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CRIMINAL LAW PROTECTION OF THE RIGHT TO HEALTH

Among the catalogue of basic human rights proclaimed by the Constitution of the Republic of Srpska is the right to health protection. Specifically, Article 37 stipulates that "everyone has the right to health protection, and the right to healthcare is guaranteed in accordance with the law. Children, pregnant women, and the elderly have the right to healthcare from public funds, while other individuals are entitled under conditions prescribed by law." The criminal law protection of this right is mainly achieved through criminal offenses classified under crimes against human health, which are aimed at protecting health as a general, shared value for all people, rather than the health of an individual.

The authors of the paper highlight the fact that human health can be endangered and/or harmed by various activities, and that the legislator has foreseen a greater number of criminal offenses in order to ensure optimal protection of the right to health. The paper analyzes several criminal offenses that, in the authors' opinion, are insufficiently represented in judicial practice. These include: transmission of infectious diseases, failure to comply with health regulations during an epidemic, failure to apply measures to prevent infectious diseases, negligent provision of medical assistance, failure to provide medical assistance, and unauthorized provision of medical services.

***Keywords**: right to health protection, criminal law protection of health, transmission of infectious diseases, failure to comply with regulations during an epidemic*

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1. Introductory remarks

According to the definition found in the Constitution of the World Health Organization, health is a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity. This is, according to many opinions, a utopian definition, as even the most developed countries in the world cannot ensure such a state of health for their populations. A more realistically acceptable definition is considered to be the one that defines human health as a period in life that enables a person to carry out all age-appropriate activities, free from physical and psychological burdens (Bačić, Pavlović, 2004:846).

However, regardless of which definition of health we choose to accept, it is important to emphasize that the right to health for every individual arises from a number of international and national documents. Here, we will mention the Constitution of the World Health Organization, whose preamble states the following: "The States Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples: Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger. Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development. The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health. Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."[1]

[1] The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text. https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1 reffer to 08.05.2025.

The European Charter of Patients' Rights (hereinafter: the EU Charter) was adopted in Rome in 2002. The main goal of the EU Charter is to protect patients' rights and to ensure the continuity of quality healthcare. In addition to the rights to information and consent, the EU Charter also provides for the **right to safety**: Every individual has the right to be protected from harm caused by the malfunctioning of healthcare services, medical negligence, and errors, as well as the right to access healthcare services and treatments that meet high safety standards (Janković, 2024:577). From the above, it follows that **every person, regardless of age, has the right to adequate healthcare**, and that belonging to the group of "elderly people" cannot be a discriminatory basis in the application of medical resources or treatment procedures. However, literature points out that **ageism**, or discrimination against older people in the field of medicine, is widespread in modern societies, and is influenced, among other things, by youth and their perception of the elderly as less valuable members of society (Ljubičić, 2021:525). In addition, it should be noted that **the right to healthcare is not conditioned by a person's sex**, but that women, due to their specific reproductive function, require **increased levels of protection**. In this regard, it is emphasized that: "It is indisputable that medical services in gynecological-obstetric institutions should comply with World Health Organization standards; respect human rights, including the patient's decisions; apply measures to relieve suffering and pain; implement informed consent effectively and correctly in general; and require written informed consent for all invasive treatments. In gynecological-obstetric institutions, empathy is not expected – rather, professionals who respect the dignity of patients. After all, that is what they are rewarded for. Women who bring new life into the world not only have the right but also deserve gynecological and obstetric institutions that are not just a 'happy place' and a 'place of hope' in theory" (Janković, 2024:589,590)

The right to healthcare, i.e., the right to health protection, is a constitutional right of every person, as proclaimed in Article 37 of the Constitution of the Republic of Srpska:

"Everyone has the right to health protection. The right to healthcare is guaranteed in accordance with the law. Children, pregnant women, and elderly persons have the right to healthcare funded from public revenues, while other persons are entitled to healthcare under conditions determined by law."

In order to realize the constitutionally guaranteed right to healthcare, several legal and sub-legal acts have been adopted to regulate this matter more precisely. However, the protection of this right is also ensured through criminal law provisions, and therefore this paper will focus on the issues of criminal law protection of health, which is mainly achieved through criminal offenses categorized as crimes against human health.

2. Criminal offenses against human health

Criminal offenses against human health belong to the group of so-called generally dangerous crimes because the protection of health, as a general and shared value, goes beyond the protection of an individual's health or local communities and becomes an obligation and responsibility of all citizens (Kambovski, 2011:815). It is indisputable, therefore, that the protected object in crimes against human health is human health. In this context, "health" does not refer to the health of an individual as a personal value belonging to each person, but rather to health as a general, common value shared by all people.

Nonetheless, it is difficult to talk about protecting a person's health without also considering the protection of their life and bodily integrity. This is because endangering or violating someone's health may simultaneously represent a threat or violation of their life and bodily integrity. Consequently, the criminal law protection of health is closely related to the protection of life and body. According to some authors, crimes against human health protect the same legal goods as crimes against life and body, albeit from a different perspective and on a different level (Kambovski, 2011:306). Specifically, these crimes endanger human health, which indirectly means they also endanger bodily integrity and life itself (Atanacković, 1981:306)

However, there are notable differences between these two groups of crimes. The most significant distinction lies in the fact that crimes against life and body are generally directed at specific individuals, whereas crimes against health are typically directed against an indeterminate or larger number of individuals (exceptions include crimes such as negligent medical treatment or failure to provide medical assistance). Additionally, crimes against life and body directly violate bodily integrity or result in loss of life (Babić, Marković, 2024: 173) whereas crimes against human health usually involve endangerment of the health of an undefined number of people.

