with the President of the Republic retained the right to absolute control over the use of the given authority to concretize measures, which means that at any time it

could have deprived the competent body of the right to decide on measures if this right had been exercised contrary to the Constitution and decisions of all relevant state institutions and bodies.

Due to the above, the Constitutional Court considers that the disputed Order of the Minister of the Interior is an appropriate implementing act, which in itself does not represent a kind of original and independent decision-making of the Minister of the Interior, but the implementation and concretization of the Government's Regulation, part of which is the aforementioned Minister. Therefore, the Order does not represent a decision in the substantive sense, but is only derived from the Government Regulation which determines the measures that deviate from the constitutionally guaranteed human and minority rights during the state of emergency. Moreover, the Constitutional Court draws attention to the provisions of the Law on State Administration, which stipulates that for the protection of life and health, state administration bodies may prescribe measures that substantially restrict or prohibit the movement of persons and their gathering at public places. Then, according to the Law on Police, the Minister of the Interior may order the police, in order to ensure public order and peace or protect the health and lives of people, to temporarily restrict or prohibit movement in certain facilities, certain areas or workplaces. The Law on Health Protection envisages the possibility that the Minister of Health, under certain conditions, may prohibit the movement of the population in the area affected by a certain infectious disease, i.e., epidemic of that infectious disease, as well as prohibit or restrict travel and prohibit gathering in public places. Based on the above, the Constitutional Court took the position that the stated measures had to be taken. However, after the given analysis, the Constitutional Court suspended the proceedings.

The issue on which the Constitutional Court also suspended the proceedings is the issue of banning the movement of the population. The Constitutional Court pointed out here that in addition to measures restricting human rights, there is also a legal regime of derogation of human rights, i.e., deviations from human rights. This legal regime exists in extraordinary circumstances and is characterized by a temporary character. With regard to the restriction of freedom of movement, the Constitutional Court took the view that the measures applied were necessary and did not constitute deprivation of liberty measures. The purpose of the measures was not to deprive persons of their liberty for a certain period of time, but to protect them from the possibility of becoming infected by a dangerous infectious disease in specific circumstances. The Constitutional Court compared the ban on freedom of movement to patients who are effectively suffering from certain diseases, which require hospital treatment, which in some situations implies a longer stay in one hospital room. Since this is not considered deprivation of liberty, the

ban on leaving apartments and houses is not deprivation of liberty. Then, neither from the content of the prescribed measures of restraint of movement does it follow that it is a matter of deprivation of liberty. According to the Constitutional Court, the content of these measures is essentially reduced to creating the necessary conditions for effective protection against dangerous infectious diseases, and the population, especially the elderly, is directly related to some chronic diseases. Therefore, the goal of the measures is their protection, not deprivation of liberty. Consequently, the Constitutional Court did not find that the article of the Constitution guaranteeing a legal remedy was violated, because since it is not a matter of deprivation of liberty, there is no place for a legal remedy. Finally, the Constitutional Court found that there were no procedural preconditions for the continuation of the proceedings, and suspended them.

4. IS MANDATORY ISOLATION OF THE POPULATION DEPRIVATION OF LIBERTY WITHIN THE MEANING OF ARTICLE 5 OF THE CONVENTION?

In its decision, the Constitutional Court clearly took the position that the ban on the movement of the population does not constitute deprivation of liberty.[8] However, this is rather questionable given the ECtHR's views on forced isolation. It is not disputed that Article 5 of the European Convention guarantees the right to liberty and security of person and no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

Dr. Korhecz Tamás did not agree with this position of the Constitutional Court, and in his dissenting opinion he gave strong reasons for his position. Namely, he claimed that Article 2 of the Regulation only determined human rights that may be limited in order to combat a pandemic, and the establishment and introduction of specific measures, their duration, categories of persons to whom they apply, as well as the territory of the country to which they apply, was left to state administration bodies. The disputed authorizing norms of the Regulation are formulated extremely generally, to the extent that the determination of the contents of the restrictions, the imposition of the obligation is left to the general acts of the state administration. Moreover, the decision-making on the ban and restriction of

[8] It is worthy to emphasize the fact that according to the research, police officers were not sufficiently prepared and trained to respond in these specific circumstances. See more in: Janković, B.; Cvetković, V., *Public Perception of Police Behaviors in the Disaster COVID-19 – The Case of Serbia*, Policing: An International Journal, Vol. 43, Issue 6, 2020, pp. 979-992.

movement is left to the competent ministries. Norms such as: "The Ministry of the Interior, in agreement with the Ministry of Health, may temporarily restrict or prohibit the movement of persons in public places"… or the state administration body "may order the closure of all accesses to an open space or facility and prevent leaving that space or facility without a special permit…" do not determine the parts of the territory of the Republic of Serbia in which restrictive measures may be applied, except for "public places" and "open spaces", nor the categories of persons to whom restrictions may apply, nor the duration of measures on a daily, weekly bases, etc., except that the measures are of a temporary nature arising from the Constitution itself, so stating the temporality of the restrictions does not represent any specific duration of the measures.

