**TEME**, г. XLV, бр. 4, октобар – децембар 2021, стр. 1081–1096

Оригинлни научни рад https://doi.org/10.22190/TEME210822063T
Примљено: 22. 08. 2021. UDK 342.76(497.11):616-036.21COVID-19
Ревидирана верзија: 30. 08. 2021. 342.7(497.11):[616.98:578.834
Одобрено за штампу: 05. 12. 2021.

# SOCIAL IMPLICATIONS CAUSED BY STATE REACTION ON COVID-19 AND HUMAN RIGHTS IN REPUBLIC OF 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 from the human rights points of view. 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 on an almost daily basis. It is debatable whether such laws meet the rule of law and the European Court of Human Rights standards. The author in this work deals with three main issues: curfews, ne bis in idem principle, and migrants' detention. The particular attention is devoted to the Constitutional Court decision regarding the mentioned issues.

**Key words**: curfews, ne bis in idem, migrants, detention, human rights.

# СОЦИЈАЛНЕ ИМПЛИКАЦИЈЕ ИЗАЗВАНЕ ДРЖАВНОМ РЕАКЦИЈОМ НА *КОВИД-19* И ЉУДСКА ПРАВА У РЕПУБЛИЦИ СРБИЈИ

**Апстракт**

Аутор у раду објашњава проблем кривичноправних мера и санкција прописаних у српском кривичном законодавству за време трајања ванредног стања изазваног пандемијом коронавируса. Марта 2020. године, Влада Републике Србије је увела ванредно стање, а истовремено је успостављен тзв. Кризни штаб, са могућношћу да прописује мере кривичноправне природе. За време двомесечног трајања ванредног стања извршна власт је готово свакодневно доносила мере које су имале знатан утицај на кривично законодавство. Поставља се питање да ли су донети закони у суштини у складу са стандардима који произлазе из судске праксе Европског суда за људска права. Аутор се у раду бави три кључна питања, и то уведеном забраном напу-

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штања станова, притварањем мигранта и начелом непоновљивости кривичног поступка. Аутор посебну пажњу посвећује одлуци Уставног суда Републике Србије у вези са наведеним питањима.

**Кључне речи**: полицијски час, начело ne bis in idem, мигранти, лишење слободе, људска права.

## *INTRODUCTION*

Coronavirus (COVID-19) is the newest dangerous contagious disease in the world, emerged at the end of 2019 and the beginning of 2020 (Turanjanin & Radulović, 2020: p. 4; Chan, 2020) and it is certainly challenge for democratic societies.[1] 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" (Stickle & Felson, 2020: p. 525; see also Lundgren & Klamberg, 2020; Klatt, 2021: p. 1). However, Serbia adopted an opposite solution – a mandatory isolation for the entire population, with some exceptions (Turanjanin, 2021b: p. 224).

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 (Turanjanin, 2021b: p. 224).

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 Regula-

[1] In the field of criminal procedure law, one of the issues is use of the technical means at the main trial (Turanjanin, 2020: p. 269; Turanjanin, 2021: p. 86). 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.

tion).[2] At the very beginning of the Regulation, in Article 1, it is stated that the Regulation deviates from the constitutionally guaranteed human and minority rights during a state of emergency.[3] 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[4] and confirmed by the National Assembly. In the text that follows, we will analyse the most important and most controversial provisions of these acts. It is important to note that the legal regulations entered into force on the day of their publication in the Official Gazette (Turanjanin, 2021b: p. 225-226).

## *THE THREE MAIN PROBLEMS*

### *Curfews*

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 public pressure – just before the elections (Turanjanin, 2021b: p. 226).

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[2] 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).

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

[4] Official Gazette of Republic of Serbia No. 65/20 (06/05/2020).

The Regulation on Amendments of the Regulation on Measures during the State of Emergency of April 9 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 on Monday.[5] As a result of 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 the maximum of 200m 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 (Turanjanin, 2021b: p. 227).