Unlike crimes against life and body, crimes against human health are mostly of a blanket nature. The advancement of modern medicine offers new possibilities for health protection but also brings new risks, which must be acknowledged by both practitioners and patients. In many cases, patient consent is required for medical procedures, i.e., informed consent, which involves fully informing the patient about all risks and potential side effects. This increases the responsibility of medical professionals and demands a legal framework that is flexible enough to allow for experimental research while also ensuring adequate protection of every individual's health, thereby reinforcing health as a collective value.

This leads to significant expansion of regulations in this area, establishing rules for various medical services – including preventive measures such as vaccinations and the prevention of contagious diseases – all the way to palliative care for terminal patients. Violations of these rules constitute actions criminalized under several offenses from this category. For many of these offenses, the law does not specify the exact behavior constituting a crime but defines the act as a violation of regulations or government orders – meaning the conduct must be examined in light of the regulations that govern the particular matter. The application of these provisions requires familiarity with laws such as the Law on Health Protection, the Law on Protection from Infectious Diseases, the Law on the Production and Trade of Narcotic Drugs, and other related laws and regulations.

In most of these offenses, the consequence is the endangerment of human health, either as an abstract or concrete danger. For instance, in crimes like non-compliance with health regulations during an epidemic, unauthorized provision of medical services, illegal production and sale of poisons or harmful products, the consequence is considered an abstract danger. In these cases, it is sufficient to prove that the prohibited act was committed, as the abstract danger is presumed due to the inherently dangerous nature of the act. Abstract danger is the legislative rationale for criminalization and does not form part of the legal definition of the offense – therefore, it does not need to be proven.

However, in crimes such as negligent handling and issuing of medications or contamination of drinking water and foodstuffs, the consequence takes the form of a concrete danger, which means it is a constitutive element of the offense and must be proven that the protected legal good was actually endangered.

Given that crimes against human health cover a wide range of harmful conduct, most offenses in this group are *delicta communia*, meaning any person can be the perpetrator. However, due to the specific nature of some actions, a few crimes are *delicta propria* and can only be committed by individuals with specific qualifications – for example, the offense of negligent medical treatment can only be committed by a physician or healthcare professional.

Unlike most groups of crimes, where criminal liability is usually based on intentional conduct, in this group, many offenses allow for criminal liability based on negligence. This is understandable given the importance of the protected interest and the inherently risky nature of the activities involved. Negligence is justified here because it reflects the failure to meet legal standards that every person in this field must follow to ensure the protection of human health.

Crimes from this group can be classified based on the mode of commission and the type of threat posed to the collective protected good, as follows:

- **Criminal offences endangering human health through infection:** Transmission of an infectious disease (Article 194), Non-compliance with health regulations during an epidemic (Article 195), Failure to implement measures for the protection against infectious diseases (Article 196).
- **Criminal offences endangering human health through medical treatment:** Negligent provision of medical assistance (Article 197), Failure to provide medical assistance (Article 198), Unauthorized provision of medical services (Article 199), Illegal performance of transplantation (Article 200).
- **Criminal offences endangering human health through harmful substances:** Negligent handling in the preparation and issuance of medicines (Article 201), Production and placing on the market of harmful treatment products (Article 202), Unauthorized production and placing on the market of poisons (Article 203), Production and placing on the market of harmful products (Article 204), Negligent inspection of foodstuffs (Article 205), Contamination of drinking water and foodstuffs (Article 206), Unauthorized production and distribution of narcotic drugs (Article 207), Enabling the use of narcotic drugs (Article 208).

From the above, it is evident that this involves a large number of criminal offences that are very different in nature but share the same consequence – endangering human health. In the following section, we will focus on several criminal offences that we consider particularly relevant, especially in the context of current times and the challenges we face in trying to protect public health.

2.1. Transmission of Infectious Diseases

The transmission of an infectious disease is a criminal offence that penalizes the failure to comply with regulations or orders issued by a competent authority which prescribe examinations, disinfection, isolation of patients, or other measures aimed at the suppression or prevention of infectious diseases in humans, resulting in the transmission of such a disease. This offence is considered a blanket provision, meaning its content must be supplemented by relevant legal regulations in order to classify specific conduct as the commission of this offence.

In this context, the most important is the **Law on the Protection of the Population from Infectious Diseases** ("Official Gazette" of Republika Srpska, Nos. 90/17, 42/20, 98/20, 63/22), which defines the protection of the population from infectious diseases as a matter of general interest for Republika Srpska. Article 7 of the law states that "measures for the protection of the population from infectious diseases comprise all ac-

tivities planned, organized, and implemented by government authorities, local self-government units, economic entities, other legal entities, entrepreneurs, healthcare institutions, medical workers and associates, and individuals, aimed at protecting the population from infectious diseases. This protection is carried out through epidemiological surveillance and by planning, organizing, and applying the prescribed measures, monitoring the implementation of those measures, and providing the necessary material and other resources". For the proper application of this offence, it is necessary to define what constitutes an infectious disease. According to Article 4 of the same law, an infectious disease is defined as "a disease caused by a specific causal agent, transmitted from an infected person or other source/reservoir of infection to a susceptible host, either directly from person to person or indirectly via contaminated food, water, common-use items, intermediate hosts, vectors, or inanimate nature, including the exchange of fluids contaminated with the infectious agent." Specific infectious diseases are listed in Article 6. The criminal offence of **Transmission of an Infectious Disease**, under Article 194 of the Criminal Code of Republika Srpska, can only be applied to conduct that is linked to a disease classified as infectious under the aforementioned definition.