Further, in a dissenting opinion, Dr. Korhecz Tamás clearly emphasizes that the Government has not determined the range of entities to which the measures are to be applied, has not determined specific measures of derogation, has not done so "substantially" or otherwise, nor has it "only set a specific operational task" to ministries. In the response of the Government and the competent ministry to the Constitutional Court, it is stated that the order of the ministry that prescribed specific measures was passed after consideration and after the consent of the Government and with the control of the Government and the President of the Republic. When assessing the constitutionality of the Regulation, as well as the Order, this information is not legally relevant, since such a procedure of adoption (with consideration and approval by the Government) is not prescribed by procedural norms, and cannot affect the constitutionality of disputed norms. From the same response of the Government and the competent ministry it follows that the Government had the opportunity to sit, and to consider the measures of the Ministry at the time of enactment of the administrative regulation, which means that there were no special reasons that due to impediment of the Government ministry itself imposes derogation measures and adjust them to epidemiological situation. After all, on April 9, less than a month after its adoption, the Government amended the Regulation in such a way that it itself prescribed measures of derogation and prescribed the termination of the validity of the disputed Order. This fact is an additional reason to conclude that specific measures to derogate from human rights could have been prescribed in the Regulation from the beginning. The dissenting opinion concludes that if the Constitutional Court confirms legal shortcomings of regulations, even formal ones, it will relativize the importance of respecting the procedure, the competence of various bodies and the constitutionally established relationship between branches of government and relations in the same branch of government, paraphrasing a Supreme Court judge of the United States of America

Robert Jackson in the case of *Toyosaburo Korematsu v. United States*[9] that the court must not confirm the constitutionality of the order of a state body, even if it represents a justified exercise of power in extraordinary circumstances, because the courts exercise legal power and must abide by the constitution and laws, otherwise they become an instrument of certain policy.[10]

First of all, we need to examine three steps: whether the applicant was "deprived of his liberty", whether the deprivation of liberty was justified under any of subparagraphs (a) to (f) of Article 5 § 1 and whether the detention in issue was "lawful" and free from arbitrariness. The ECtHR took a stand that the compulsory isolation orders and the citizens' involuntary placement in the hospital amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. Furthermore, Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds of deprivation of liberty. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one subparagraph.[11]

The expressions "lawful" and "in accordance with a procedure prescribed by law" ("*selon les voies légales*" in French) in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently accessible and precise to allow the person – if necessary, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail.[12] Moreover, an essential element of the "lawfulness" of a detention within the meaning of Article 5 § 1 (e) is the absence

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9 *Toyosaburo Korematsu v. United States*, Supreme Court. 323 U.S. 214. 65 S.Ct. 193. 89 L.Ed. 194., 1944.

10 *Decision No. Iuo-45/2020*.

11 *Enhorn v. Sweden* (2005), *Eriksen v. Norway* (1997) 1997-III 861; *Brand v. the Netherlands* (2004). See: Mowbray, A., *Compulsory Detention to Prevent Spreading of Infectious Diseases*, Human Rights Law Review, Vol. 5, Issue 2, 2005, pp. 387-391; Martin, R., *The exercise of public health powers in cases of infectious disease: human rights implications. Enhorn v. Sweden*, Med Law Rev, Vol. 14, No. 1, pp. 132-143.

12 *Varbanov v. Bulgaria* (2000) ECHR 2000-X; *Amann v. Switzerland* (2000) ECHR 2000-II; *Steel and Others v. the United Kingdom* (1998) 1998-VII 2735; *Amuur v. France* (1996) 1996-III 850-51; *Hilda Hafsteinsdóttir v. Iceland* (2004).

of arbitrariness.[13] The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances[14] and in accordance with the principle of proportionality.[15]

When we speak about the detention of citizens for preventing the spread of the infection, it should be noted that the ECtHR has so far encountered several forms of this deprivation of liberty. Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention.[16] Taking these principles into account, the ECtHR states that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are:

1. whether the spreading of the infectious disease is dangerous to public health or safety
2. whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.