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 the 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). What is especially theoretically problematic here, is 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 misdemeanour procedure will be initiated and completed due to the committed misdemeanour, even if criminal proceedings have been initiated against the perpetrator for a

[5]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.

criminal offense that includes the characteristics of that misdemeanour, regardless of prohibition from Article 8, paragraph 3 of the Law on Misdemeanours. This provision clearly stipulates that proceedings for the misdemeanour cannot be initiated against a perpetrator of a misdemeanour, or if already initiated, cannot be continued if a person has already been found guilty of a criminal offense which includes the characteristics of the misdemeanour (Turanjanin, 2021b: p. 227).

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 the 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 for a walk, it is also allowed to take them out on Monday, April 20 from 08 to 10 am (Turanjanin, 2021b: p. 227-228).

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 4 to 7 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 the 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 to the period 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 (Turanjanin, 2021b: p. 228).

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 was not changed. The ban on going out was also extended during Labour Day holidays, from 6 pm on Thursday, April 30, until 5 am on Monday, May 4. Taking the pets out was 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) (Turanjanin, 2021b: p. 228).

*Migrants' detention*

Article 3 of the Regulation stipulated that the Ministry of the Interior could order the closure of all accesses to an open space or facility and prevent it from leaving that space or facility without special permission, as well as order mandatory stay of certain persons or groups of persons in a certain area or certain facilities (reception centres for migrants, etc.). In order to prevent the uncontrolled movement of persons who may be carriers of the virus and to prevent arbitrary leave of migrants from asylum centres and reception centres, the movement of asylum seekers and irregular migrants accommodated in these centres in the Republic of Serbia was temporarily restricted. They could not leave a centre except in the justified cases (going to the doctor or for other justified reasons), with the special approval of the Commissariat for Refugees and Migration of the Republic of Serbia, which was limited in time – in accordance with the reason for which it was issued. The mentioned provisions were also challenged before the Constitutional Court, with the explanation that it was an illegal, arbitrary and collective deprivation of liberty, based on discriminatory criteria, with the lack of judicial protection.

*Ne bis in idem*

In short, Article 4d of the Regulation stipulates that a person who violates the prohibitions prescribed in Articles 1a and 1b will be punished for a misdemeanour. A misdemeanour procedure could be initiated and conducted for a misdemeanour even in the event that criminal proceedings were initiated or were in progress against the perpetrator for a criminal offense that includes the characteristics of that misdemeanour, regardless of the prohibition of non-repeatability of criminal proceedings.

In the actions of the executive bodies in this field, two problems can be singled out which can later be branched out into several others. First, the Government of the Republic of Serbia acknowledged that the envisaged misdemeanour had the characteristics of a criminal offense under Article 248 of the Criminal Code. Then, the Government submitted that the conduct of two proceedings in relation to the same matter was made possible because the misdemeanour proceedings were faster and more efficient than the criminal proceedings, and thus in specific circumstances a higher degree of respect for the restraining order could be achieved. The misdemeanour procedure, as a rule, ends in a shorter period of time, thus reducing the risk of infection for defendants, holders of judicial office and officials. Particularly problematic is the position in which the Government invoked the possibility of including the sentence of imprisonment or fine that the convict served or paid for the misdemeanour in the sentence imposed for the criminal offense.

## *DISCUSSION*

### *Curfews*

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.[6] However, this is rather questionable given the ECtHR's views on forced isolation. It is not disputed that Article 5 of the Convention guarantees the right to liberty and security. At the same time, the Constitutional Court compared this situation with the placement of patients suffering from certain diseases in the hospital, emphasizing that this is not deprivation of liberty. This attitude can be extremely wrong.

First of all, we need to examine three steps: whether the applicant was "deprived of his liberty," whether it was justified under 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." 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 sub-paragraph (Turanjanin, 2021b: p. 233).[7]

[6] 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 & Cvetković, 2020).

[7] Enhorn v. Sweden, 2005; Eriksen v. Norway, 1997; Brand v. the Netherlands, 2004 (see: Mowbray, 2005; Martin, 2006).