The act of commission is defined as non-compliance with regulations or orders issued by the competent authority prescribing measures for the suppression or prevention of infectious diseases in humans. Such non-compliance can manifest as an act (i.e., active behavior contrary to the regulations or orders of the competent authority, or not fully aligned with them) or as an omission (i.e., a passive failure to do something mandated by the regulations or orders).For a certain act or omission to constitute the actus reus of this criminal offence, it must be established that the conduct in question contradicts a regulation or order issued by a competent authority prescribing examinations, disinfection, isolation of patients, or any other measure aimed at suppressing or preventing the spread of infectious diseases in humans. The term "examination," within the context of this offence, refers to medical examinations of individuals, regardless of whether it involves a single person, a group, or the general population. "Disinfection" refers to a set of measures and procedures undertaken to destroy or inhibit the growth and reproduction of pathogenic and other microorganisms on the surface of the body, objects, materials, equipment, or within a space. "Isolation of patients" is a measure by which individuals suffering from an infectious disease, or those reasonably suspected of being infected, are separated – either by placement in designated rooms or by ordering them, for instance, not to leave certain premises (Babić, Marković, 2024:151)

As for other measures aimed at suppressing or preventing infectious diseases, the **Law on the Protection of the Population from Infectious Diseases** prescribes a range of actions categorized as general, special, emergency, and other measures, along

with the conditions for their application. For example, isolation is defined as an anti-epidemic measure involving the spatial separation of infected individuals during the infectious period, in conditions that prevent or limit the direct or indirect transmission of the pathogen to other susceptible persons. Quarantine, on the other hand, is a measure that restricts the movement of healthy individuals who have been in contact with an infected person, for the duration of the maximum incubation period – or, in cases of high disease burden, for the average incubation period, as recommended by the Institute of Public Health.

Given that global human health was recently threatened by the SARS-CoV-2 coronavirus (COVID-19) pandemic, it is noteworthy that Article 43 of the Law on the Protection of the Population from Infectious Diseases provides for **emergency measures** in situations that endanger the safety and health of people due to an imminent risk of mass transmission of infectious diseases. These emergency measures include: Restricting movement in infected and at-risk areas and placing under medical surveillance persons who had contact with infected individuals; Restricting or banning the transport of certain or all types of goods and means of transport in a given area; Closing educational institutions and banning gatherings in public places; Mandatory involvement of healthcare workers and other citizens in efforts to mitigate the consequences of the situation; Emergency vaccination or chemoprophylaxis; Isolation of infected individuals at home or in other adapted facilities when healthcare institutions cannot accommodate them due to the scale of the outbreak; Allocation and adaptation of other facilities and engagement of necessary resources and equipment for healthcare needs; Establishment of quarantine and quarantine placement of persons who were in contact with individuals suffering from especially dangerous infectious diseases, and, in accordance with recommendations, other necessary measures as determined by the nature of the disease or by the **World Health Organization**, Informing the public about the current epidemiological situation, available resources, measures being implemented, and those citizens are required to follow.

For the application of this criminal offence, it is necessary to establish that the transmission of an infectious disease occurred as a result of non-compliance with regulations or orders issued by the competent authority prescribing measures for the suppression or prevention of infectious diseases in humans. Therefore, a causal link must exist between the failure to comply with such regulations or orders and the actual transmission of the infectious disease. If this link does not exist – for example, if the disease was transmitted despite the individual acting in accordance with the regulations or orders – then this offence is not committed.

Therefore, the purpose of this incrimination is to prevent the spread of an infectious disease, and the consequence of the act is the creation of a concrete danger to human

health, which manifests itself as the transmission of an infectious disease. This criminal offense is actually an irrefutable legal presumption that a concrete danger to human health has occurred if an infectious disease has been transmitted to at least one person. However, unlike criminal offenses with abstract danger as a consequence, in which the danger is assumed and does not have to be proven because the legislator assumes that the abstract danger occurred by the act of execution itself, in this criminal offense, this legal presumption requires that an infectious disease has been transmitted to a person. It is only at the moment when it is determined that this transmission of an infectious disease has occurred that the legal presumption arises that a concrete danger to human health has occurred. So, it is about the assumption of the occurrence of a specific danger based on the individual injury caused, that is, the individual transmission of an infectious disease (Atanacković, 1981:313,314).

Hence, the consequence of the offence is not the transmission of the disease itself, but the creation of a concrete danger to public health. The transmission of the disease is merely a manifestation of that danger – a symptom of its presence and proof that it has actually occurred. In this context, causing illness is not the source of future danger, but rather the result of an already existing one.

The perpetrator of the offence can be any person who fails to comply with the regulations or orders issued by the competent authority that prescribe measures for the suppression or prevention of infectious diseases. This may include, for example, an individual who is infected, a healthcare worker, a physician, or a person responsible for carrying out disinfection, pest control, etc. This is also supported by Article 3 of the Law on the Protection of the Population from Infectious Diseases, which stipulates that: "Every citizen of the Republic is obliged to undergo treatment for an infectious disease that may endanger the health of others, to take measures in accordance with the recommendations of the competent institutions and healthcare providers to protect others, and to allow and participate in the implementation of measures prescribed by this law and regulations enacted under it. A person infected with an infectious disease, or a carrier of the disease-causing agent, is obliged to provide truthful information during an epidemiological investigation and to adhere to the prescribed measures and instructions of the healthcare institution or medical doctor, particularly those concerning the prevention of disease transmission."

In addition to the basic form of the offence, a secondary form is also prescribed. This form differs from the previous one only in that it involves non-compliance with regulations or orders issued by the competent authority for the suppression or prevention of infectious diseases in animals that can be transmitted to humans, which consequently results in the transmission of an infectious disease to a human.