When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.[17] As judge Costa in *Enhorn* emphasizes, Article 5 § 1 (e), which provides for the possibility of depriving a person of his liberty "in accordance with a procedure prescribed by law" where the purpose is "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants", has not given rise to

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13 *Chahal v. the United Kingdom* (1996) 1996-V 1864; *Witold Litwa v. Poland* (2000) ECHR 2000-III; *K.-F. v. Germany* (1997) 1997-VII 2674.

14 *Witold Litwa v. Poland*, note 13.

15 *Vasileva v. Denmark* (2003).

16 *Guzzardi v. Italy*, (1980) 39 36-37, *Witold Litwa v. Poland*, note 13.

17 *Enhorn v. Sweden*, note 11.

a very extensive body of case-law and there are virtually no precedents concerning "the prevention of the spreading of infectious diseases". Additionally, we can agree with his statement in *Enhorn*, which can be very copied to some degree on the present, that illustrate both the difficulty of striking a balance between liberty (which should ultimately prevail) and the "protection of society", because a disproportionate deprivation of liberty is not necessary and that, if it is not necessary, it borders on arbitrary. Some clarification would be desirable, particularly with a view to ensuring legal certainty and this would be especially helpful as developments in epidemiology. Furthermore, as judge Cabral Bareto emphasizes in *Enhorn*, today situation also relates to "a deprivation of liberty in the context of the measures which States are called upon to take in order to protect society from the potential acts of individuals who have contracted an infectious disease. The obvious aim of such measures is to prevent the spread of a disease whose consequences are exceptionally serious. The problem is that where such measures entail deprivation of liberty within the meaning of Article 5 § 1 of the Convention, they must be consistent with the Court's settled case-law, which is rightly stringent."

We believe that the forcible detention of the population in their homes constitutes deprivation of liberty within the meaning of Article 5 of the Convention. If we start from the three-level test (whether the applicant was "deprived of his liberty", whether the deprivation of liberty was justified under any of sub-paragraphs (a) to (f) of Article 5 § 1 and whether the detention in issue was "lawful" and free from arbitrariness), we can state that all conditions are not met. First, it is clear that the forced detention of the population, threated by imposing high fines and imprisonment, in their own homes, is deprivation of liberty. Secondly, it is true that this was done to prevent the spread of infectious diseases. However, according to the legal rules, the restriction of movement can be imposed only in a certain area, while in the Republic of Serbia, an absolute ban on movement is imposed on the entire territory, to all residents, regardless of their health condition. At the same time, if we look at the number of changes and changes in the regime of movement, we can conclude that the detention was not free of arbitrariness.

It is important to emphasize one more fact here. Namely, the Constitutional Court described in detail why it found that the provisions regarding the principle of *ne bis in idem* were not in accordance with the Constitution. In the reasoning of the decision, the Constitutional Court definitely took a position on that issue, referring both to the European Convention on Human Rights and to a number of decisions of the European Court of Human Rights. On the contrary, when deciding on the ban on movement, the Constitutional Court very laconically took the position that it was not a matter of deprivation of liberty, without engaging in any form of argumentation for such a position.

5. HAS THE REPUBLIC OF SERBIA VIOLATED THE PRINCIPLE OF LEGALITY?

The principle of legality, as a basic principle of criminal law, is deeply connected with the rule of law[18] and the legal state and it is known as one of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege* ("no crime without law, no punishment without law".[19] Today, *nullum crimen sine lege and nulla poena sine lege* serve as the bedrock of the principle of legality.[20] A comparative analysis of the criminal codes reveals that the this principle enjoys universal recognition, while only two member States of the United Nations (Bhutan and Brunei) do not contain provisions on *nullum crimen nulla poena sine lege* in their domestic legal orders.[21] As Enric Fossas Espadaler emphasizes, following the path of the Inter-American Court of Human Rights, the ECtHR has contemplated a duty to protect rights through criminal law.[22] The principle of legality is part of the concept of the rule of law[23] and it is prescribed by numerous international and domestic legal texts.

As is well known, Article 7 of the ECHR stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. At the same time, this article does not affect the trial and punishment of a person for an act or omission which at the time of execution was considered a criminal offense under the general principles of law recognized by civilized nations. Thus, this article prescribes the principle

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18 The rule of law, as protection against the arbitrary and excessive use of state power, is certainly one of the most attractive items Western liberal democracies. Letnar Černič, J., *Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe*, Hague Journal of Human Rights, Vol. 10, 2018. p. 113.

19 Van Schaack, B., *Crimen sine lege: Judicial lawmaking at the intersection of law and morals*, Georgetown Law Journal, Vol. 97, No. 1, 2008, p. 121; see more: Olasolo, H., *A Note on the Evolution of the Principle of Legality in International Criminal Law, Criminal Law Forum*, Vol. 18, 2007, pp. 301-319.