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.[8] An essential element of the "lawfulness" of a detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness.[9] 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[10] and in accordance with the principle of proportionality (Turanjanin, 2021b: p. 233-234).[11]

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. 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.[12] 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 (Turanjanin, 2021b: p. 234).

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[8] See Varbanov v. Bulgaria, 2000; Amann v. Switzerland, 2000; Steel and Others v The United Kingdom, 1998; Amuur v. France, 1996; Hilda Hafsteinsdóttir v. Iceland, 2004.

[9] Chahal v. the United Kingdom, 1996; Witold Litwa v. Poland, 2000; K.-F. v. Germany, 1997.

[10] Witold Litwa v. Poland, 2000.

[11] Vasileva v. Denmark, 2003.

[12] Guzzardi v. Italy, 1980; Witold Litwa v. Poland., 2000.

When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.[13] 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 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 very be copied to some degree on the present, illustrates both the difficulty of striking a balance between liberty (which should ultimately prevail) and the "protection of society," because 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 the view of ensuring legal certainty and this would be especially helpful in terms of the development of the epidemic situation. Furthermore, as judge Cabral Bareto emphasizes in *Enhorn*, today's 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" (Turanjanin, 2021b: p. 235).

We believe that the forcible detention of the population in their homes constitutes deprivation of liberty. If we start from the three-level test, 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 was 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 (Turanjanin, 2021b: p. 235).

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

[13] Enhorn v. Sweden, 2005.

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 (Turanjanin, 2021b: p. 235).

*Migrants' detention*

The controversial detention of migrants is the second biggest issue. In its decision, the Constitutional Court took the position that this was not an illegal, arbitrary and collective deprivation of liberty on the basis of discriminatory criteria and without the possibility to exercise judicial protection in relation to the prescribed restriction. The Constitutional Court considers that in the specific case it is a prescribed measure of temporary restriction of movement of the mentioned persons during the state of emergency. According to Article 202 para. 1, this was not a matter of deprivation of liberty either in terms of purpose or content. The reasoning of the Decision is exhaustive in the following:

> "The purpose of the temporary restriction was both effective protection against the dangerous infectious disease of asylum seekers and irregular migrants, accommodated in reception centres, and effective protection of the general population, i.e. all citizens. Both of these purposes are legitimate, legally acceptable and constitutionally justified. Namely, if asylum seekers and irregular migrants were allowed to move freely outside the reception centres in the conditions of the state of emergency imposed due to the real threat of citizens from a dangerous infectious disease, it would, in specific circumstances, expose them to a serious risk of infection and suffering from a dangerous infectious disease, and on the other hand, the absence of such a temporary restriction significantly increased the risk of exposing other persons in the Republic of Serbia to the possibility of contracting and contracting the disease. The risk for asylum seekers and irregular migrants in this case was logically significant because by far the largest number of these persons do not intend to stay in Republic of Serbia and live permanently, i.e. stay in Serbia for a relatively long period of time, on the contrary, they try to move to other countries as soon as possible. At the same time, in the specific circumstances when the state borders were maximally secured, they would certainly not have real opportunities to leave the territory of the Republic of Serbia, and if they succeeded in that, they would face serious problems in neighbouring countries. In addition, irregular migrants would most often be forced to try to cross the state border illegally on several occasions in a state of emergency, which would usually be unsuccessful in the given circumstances, and any such attempt would

> necessarily and logically be connected with significant to a higher degree of other types of risk than in regular circumstances. Temporary restriction of the movement of asylum seekers and irregular migrants accommodated in asylum centres and reception centres during the state of emergency cannot be considered deprivation of liberty, even in its content. Namely, the content of these measures essentially comes down to creating the necessary conditions for effective protection against dangerous infectious diseases in specific circumstances, targeting precisely those categories of persons who would, in principle, be significantly more exposed to the risk of contracting a specific disease. Such a temporary restriction certainly created a significantly increased risk of spreading a dangerous infectious disease in relation to other persons. Therefore, this essential content of the temporary restriction of movement of asylum seekers and irregular migrants accommodated in asylum centres and reception centres in the Republic of Serbia during the state of emergency, and especially when the previously explained purpose of such restriction is taken into account, is legally acceptable, legitimate and constitutionally justified." (The Constitutional Court Decision)