For intentional commission of either form of this offence, the prescribed sanction is a fine or imprisonment for up to two years. In order for criminal liability to arise in these cases, the perpetrator must be aware of the existence of regulations or orders issued by the competent authority that prescribe examinations, disinfection, isolation of infected persons, or other measures aimed at suppressing or preventing infectious diseases in humans, or in animals that can transmit diseases to humans. Moreover, if the person is infected with an infectious disease but is not aware of it (i.e., the disease has not yet been diagnosed), they cannot be held criminally liable for this offence, even if their conduct – contrary to the regulations – leads to the spread of the disease. To hold them liable in such a case would be to apply a concept of strict (objective) liability, which is not permitted in this context. The same reasoning applies in cases involving transmission of an infectious disease from animals to humans, if the animal's owner was unaware that the animal was infected.

Since this offence is defined as a *blanket provision*, meaning it requires the existence of complementary legal regulations to be fully applicable, a *genuine mistake of fact* will exist if the perpetrator was unaware of the existence of these regulations or their content. An unavoidable mistake of fact excludes liability under paragraphs 1 and 2. However, an *avoidable* mistake of fact – either regarding the existence of the regulation or the existence of the disease – does not exclude liability for the negligent form of the offence.

Bearing in mind the importance of the protected property, the legislator also provided punishment for the negligent execution of the criminal offense referred to in paragraphs 1 and 2 of this article, prescribing for the perpetrator a fine or a prison sentence of up to one year.

The legislator has also prescribed several aggravated (qualified) forms of the offence, which differ from each other based on the severity of the consequences caused.

The first aggravated form (paragraph 3) applies in cases where, as a result of the basic form of the offence (paragraph 1), an incurable infectious disease is transmitted. This form of the offence replaces the incrimination of transmission of a sexually transmitted disease, which exists in some legal systems. It can be said that this is a special form of the offence that differs from the basic form by the nature of the infectious disease, which must belong to the category of incurable infectious diseases, such as incurable sexually transmitted diseases, for example, the HIV virus. The perpetrator may be a person who knows they are sexually infected, because it can happen that a person who is sexually infected but unaware of their infection at the time transmits the incurable sexually transmitted disease to another person through sexual intercourse or in another way. In such a case, they will not be held responsible for this offence.

This form of the offence also concerns endangering public health, because the transmission of an incurable infectious disease to another person creates a real possibility for its spread within a given social environment, at least until the infected person becomes aware of their condition. This fact also represents a higher degree of danger associated with this form of the offence, for which imprisonment from one to ten years is prescribed.

The second aggravated form (paragraph 5) exists if, as a result of the acts referred to in paragraphs 1, 2, or 4, a severe bodily injury or serious health impairment of one or more persons occurs. If the more severe consequence occurred due to the acts from paragraphs 1 or 2, the perpetrator shall be punished by imprisonment from one to eight years; if the consequence resulted from the act from paragraph 4, the perpetrator shall be punished by imprisonment of up to three years.

The most severe form of the offence (paragraph 6) applies if the acts from paragraphs 1, 2, 3, or 4 result in the death of one or more persons. If death occurs as a consequence of the acts from paragraphs 1 or 2, imprisonment from two to twelve years is prescribed; if it results from the act under paragraph 3, imprisonment from two to fifteen years is prescribed; and if death is caused by the act under paragraph 4, the perpetrator shall be punished by imprisonment from one to eight years.

2.2. Failure to comply with health regulations during an epidemic

Failure to comply with health regulations during an epidemic is a criminal offense of abstract endangerment of human health, which criminalizes the failure to act in accordance with regulations, decisions, or orders that prescribe measures for the suppression or prevention of an epidemic of an infectious disease in humans during the course of such an epidemic, or during an epidemic of a dangerous infectious disease in animals that can be transmitted to humans. This is, therefore, a formal offense that is completed by the act of non-compliance itself, with the legislative motive for criminalization being the abstract danger posed to public health. If such conduct results in the transmission of an infectious disease, the offense would be classified as *Transmission of an Infectious Disease* (Kambovski, 2011; p. 817).

Non-compliance with regulations during an epidemic is a blanket criminal offense, where the act of commission is defined as failure to act in accordance with regulations, decisions, or orders prescribing epidemic control or prevention measures. Thus, for the application of this criminal provision, it is necessary to determine whether the specific conduct constitutes a failure to comply with the stated regulations. This non-compliance may be manifested as an omission (i.e., failure to take required measures) or as an act (i.e., undertaking actions that contradict the content of the relevant regulations, decisions, or orders, or that are not fully in line with them) (Babić, Marković, 2024:152)

Given the broad scope of measures for the prevention and suppression of epidemics, any individual obliged to comply with such regulations may be a perpetrator of this offense. This includes persons who are infected, who have been in contact with infected individuals, who perform certain activities, or who visit specific places, etc. Considering that these measures may involve prohibiting or restricting the operations of certain legal entities, as well as imposing rules for carrying out specific activities, legal entities may also be held liable for committing this criminal offense – provided that the legal requirements for establishing such liability are met. It is worth noting that the Criminal Code of North Macedonia explicitly provides that a legal entity can be the perpetrator of this offense (Art. 206).