20 Dana, S., *Beyond retroactivity to realizing justice: theory on the principle of legality in international criminal law sentencing*, Journal of Criminal Law and Criminology, Vol. 99, No. 4, 2009, p. 861.

21 Rauter, T., *Judicial Practice, International Criminal Law and Nullum Crimen sine Lege*, Springer, Cham, 2017, 20. See more in: Hallevy, G., *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer, Heidelberg, 2010.

22 Fossas Espadaler, E., *Material Limits on the Criminal Legislator: Their Interpretation by the Spanish Constitutional Court and the European Court of Human Rights*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, p. 17.

23 Manusama, K., *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, Martinus Nijhoff Publishers, Leiden-Boston, 2006, p. 6.

of legality, which originates from the principle of the rule of law,[24] and there is an opinion that the public may be more understandable and acceptable to the name of the principle of illegality.[25] It applies only when a conviction which determines the sentence has been pronounced, and if the criminal proceedings are terminated in any other way, this article will not be applied, and its scope does not include sanctions imposed during the execution of the sentence.[26] Due to the scope of work here, we will not deal with the definition and explanation of the principle of legality according to the legislation of the Republic of Serbia.[27] Finally, what is particularly important in the case of this Article of the ECHR is that no derogation from it is allowed under Article 15 of the ECHR, which has been emphasized in a number of judgments.[28]

Despite the fact that the principle of legality is prescribed as one of the basic principles of criminal law in numerous national and international legal documents, the ECtHR has dealt with this issue on many occasions. Through its rich jurisprudence it has defined what is really meant by the principle of legality. Thus, although the principle of *nullum crimen nulla poena sine lege* seems clear at first sight, the ECtHR has, in a series of its judgments, identified situations in which this principle may be applied and in which it may not. At the same time, the ECtHR's views on the principle of legality, and especially on its segments do not coincide with national legislations, which is understandable given that the ECtHR seeks to reconcile different legal traditions. In the majority of cases, the ECtHR found a violation of the prohibition of retroactive application of criminal law. As we can conclude from the provision prescribing the principle of legality, the ECHR does not openly guarantee the application of a more lenient law, so the ECtHR initially denied the guarantee of this right, but during later practice there was a turnaround on this issue. The ECtHR has given special importance to the

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24 Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, p. 239.

25 Gallant, K., *The principle of legality in international and comparative criminal law*, Cambridge, Cambridge University Press, 2009, pp. 14-15.

26 Jaksić, A., *European Convention on Human Rights: A Commentary*, Belgrade, Faculty of Law, 2006, p. 235.

27 Škulić, M., *The Principle of Legality and the Principle of Guilt in Criminal Law as Segments of Legal State*, in: Nogo, S. (ed.), The Principles of Rule of Law, Tara, 2017, pp. 78-109; Stojanović, Z., *Criminal Law – General Part*, Belgrade, 2012, pp. 22- 23; Čejović, B., *The Principles of Criminal Law*, Belgrade, Dosije, 2008, pp. 59-140.

28 See more: Jovičić, S., *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights*, ERA Forum, Vol. 21, 2021, pp. 545-560.

practice of national courts, especially due to the issue of foreseeability of criminal law,[29] which, together with accessibility, is an integral part of the principle.[30]

Today, legal rules must be laid down in a clear and precise statute in order to enable the citizens to foresee legal consequences of an action.[31] For these considerations, the most important segment of the principle of legality is reflected in the foreseeability of criminal law. In this paper, we will emphasize the regulations passed by the Republic of Serbia during the state of emergency, which, from the author's point of view, did not meet the requirement of foreseeability, which resulted in numerous negative consequences for alleged violators of the measures imposed by the regulations.[32]

In the first place, it is necessary to start with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[33] Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage.[34] It also embodies, more generally, the principle that only the law can define a crime and prescribe a pen-

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29 Stojanović, A, *The Prohibition of Retroactivity in the ECtHR Jurisprudence*, Godišnjak Pravnog fakulteta u Istočnom Sarajevu, Vol. 2, No. 1, 2011, p. 54.

30 Schabas, W., *European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015, p. 335.

31 Gless, S., *A New Test for Mens Rea: Safeguarding Legal Certainty in a European Area of Freedom, Security and Justice*, European Criminal Law Review, Vol. 1, No. 2, 2011, p. 115; Faure, M.; Goodwin, M.; Weber, F., *The regulator's dilemma: Caught between the need for flexibility & the demands for foreseeability reassessing the lex certa principle*, Albany Law Journal of Science & Technology, Vol. 24, No. 2, 2014, p. 285; Pinto Soares, P., *Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism*, Criminal Law Forum, Vol. 23, 2012, p. 164; Manes, V., *'Common Law-ization of criminal law'? The Evolution of nullum crimen sine lege and the forthcoming challenges*, New Journal of European Criminal Law, Vol. 8, No. 3, 2017, p. 335.