Of course, this reasoning raises many questions. As when we talked about the explanation of quarantine, the question arises why the Constitutional Court deviates from the detailed elaboration of the positions of the European Court of Human Rights, but in only a few paragraphs it explains that it is not about the deprivation of liberty in purpose or content. In doing so, both attitudes are questionable.

The Article 5 of the Convention concerns the protection of each person, as confirmed by the Court in *Nada v. Switzerland*.[14] Most EU countries allow migrants to be deprived of their liberty upon entering the country, most often by border police (Cornelisse, 2010: p. 8). Establishing a global image of imprisonment for migrants is considered extremely difficult (Fiske, 2016: p. 191). The grounds for deprivation of liberty are exhaustively stated in the Convention and a person cannot be deprived of his liberty beyond the enumerated grounds (Turanjanin & Soković, 2019: p. 962).[15] However, the "lawfulness" of detention under domestic law is not always the decisive element, so the Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. In the first place, the general principle of legal certainty has to be satisfied (Turanjanin & Soković, 2019: p. 963).[16]

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[14] Nada v. Switzerland, 2012, § 224.

[15] See Saadi v. the United Kingdom, 2008, § 43.

[16] See Nasrulloyev v. Russia, 2007, § 71; Khudoyorov v. Russia, 2005, § 125; Ječius v. Lithuania, 2000, § 56; Baranowski v. Poland, 2000, §§ 50-52; Shamsa v. Poland, 2003, § 40, Steel and Others v. the United Kingdom, 1998, § 54.

In addition, Article 5 § 1 requires that any deprivation of liberty has to protect the individual from arbitrariness, and the notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law, so that deprivation of liberty may be lawful in terms of domestic law but still arbitrary, and therefore contrary to the Convention. The Court in *Saadi v. the United Kingdom, A. and Others v. the United Kingdom* and *Rustamov v. Russia* stated that to avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the grounds of detention relied on by the Government, the place and conditions of detention must be appropriate, and the length of the detention must not exceed that reasonably required for the purpose pursued (Turanjanin & Soković, 2019: p. 963).[17]

Regardless of the position of the Constitutional Court, we believe that in this case we can equalized the migrants' position with the deprivation of liberty in practice. Simply, by claiming that there was no deprivation of liberty in this case, the Constitutional Court avoided resolving the complex issues of detaining migrants and exercising their judicial protection. The Court's jurisprudence is extremely rich in this field, and the Constitutional Court should have elaborated its position in relation to the standards set in the Court's jurisprudence.

### *Ne bis in idem*

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 as *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 behaviours, and the most problematic was the Order of the Minister of Internal Affairs on the prohibition of movement (curfew).

Article 4 of the Criminal Procedure Code prescribes that no one may be prosecuted in connection with a criminal offence for which he has been acquitted or convicted by a final decision of a court, or for which the indictment has been denied by a final decision, or where the proceedings

[17] Saadi v. the United Kingdom, 2008, § 74, ECHR 2008; Rustamov v. Russia, 2012, § 150; A. and Others v. the United Kingdom, 2009, § 164.

have been discontinued by a final decision (Ilić & Milić, 2018; Zupančič, 2011; Bajović, 2014). Article 8 of the Law on Misdemeanours[18] prescribes that no one can be tried again and a misdemeanour sanction may not be imposed again for a misdemeanour on which a final decision has been passed in compliance with the law. No procedure can be initiated for a misdemeanour against a misdemeanour offender who has been finally pronounced guilty in a criminal proceeding of a criminal offence which additionally includes the characteristics of such misdemeanour, and where it has been initiated or is in progress, it may not continue or be completed.