A key characteristic of this criminal offense is the time of its commission, as it can only be committed during an epidemic of an infectious disease in humans or a dangerous infectious disease in animals that can be transmitted to humans. According to the Law on Protection of the Population from Infectious Diseases (Article 4, paragraph 1, items 9 and 10), an epidemic of an infectious disease is defined as illness caused by an infectious agent characterized by:

1) An unusual number of cases, time, location, or affected population;
2) An unusual increase in the number of cases with complications or fatalities;
3) The appearance of two or more epidemiologically linked cases of a disease not seen in the area for many years or ever before;
4) A greater number of cases of febrile illness with an unknown cause.

An epidemic of greater epidemiological significance involves the appearance of severe clinical forms of the disease and/or fatalities, posing the risk of serious economic and social consequences, cross-border transmission, or the re-emergence of previously eliminated or eradicated infectious diseases.

The declaration of an epidemic entails a measure through which, due to the occurrence of an epidemic of greater epidemiological significance, infected and threatened areas are identified, public health measures and responsible executors are defined, and funding is allocated for the implementation of such measures. A pandemic is defined as the spread of an infectious disease beyond national borders, affecting large parts of the world or the entire globe, endangering populations in all affected regions.

This criminal offense was especially relevant during the COVID-19 pandemic (SARS-CoV-2), declared a pandemic by the World Health Organization on March 11, 2020. For a certain period, the pandemic halted many aspects of daily life on a global scale and led to the adoption of measures by competent authorities that temporarily restricted some rights and freedoms of citizens – such as the right to work or freedom of

movement (e.g., bans on the operation of hospitality venues, hair salons, etc., or curfews and movement restrictions for certain categories of the population during specific periods).[2]

In this context, the question arose regarding the relationship between the aforementioned rights and freedoms, on one hand, and the right to health, on the other. It appears that, in light of the events of that time, the right to health should have been given primacy, as health represents a common good for all people – not only on a national, but also on a global level (as the COVID-19 pandemic clearly demonstrated).

The perpetrator of this offense is any person who is obligated to act in accordance with the regulations, decisions, or orders of the competent authorities prescribing measures for the suppression or prevention of an epidemic. The COVID-19 pandemic demonstrated that this could include an infected person, a person who had been in contact with an infected individual, or someone who fails to wear a protective mask in public spaces.

For example, a person was charged with this offense for the following conduct: "On August 28, 2020, at around 11:30 p.m. in Banja Luka, in Veselina Masleše Street, during the COVID-19 epidemic in the Republic of Srpska, there were more than 50 guests inside and outside the hospitality venue '…', whereby the accused, acting as the responsible person based on authorization from the owner M.B., violated Point 1 of the Conclusion of the Republic Emergency Situations Headquarters, No. 52-1/20 dated August 17, 2020. This conclusion prohibited all public gatherings of more than 50 people in the territory of the Republic of Srpska, from August 17 to August 31, 2020, to prevent the spread of the SARS-CoV-2 virus and protect and rescue the population."

In another case, by judgment of the Basic Court in Bijeljina, No. 80 0 K ..... 20 Kps, dated July 15, 2020, the accused was found guilty because: "On March 10, 2020, at around 10:55 p.m., at the Orašje border crossing, he exited the state of Bosnia and

[2] In response to the epidemiological situation caused by the 2019-nCoV coronavirus, the National Assembly of the Republic of Srpska adopted a *Decision on the Declaration of a State of Emergency* for the territory of the Republic of Srpska (*Official Gazette of the RS*, No. 31/20). This decision was enacted pursuant to Amendment CVII to Article 70, paragraph 3 of the Constitution of the Republic of Srpska, which authorizes the National Assembly, in accordance with the Constitution and applicable legislation, to declare a state of emergency for the entirety or a part of the Republic in circumstances where security is jeopardized. Such circumstances include natural disasters (e.g., floods, earthquakes, and fires), natural catastrophes, epidemics, violations of human rights and freedoms, or disruptions to the normal functioning of constitutional institutions. Further regulatory measures were established through the *Regulation on the Manner of Implementation of Measures for the Prevention and Suppression of the Infectious Disease COVID-19*. This regulation defined the operational framework for implementing public health measures aimed at curbing the spread of the disease. Among the measures prescribed were mandatory isolation of individuals confirmed to be infected with the virus, as well as quarantine for persons who had been in contact with infected individuals. These legal instruments reflect the state's response framework during public health emergencies, highlighting the legal basis for limiting certain rights and freedoms in favor of protecting public health and ensuring the functionality of essential state institutions.

Herzegovina despite being subject to medical supervision/quarantine due to coronavirus, as ordered by the Lopare Health Center on March 5, 2020, which imposed home isolation for 14 days. Furthermore, on March 13/14, 2020, he re-entered Bosnia and Herzegovina, thereby violating the home isolation order during the epidemic of an infectious disease."

The second form of the offense (paragraph 2) criminalizes failure to comply with regulations, decisions, or orders during an epidemic of a dangerous infectious disease in animals that can be transmitted to humans. Therefore, this form of the offense can only be committed during an epidemic of such a dangerous zoonotic disease. Dangerous infectious diseases are those that spread easily and pose serious risks to human life and health. If the epidemic involves an animal disease that is not classified as a dangerous zoonotic disease, then non-compliance with relevant regulations, decisions, or orders does not constitute an act punishable under this criminal provision. For these forms of the offense, the law prescribes either a fine or imprisonment of up to two years.

Taking into account the importance of the protected legal good and the degree of danger that such conduct poses to public health, the legislature also provided for the punishment of negligent commission of these offenses (paragraph 3), prescribing either a fine or imprisonment of up to one year for the perpetrator.

2.3. Failure to Implement Measures for Protection Against Infectious Diseases (Article 196)

The criminal offense of *Failure to Implement Measures for Protection Against Infectious Diseases*, prescribed under Article 196 of the Criminal Code of Republika Srpska (CC RS), is another incrimination aimed at protecting public health from the dangers posed by various infectious diseases.