32 See further Turanjanin, V., *Life Imprisonment Without Parole: The Compatibility of Serbia's Approach with the European Convention on Human Rights*, Liverpool Law Review, 2021, [https://doi.org/10.1007/s10991-020-09269-6].

33 *S.W. v. the United Kingdom* (1995) 21 ECHR 363; *C.R. v. the United Kingdom* (1995) 21 ECHR 32; *Kafkaris v. Cyprus* (2008) 49 EHRR 877.

34 *Welch v. the United Kingdom* (1995) 20 EHRR 247; *Jamil v. France* (1995); *Ecer and Zeyrek v. Turkey*, (2001) ECHR 2001II; *Mihai Toma v. Romania* (2012).

alty.[35] While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[36] It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.[37]

The ECtHR states that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability.[38] These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[39] However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.[40] The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain.[41] The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States.[42] Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case,

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35 *Kokkinakis v. Greece* (1993) 17 EHRR 397.

36 *Coëme and Others v. Belgium* (2000) ECHR -VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 1999IV.

37 *Cantoni v. France* (1996) 1996V; *Kafkaris v. Cyprus*, note 33.

38 *Kokkinakis v. Greece*, note 35; *Cantoni v. France*, note 37; *Coëme and Others v. Belgium*, note 36; E.K. v. Turkey (2002)

39 *Ibid*.

40 *Kafkaris v. Cyprus*, note 33.

41 *Ibid*.

42 *Kruslin v. France* (1990) 12 EHRR 547.

provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[43] The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights.[44] Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated. The European Court of Human Rights puts emphasis on the question of whether the rule prohibiting the offence is knowable to the offender, by requiring that the provision is both foreseeable and accessible and the underlying idea is that human beings can only adapt their behaviour in order to prevent criminal responsibility, by refraining from engaging in offences, if they are privy to the consequences.[45] Furthermore, the ECtHR assessed the foreseeability using the subjective ability for the applicant to recognize the criminal liability.[46]

Juan Antonio García Amado remands us that according to the Dictionary of the Spanish Royal Academy, foreseeable is "What may be foreseen or comes within normal foresight", so, to foresee is to see in anticipation or to know, to conjecture by some signs or indications what has to happen or to have or to prepare resources against future contingencies.[47] Precisely in the field of accessibility and foreseeability of norms, close to the prohibition of retroactivity,[48] and court interpretation, we believe that the provisions of the regulations were not in accordance with the requirements of the principle of legality. In the first place, we believe that the European Court of Human Rights did not encounter a situation before the coronavirus epidemic that the provisions on which the application of the criminal law depends change on a weekly basis.

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43 *Del Rio Prada v. Spain* (2013) 1004; S.*W. v. the United Kingdom*, note 33; *C.R. v. the United Kingdom*, note 33; *Streletz, Kessler and Krenz* (2001) ECHR 2001-II; K.-H.W. v. Germany (2001), *Korbely v. Hungary* (2008) ECHR 847; *Kononov v. Latvia* (2010) ECHR 667.

44 *Pessino v. France* (2006); *Dragotoniu and Militaru-Pidhorni v. Romania* (2007); *Alimuçaj v. Albania* (2012). Unfortunately, this term has not been consistently applied. See more: Zdravković, A., *Few Questions Yet to Be Answered in Regard to the Article 7 of the European Convention on Human Rights*, ECLIC, Vol. 4, 2020, pp. 670-700.

45 van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, Nordic Journal of International Law, Vol. 84, 2015, p. 518.

46 Mariniello, T., *The Nuremberg clause and beyond: Legality principle and sources of international criminal law in the European court's jurisprudence*. Nordic Journal of International Law, Vol. 82, No. 2, 2013, p. 244.

47 Antonio García Amado, J., *On the Foreseeability of Legal Consequences: Which Normative Provisions Are and Which Are Not Protected?*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, 177.