The Constitutional Court took the right position that the principle of *ne bis in idem* had been violated, with reference to the Court's jurisprudence. The Constitutional Court first stated that the Regulation enabled several criminal proceedings to be conducted in parallel and simultaneously. At the same time, the Constitutional Court emphasized that this prohibition is not explicitly provided by the Constitution, but that the creation of the possibility of conducting several simultaneous proceedings is not justified. However, although it is true that this prohibition is not explicitly prescribed, this principle contains precisely this prohibition. This ban, on the other hand, should be explicitly prescribed for reasons of legal certainty.

In the second place, the Constitutional Court concluded that the characteristics of the misdemeanours from the Regulation are essentially identical to the mentioned criminal offense and that they represent the same *idem* in the context of the criteria of both the Court and the Constitutional Court. Moreover, the Government even acknowledged that a formal double penalty for the same offense was provided for in the prescribed manner. However, in this way, even the perpetrators of misdemeanours are privileged, because by the nature of things, the misdemeanour procedure would have been completed earlier by a final decision.

Thirdly, the Constitutional Court correctly noted that the provision of Article 63 para. 3 of the Criminal Code, which prescribes the imputation of a sentence, does not allow the conducting of several simultaneous proceedings. This is especially invalid in situations where the final judgment is rendered in one criminal proceeding and then another is instituted for the same offense. Therefore, in essence, the prescribed solutions, contrary to the Constitution, enable the simultaneous conduct of several criminal proceedings in the same matter, and the Constitutional Court has taken the correct position. The only question is whether the Constitutional Court expressed its position too late.

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[18] Published in the *Službeni glasnik RS*, Nos. 65/13 of 25 July 2013, 13/16 of 19 February 2016, 98/16 of 8 December 2016 (CC), 91/19 of 24 December 2019 (other law) and 91/19 of 24 December 2019.

## *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 strikingly varied. 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. Moreover, we discussed whether forcible detention of migrants is deprivation of liberty. Then, whether the state violated the *ne bis in idem* principle. We believe that the answer is positive for every and each question. Constitutional Court confirms our beliefs when we talk about the *ne bis in idem* principle, but not for the first two questions.

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# СОЦИЈАЛНЕ ИМПЛИКАЦИЈЕ ИЗАЗВАНЕ ДРЖАВНОМ РЕАКЦИЈОМ НА КОВИД-19 И ЉУДСКА ПРАВА У РЕПУБЛИЦИ СРБИЈИ

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**Резиме**

Пандемија изазвана коронавирусом неминовно је довела до многобројних промена у свакодневном животу. Промене нису могле да заобиђу ни област кривичног законодавства. Анализирајући реакцију Уставног суда, иако постоји већи број питања која захтевају брижљиву анализу, сматрамо да се издвајају три. То је проблем полицијског часа и затварања становништва у сопствене домове, затварање миграната у центре и питање начела непоновљивости кривичног поступка. На првом месту, неопходно је анализирати да ли је држава имала право да забрани излазак становништву из сопствених станова, узевши у обзир становишта Европског суда за људска права. Истовремено, на другом месту, сличан проблем се јавља и код затварања миграната у центре. Уставни суд је заузео став да се у конкретним случајевима не ради о лишавању слободе, како по циљу тако ни по сврси, те је држава реаговала у складу са Уставом. Но, питање је да ли је заиста тако. Приметно је да је Уставни суд заобишао анализу ставова Европског суда за људска права по овим питањима, а који, ипак на одређен начин указују да се овде радило о лишењу слободе. На трећем месту, Уставни суд јесте, узевши на овом месту стандарде Европског суда за људска права у обзир, стао на становиште да је повређено начело непоновљивости поступка, јер је актима донетим за време ванредног стања омогућено истовремено вођење прекршајних и кривичних поступака за исту радњу. Образложење ове могућности је проблематично са више аспеката, који су анализирани у раду.