The basic form of this offense is committed by a person who, in a hospital, maternity ward, dormitory, school, business entity, or other organization or facility involved in handling food or providing hygienic services, fails to implement appropriate hygiene measures or, contrary to health regulations, hires or retains an employee suffering from an infectious disease, resulting in the transmission of the disease.

Considering the legal wording of the act, it could be said that the perpetrator can be any person. However, the logical interpretation of the elements of the criminal offense results from the fact that the perpetrator can be a person who, in accordance with his workplace, has the obligation to apply appropriate hygiene measures in a hospital, maternity hospital, boarding school, school, company or other organization or shop where food items are handled or hygiene services are provided, or a person who is authorized to hire or keep certain persons as employees in such institutions. Thus, the circle of persons who

can be perpetrators of this act is narrowed down to persons who have the above-mentioned obligations or powers.

The act of execution is determined alternatively, and the act can be carried out by not applying appropriate hygiene measures or by hiring or keeping at work a person suffering from an infectious disease, provided that this is done in violation of health regulations. Therefore, the offense is of a blanket character because in each specific case it must be established that the specific action is contrary to the corresponding health regulations, that is, prescribed or certain hygiene measures. Failure to apply appropriate hygiene measures can be done by the person who is obliged to do so not applying hygiene measures at all or applying them but not in the prescribed manner or to the prescribed extent. Therefore, in any case, it must be determined whether the specific action was in violation of the regulations that determine the hygiene measures for the given situation.

The offense may also be committed by employing or retaining a person suffering from an infectious disease, in violation of health regulations. This presumes that the offender knew of the individual's illness and, despite this knowledge, hired or retained them contrary to regulations. The term "infectious disease" should be interpreted in the same manner as under Article 194 of the CC RS.

"Employing" refers to establishing an employment relationship or a temporary engagement, while "retaining" means allowing the person to continue working despite the health risk. If the employer is unaware that the person has an infectious disease, a factual error exists, excluding liability for the basic form of the offense. However, if it is a remediable **error**, the offender may still be held liable for negligent commission, as stipulated in paragraph 2 of Article 196 of the CC RS.

A crucial element of the offense is the location where it is committed. According to the law, the offense may occur in hospitals, maternity wards, dormitories, schools, business entities, or other organizations or facilities handling food or providing hygienic services. These may include grocery stores, pharmacies, beauty salons, barbershops, etc.

As mentioned, this is a blanket offense, and its interpretation requires reference to public health legislation – primarily the Law on the Protection of the Population from Infectious Diseases. Article 20 of this law states that, to prevent the spread of infectious diseases, persons working in the following sectors must undergo sanitary supervision:

1) Food production, processing, and sales
2) Maintenance of public water supply systems
3) Production of cosmetic products
4) Work with preschool children in educational and care institutions
5) Play centers

6) Services related to personal care and beautification
7) Manufacturing, packaging, and dispensing of medicines and medical devices
8) Healthcare workers and associates, and other employees working in health institutions, especially in units providing care in intensive care, neonatology, pediatrics, burn treatment, transplant surgery, cardiac surgery, neurosurgery, vascular, abdominal, orthopedic, trauma, urology, obstetrics, gynecology, maxillofacial surgery, ENT, ophthalmology, thoracic, plastic and reconstructive surgery, pediatric surgery, general surgery, dialysis, dentistry, oncology, and hematology
9) Individuals in practical training in any of the above-listed roles

Sanitary surveillance represents the health examinations of persons employed in certain jobs for the purpose of detecting, preventing and suppressing infectious diseases and includes sanitary examination and monitoring of germs detected by sanitary examination, which for the persons listed in Article 20 of this law is carried out at the time of employment and then every six months, and if there are epidemiological indications, more often. In order to prevent the spread of an infectious disease, the legislator provided that a health institution that, through a sanitary examination, determines an infectious disease or germs in a person referred to in Article 20 of this law, is obliged to notify the competent inspection and the employer where the person is employed within 24 hours, and that a person who has been diagnosed with an infectious disease or germs, and who poses a risk of infecting other persons at that workplace, may not work in the jobs referred to in Article 20 of this law until the sanitary examination determines that it has been cured or that germs have stopped (Article 22 of the Law on the Protection of the Population from Infectious Diseases). In accordance with the above, the offense would be committed by an employer who hires or keeps a person working in a kindergarten without a sanitary inspection or a person whose sanitary card has expired.

As with the criminal offense Transmission of an infectious disease from Article 194 of the RS CC, when determining the consequences of this criminal offense, one should start from the fact that the object of protection is people's health, not the health of an individual. Therefore, this criminal offense, considering the consequence, belongs to the criminal offenses of endangerment with concrete danger, which derives from part of the legal definition of the basic form of the criminal offense, which reads: "as a result, the transmission of an infectious disease occurs". With this criminal offense, we are talking about an irrefutable legal assumption that a concrete danger to the death of people has occurred if an infectious disease has been transmitted to at least one person (Atanacković, 1981: 314). In order for there to be responsibility for this criminal offense, the existence

of a causal link between the act of execution, i.e. failure to apply appropriate hygiene measures or receiving or keeping at work a person suffering from an infectious disease and the transmission of an infectious disease, must be established. A fine or imprisonment of up to one year is provided for the basic form of the offense, and a fine or imprisonment of up to six months for the negligent execution of the offence.