48 Krstulović Dragićević, A., *The Principle of Legality in the Case Law of the European Convention of Human Rights*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, p. 431.

ay that „in criminal matters, the relationship between the principle of legality and foreseeability is indisputable and is, therefore, delimited as follows: the punishment handed down for the offence cannot be harsher than what an average citizen may reasonably foresee, making use, as appropriate, of expert advice on the subject. On the other hand, there is no violation of a basic right associated with the principle of legality in criminal matters, when the penalty handed down is less severe than what could reasonably have been foreseen by this subject at the time of his action."[49] For these considerations very important is a judgment in a case *Öcalan v. Turkey (no. 2)*. The ECtHR states that "the isolation in question was not imposed under any decision taken by the authorities to confine the applicant in a cell in an ordinary prison, but rather resulted from a concrete situation, namely the fact that the applicant was the only inmate in the prison. The highly exceptional measure, which consisted in earmarking an entire prison for a single prisoner, did not for part of a detention regime geared to punishing the applicant more severely. It was motivated solely by the concern to protect the applicant's life and to prevent risk of escape linked to the conditions prevailing in ordinary prisons, including high-security establishments. The Court takes the view that this was such an extraordinary measure that a State could not be reasonably expected to provide details in its legislation on the regime to be applied in such cases. Moreover, the applicant, who had been wanted for serious offences carrying the death penalty, did not contend before the Court that he could not have foreseen that he would be incarcerated under exceptional conditions should be arrested."[50]

Therefore, we believe that foreseeability, as an element of the principle of legality, should be viewed in two directions. First, as the European Court of Human Rights has repeatedly emphasized, the law must be such that any person can reasonably foresee the sanction that will follow in the event of a breach of the norms. Secondly, however, we believe that the law itself must be foreseeable, so that each person can adjust their behavior to legal norms. Although the ECtHR finds that when the punishment is accessible and foreseeable, then the principle cannot be breached, in the light of the multiple changes of the laws nor the punishment nor the offence are not foreseeable.[51] In other words, the principle of legality was held not to have been violated when offenders could have foreseen the criminal consequences of their con- duct, despite no specific law criminalising such action at the time when it was carried out.[52]

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49 Antonio García Amado, *op. cit.*, note 47, p. 180.

50 *Öcalan v. Turkey (no. 2)* (2014).

51 *S.W. v. the United Kingdom*, note 33; *C.R. v. the United Kingdom*, note 33; Dana, *op. cit.*, note 20, p. 905.

52 Vanacore, G., *Legal Culpability and Dogmatik: A Dialogue between the ECtHR, Comparative and International Criminal Law*, International Criminal Law Review, Vol. 15, 2015, p. 830.

It is not disputed that the provisions of the regulations were clear. However, the question arises as to how citizens could monitor the changes in these bylaws in general. On the one hand, in some court verdicts, justifications of convictions were based on the requirement that citizens are obliged to follow the speeches of the President of the Serbia, and that in that way the standard of accessibility of the law was met. In other words, citizens were required to follow the president's speeches to know which legal rules would apply to them. On the other hand, through numerous verdicts we recognize the objectification of guilt. This view deserves a closer interpretation.

The Criminal Code of the Republic of Serbia adopts an objective-subjective theory of the concept of a criminal offense. According to the Article 14, a criminal offence is an offence set forth by the law as criminal offence, which is unlawful and committed with guilty mind/*mens rea*. Therefore, in this definition, both objective and subjective elements of the notion of a criminal offense stand out. The misdemeanor law, on the other hand, contains an objective conception of a misdemeanor, according to which a misdemeanor is an illegal act which is determined as a misdemeanor by law or other regulation of the competent authority and for which a misdemeanor sanction is prescribed.

The analysis of verdicts points to the fact that the courts, both criminal and misdemeanor, did not take into account both the subjective component and the circumstances that in this case could have influenced the fact that the defendants were not guilty of misdemeanor. For example, in several cases, persons were convicted because they were on the way home during the period covered by the ban, but did not arrive on time due to vehicle breakdowns. According to the court, they had enough time to reach the house in another way, and that they did not act in an emergency, acting intentionally during the commission of the offense.[53]

Thus, the population has been put in a position to adjust all its activities by bylaws, which have been changed on a weekly basis. At the same time, there were no exculpatory circumstances on the basis of which the person violated the prohibitive measures. It is true that in criminal law criminal offences can be prescribed only by law. However, here we have a case of a blanket bylaw that changes very quickly, and we have a criminal penalty based on bylaws. In doing so, we should take into account the views of the European Court of Human Rights on the concept of law and criminal punishment. Therefore, we believe that this approach of the legislator essentially objectifies the guilt of the offender.

[53] Verdicts of the Čačak Misdemeanor Court no. 12 Pr 1333/20 (29/04/20) and 13 Pr 1326/20 (23/04/20).

6. CONCLUSION

The coronavirus epidemic has caused many problems around the world. The sphere of criminal law could not be excluded. The states found themselves facing situations that they had not faced for years, and as a result, the reactions were more than different. However, the analysis of comparative legislation can also show different degrees of respect for human rights.