The legislator also provided for two more serious forms of crime that exist in the case when, as a result of the crime from paragraphs 1 and 2 of this article, serious bodily injury or serious damage to the health of one or more persons occurred, that is, if the death of one or more persons occurred. For the case where serious bodily injury occurred as a result of the offense referred to in paragraph 1, a prison sentence of one to five years is provided, and when one or more persons died, a prison sentence of two to twelve years. If the said consequences are caused by the negligent execution of the act, a prison sentence of up to three years is provided for the occurrence of serious bodily injury, and a prison sentence of one to eight years for the occurrence of death.

2.4. Production and Distribution of Harmful Products (Art. 204)

Human health can be endangered not only by certain infectious diseases but also by food, beverages, or other products used in everyday life. Specifically, certain substances are used in the production process of food products and everyday items which, if used contrary to specific regulations, can significantly endanger human health, sometimes even resulting in fatal consequences. The development of food technology has increased the level of risk when using certain substances in food production, which has required an adequate legislative response through the establishment of legal regulations aimed at protecting human life and health.

For instance, the **Food Law** (Official Gazette of the Republic of Srpska, no. 19/17) regulates general conditions for food and animal feed safety, the obligations and responsibilities of food and feed business operators, including traditional products, and other matters relevant to food and feed safety, in order to protect human life and health, the environment, consumers, and ensure the efficient functioning of the market. According to this law, *food or a food product* is any substance or product, whether unprocessed, partially processed, or processed, intended for human consumption or reasonably expected to be used for human consumption. The definition of food also includes beverages, chewing gum, and any other substance intentionally incorporated into food during its production, preparation, or processing, including: water used for public water supply as drinking water; water used or added during food production, preparation, or processing, and bottled or otherwise packaged water (Article 3 of the Food Law).

The **Law on General Use Items** (Official Gazette of the RS, no. 50/10) regulates the safety requirements that general use items must meet when produced or imported for market distribution, the activities of production and placing such items on the market, advertising, health inspection, and other matters related to general use items. Provisions of this law also apply to raw materials and additives used in the production of general use items. *General use items* include: materials and items that come into direct contact with food; consumer goods; children's toys; detergents. A *product* refers to any product intended for consumers, whether new, used, or refurbished. *Materials and items that come into direct contact with food* include materials from which general use items are made and items that come into direct contact with food, such as dishes, utensils, equipment, devices, and packaging used in food business operations. *Consumer goods* include dishes, utensils, equipment, and devices used in the production of cosmetic products, packaging for consumer goods, cosmetic products, cleaning agents, tobacco and tobacco products, and smoking accessories, as well as items and substances that come into direct contact with skin or mucous membranes during use. A *detergent* is any substance or preparation that contains soap and/or other surfactants (surface-active agents) and is used for washing and cleaning. It must comply with the legal requirements set forth in laws regulating chemicals.

Criminal protection of human health from the threat of harmful products is realized through the criminal offense *Production and Distribution of Harmful Products* (Art. 204), which prescribes a prison sentence of up to two years and a monetary fine for anyone who produces for sale, sells, or otherwise distributes harmful foodstuffs, meals, beverages, or other products that are harmful to human health.

The act of commission is defined alternatively as: production for sale, sale, or other forms of distribution of harmful foodstuffs, meals, beverages, or other products harmful to human health. When defining this criminal offense, the legislator used a continuous verb, which, according to Article 123, Paragraph 1, Item 22 of the Criminal Code of the RS, means that the offense is considered *a continuing offense*, regardless of whether the act was committed once or multiple times. However, if there is a significant time gap between individual acts that breaks the continuity of the criminal activity, it would be justified to consider them as *concurrent offenses* (Babić, 2021:400). Repetition of the act within a continuous time frame, indicating a single criminal event, can be considered an aggravating circumstance during sentencing, as it shows the offender's persistence in committing the offense.

For the act of producing harmful products to be considered a criminal offense under this provision, it must be done *for the purpose of sale*. This subjective element can be inferred from objective facts. For example, if a person produces a harmful food product

(e.g., jam with an excessive amount of additives to prolong shelf life) in a quantity clearly exceeding the needs of their household, it is reasonable to conclude that the production is intended for sale. The same applies if the products are advertised on social media. Production not intended for sale does not constitute this criminal offense. *Sale* represents the traditional form of goods-for-money exchange, while *other forms of distribution* refer to any action by which such items are made available to others – e.g., giving them as gifts, distributing them for promotional purposes, bartering, etc.

The object of the criminal act includes harmful foodstuffs, meals, beverages, or other products that are dangerous to human health. In order for these products to be considered harmful, they must be in such a condition that their use poses a danger to human health or may cause harm to human health. However, there are products such as cigarettes or alcoholic beverages which, although harmful to health, cannot be considered "harmful products" in the sense of this criminal offense if they are produced in accordance with established standards. For example, food or beverages that are inherently harmful to health but are legally permitted for production and sale – such as alcoholic beverages – are not considered harmful under this provision (Stojanović, 2021: 862).

Food products also typically contain certain amounts of additives that affect their shelf life, color, smell, etc. However, the use of additives that are potentially harmful – within the legally allowed limits – does not render those products harmful. If, however, such additives are used excessively or above allowed thresholds during food production, the product becomes harmful. A product may also be considered harmful if, for instance, its expiration date has passed.

The term *foodstuffs* includes all substances used as food or drink in processed or unprocessed form (e.g. flour, oil, raw meat), as well as water used for public supply or in the production of food intended for sale. Pork sold in a butcher shop without proof of origin or veterinary inspection is also considered a harmful food product (*Judgment of the District Court in Belgrade, Kž. 599/97 of April 24, 1997*). *Meal* refers to food prepared for consumption, and *beverages* include water, alcoholic, and non-alcoholic drinks.