In this paper, we have tried to answer the question of whether the behavior of state bodies in the Republic of Serbia was in accordance with human rights standards. On the one hand, we have tried to answer the question of whether the forcible isolation of the population constituted deprivation of liberty within the meaning of Article 5 of the Convention. On the other hand, the question is whether the legal regulations adopted by the state met the requirements of the principle of legality within the meaning of Article 7 of the Convention. Although the European Court of Human Rights may take the view that such measures, such as compulsory vaccination, were and are necessary in a democratic society, we believe that, at this point, there has been a violation of human rights protected by Articles 5 and 7 of the Convention.

REFERENCES

BOOKS AND ARTICLES

1. Antonio García Amado, J., *On the Foreseeability of Legal Consequences: Which Normative Provisions Are and Which Are Not Protected?*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, pp. 177-193
2. Chan, H.Y., *Hospitals' Liabilities in Times of Pandemic: Recalibrating the Legal Obligation to Provide Personal Protective Equipment to Healthcare Workers*, Liverpool Law Rev, 2020, [https://doi.org/10.1007/s10991-020-09270-z]
3. Dana, S., *Beyond retroactivity to realizing justice: theory on the principle of legality in international criminal law sentencing*, Journal of Criminal Law and Criminology, Vol. 99, No. 4, 2009, pp. 857-928
4. Janković, B.; Cvetković, V., *Public Perception of Police Behaviors in the Disaster COVID-19 – The Case of Serbia*, Policing: An International Journal, Vol. 43, Issue 6, 2020, pp. 979-992
5. Faure, M.; Goodwin, M.; Weber, F., *The regulator's dilemma: Caught between the need for flexibility & the demands for foreseeability reassessing the lex certa principle*, Albany Law Journal of Science & Technology, Vol. 24, no. 2, 2014, pp. 283-364
6. Fossas Espadaler, E., *Material Limits on the Criminal Legislator: Their Interpretation by the Spanish Constitutional Court and the European Court of Human Rights*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, pp. 3-20

7. Gallant, K., *The principle of legality in international and comparative criminal law*, Cambridge, Cambridge University Press, 2009
8. Gless, S., *A New Test for Mens Rea: Safeguarding Legal Certainty in a European Area of Freedom, Security and Justice*, European Criminal Law Review, Vol. 1, No. 2, 2011, pp. 114-122
9. Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006
10. Hallevy, G., *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer, Heidelberg, 2010
11. Jaksić, A., *European Convention on Human Rights: A Commentary*, Belgrade, Faculty of Law, 2006
12. Jovičić, S., *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights*, ERA Forum, Vol. 21, 2021, pp. 545-560
13. M. Klatt, *What COVID-19 does to our Universities*, University of Bologna Law Review, Vol. 6, No. 1, 2021, pp. 1-5
14. Krstulović Dragićević, A., *The Principle of Legality in the Case Law of the European Convention of Human Rights*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, pp. 403-433
15. Letnar Černič, J., *Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe*, Hague Journal of Human Rights, Vol. 10, 2018, pp. 111-137
16. Lundgren, M.; Klamberg, M.; Sundström, K.; Dahlqvist, J.*, Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, Nordic Journal of Human Rights, Vol. 38, No. 4, 2020, pp. 305-318
17. Manes, V., *'Common Law-ization of criminal law'? The Evolution of nullum crimen sine lege and the forthcoming challenges*, New Journal of European Criminal Law, Vol. 8, No. 3, 2017, pp. 334-351
18. Manusama, K., *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, Martinus Nijhoff Publishers, Leiden-Boston, 2006
19. Mariniello, T., *The Nuremberg clause and beyond: Legality principle and sources of international criminal law in the European court's jurisprudence*. Nordic Journal of International Law, Vol. 82, No. 2, 2013, pp. 221-248
20. Martin, R., *The exercise of public health powers in cases of infectious disease: human rights implications. Enhorn v. Sweden*, Med Law Rev, Vol. 14, No. 1, pp. 132-143
21. Mowbray, A., *Compulsory Detention to Prevent Spreading of Infectious Diseases*, Human Rights Law Review, Vol. 5, Issue 2, 2005, pp. 387-391
22. Olasolo, H., *A Note on the Evolution of the Principle of Legality in International Criminal Law, Criminal Law Forum*, Vol. 18, 2007, pp. 301-319
23. Pinto Soares, P., *Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism*, Criminal Law Forum, Vol. 23, 2012, pp. 161-191
24. Rauter, T., *Judicial Practice, International Criminal Law and Nullum Crimen sine Lege*, Springer, Cham, 2017

25. Schabas, W., *European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015
26. Stickle, B.; Felson, M., *Crime Rates in a Pandemic: the Largest Criminological Experiment in History*, American Journal of Criminal Justice, Vol. 45, 2020, pp. 525-536
27. Stojanović, A, *The Prohibition of Retroactivity in the ECtHR Jurisprudence*, Godišnjak Pravnog fakulteta u Istočnom Sarajevu, Vol. 2, No. 1, 2011, pp. 45-64
28. Stojanović, Z., *Criminal Law – General Part*, Belgrade, 2012
29. Škulić, M., *The Principle of Legality and the Principle of Guilt in Criminal Law as Segments of Legal State*, in: Nogo, S. (ed.), The Principles of Rule of Law, Tara, 2017, pp. 78-109
30. Turanjanin, V.; Radulović, D., *Coronavirus (Covid-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, Iranian Journal of Public Health, Vol. 49, Suppl. 1, 2020, pp. 4-11
31. Turanjanin, V., *Video Surveillance of the Employees Between the Rights to Privacy and Rights to Property after Lopez Ribalda and Others v. Spain*, University of Bologna Law Review, Vol. 5, No. 2, 2020, pp. 268-293
32. Turanjanin, V., *Life Imprisonment Without Parole: The Compatibility of Serbia's Approach with the European Convention on Human Rights*, Liverpool Law Review, 2021, [https://doi.org/10.1007/s10991-020-09269-6]
33. Vanacore, G., *Legal Culpability and Dogmatik: A Dialogue between the ECtHR, Comparative and International Criminal Law*, International Criminal Law Review, Vol. 15, 2015, pp. 823-860
34. Van Schaack, B., *Crimen sine lege: Judicial lawmaking at the intersection of law and morals*, Georgetown Law Journal, Vol. 97, No. 1, 2008, pp. 119-192
35. van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, Nordic Journal of International Law, Vol. 84, 2015, pp. 515-535
36. Zdravković, A., *Few Questions Yet to Be Answered in Regard to the Article 7 of the European Convention on Human Rights*, ECLIC, Vol. 4, 2020, pp. 670-700
37. Čejović, B., *The Principles of Criminal Law*, Belgrade, Dosije, 2008

ECHR

1. *Alimuçaj v. Albania* (2012) ECHR
2. *Amann v. Switzerland* (2000) ECHR 2000-II
3. *Amuur v. France* (1996) 1996-III 850-51
4. *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 1999IV
5. *Brand v. the Netherlands* (2004) ECHR
6. *Cantoni v. France* (1996) 1996V
7. *Chahal v. the United Kingdom* (1996) 1996-V 1864
8. *C.R. v. the United Kingdom* (1995) 21 ECHR 32
9. *Del Rio Prada v. Spain* (2013) ECHR 2013-VI 11
10. *Dragotoniu and Militaru-Pidhorni v. Romania* (2007) ECHR

11. *Ecer and Zeyrek v. Turkey* (2001) ECHR 2001II
12. *Enhorn v. Sweden* (2005) ECHR 2005-I 99
13. *Eriksen v. Norway* (1997) 1997-III 861
14. *Hilda Hafsteinsdóttir v. Iceland* (2004) ECHR
15. *Jamil v. France* (1995) 317-B
16. *Guzzardi v. Italy* (1980) 39 ECHR
17. *Mihai Toma v. Romania* (2012) ECHR
18. *K.-H.W. v. Germany* (2001) 12 HRCD
19. *K.-F. v. Germany* (1997) 1997-VII 2674
20. *Kafkaris v. Cyprus* (2008) 49 EHRR 877
21. *Kokkinakis v. Greece* (1993) 17 EHRR 397
22. *Kononov v. Latvia* (2010) ECHR 667
23. *Korbely v. Hungary* (2008) ECHR 847
24. *Öcalan v. Turkey (no. 2)* (2014) ECHR
25. *Pessino v. France* (2006) ECHR
26. *S.W. v. the United Kingdom* (1995) 21 ECHR 363
27. *Steel and Others v. the United Kingdom* (1998) 1998-VII 2735
28. *Streletz, Kessler and Krenz* (2001) ECHR 2001-II
29. *Varbanov v. Bulgaria* (2000) ECHR 2000-X
30. *Vasileva v. Denmark* (2003) 13 HRCD
31. *Welch v. the United Kingdom* (1995) 20 EHRR 247
32. *Witold Litwa v. Poland* (2000) ECHR 2000-III 293

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. *Toyosaburo Korematsu v. United States*, Supreme Court. 323 U.S. 214. 65 S.Ct. 193. 89 L.Ed. 194., 1944
2. Verdicts of the Čačak Misdemeanor Court no. 12 Pr 1333/20 (29/04/20) and 13 Pr 1326/20 (23/04/20)