The question arises as to what is meant by the phrase "other products harmful to human health" in terms of this incrimination, if the provision from paragraph 2 of this article is taken into account, which foresees a special form of the act that differs from the previous one in terms of the object of the action. Namely, the aforementioned provision foresees punishment for those who produce, sell or otherwise put into circulation personal care products, children's toys or similar products for mass use or consumption that are harmful to health. Because of the above, we believe that in the context of the provision from paragraph 1 of this article, the phrase "other products harmful to human health"

should mean all products that humans consume in a similar way as they consume food and drink, e.g. various preparations for losing weight, strengthening the body and the like.

The subjective element of the offense consists of intent, whether direct or eventual, depending on the specific act committed in a given case. For example, if the act involves "production for sale," it is logical to infer the existence of direct intent. Given that the nature of the object of the act is an essential characteristic of this criminal offense, a mistake regarding this element excludes intent, and consequently, criminal liability for this form of the offense.

For instance, if a person produces and sells a food product believing – based on documentation and the product's appearance – that it is not harmful, but it is later found to contain prohibited substances, this may constitute a factual error. If the error was avoidable (e.g., the person failed to check the composition), the individual is liable for negligence. However, if there was no way to know, the person is not liable.

To establish this form of the offense, it is sufficient for the perpetrator to commit one of the alternatively listed acts. Thus, this offense is classified as a formal endangerment crime, with abstract danger as its consequence. One could conclude that the degree of danger to human health resulting from these actions is the legislative rationale for criminalization, since the offense is consummated through the very act of production for sale, sale, or distribution of harmful products, regardless of whether any actual harm to a person's health has occurred.

The offender can be *any person* who undertakes one of the listed acts – e.g. a housewife making juice, a vendor selling such products at a market stall, or a person giving away such products as gifts. It is irrelevant whether or not he has a formal license to manufacture or sell the product.

The second form of the offense (para. 2) is committed by the person who produces, sells or otherwise puts into circulation personal care products, children's toys or similar products for mass use or consumption that are harmful to health. What distinguishes this form of work from the previous one is its subject. The offense can only be committed in relation to personal care products, children's toys or similar products for mass use or consumption that are harmful to health. According to the Law on Items of General Use, children's toys are all products or shaped materials intended for play by children up to 14 years of age and products that can come into contact with the oral cavity and skin of the child. The term "similar products for mass use or consumption" should be interpreted as items that are similar in purpose and function to personal care products and children's toys. These can be e.g. various personal care products, e.g. nail files, hair comb, body wash sponges and the like. And this form of the act belongs to formal delicts with abstract danger as a consequence.

Due to the importance of the protected legal interest – human health – the legislator also criminalizes **negligent commission** of the above offenses, prescribing a punishment of up to one year in prison and a fine. This allows punishment of a perpetrator who is in a *removable factual mistake* regarding the harmful nature of the product.

Depending on the severity of the consequences, the legislator distinguishes between two more serious forms of crime. The first serious form of the offense exists if it is due to the offense from para. 1, 2 and 3 of this article, a serious bodily injury or serious damage to the health of one or more persons has occurred, with a prison sentence of one to eight years if the serious bodily injury was caused by the acts referred to in paragraph 1 or 2, i.e. a prison sentence of up to three years if it was caused by the act referred to in paragraph 3. Another more serious form of the offense exists if, as a result of the act referred to in paragraph 1, 2, and 3 of this article, the death of one or more persons has occurred with the stipulated prison sentence of two out of twelve years if the death was caused by the acts from paragraph 1 or 2, that is, by a prison sentence of one to eight years if it was caused by the act from paragraph 3. In order for the responsibility of the perpetrator to exist for these types of acts, a causal connection must be established between the aforementioned forms of the act and the resulting consequences, as well as the fact that there was negligence on the part of the perpetrator in relation to a more serious consequence. Although according to the security measure confiscation of items from Article 82 of the RS CC, the court is obliged to confiscate items and means that were used or were intended for the commission of a criminal offense, the legislator provided a special provision in paragraph 6 of this article for mandatory confiscation of harmful foodstuffs and products.

3. Conclusion

The right to health protection is a constitutional right of every human being, which is realized through a series of legal and sub-constitutional regulations that regulate this matter in more detail. However, the protection of this right, as well as every other human right and freedom, is provided through criminal law norms that provide for incriminations aimed at protecting the right to health, that is, protecting health as a general common value of all people. Health protection, as a general common value, exceeds the framework of health protection of individuals or narrower local communities and becomes an obligation and task of all citizens. However, although this group of criminal acts protects health, understood in terms of the common general value of all citizens and as one of the conditions for the normal functioning of all life and social functions, it seems to us that until the outbreak of the epidemic caused by the corona virus Covid 19, many

citizens did not understand the importance of this good. Namely, the corona virus epidemic has shown that care for human health knows no borders, neither state, nor regional, nor national, but that it is a good of global importance that requires actions on a global level in order to adequately protect it. This is indicated by the consequences of the aforementioned epidemic, which manifested itself in a huge number of human victims as well as huge losses in all spheres of the economy in a large number of countries. The irresponsible behavior of individuals and legal entities that did not respect the orders and instructions of the competent authorities, which provided for measures to prevent the spread of this epidemic, contributed to such a situation, on the one hand, and on the other hand, the ineffective action of the competent authorities in the application of certain incriminations from this group of criminal acts. This is because we believe that with the adequate application of the existing criminal law norms, which provide for punishment for non-compliance with the above-mentioned by-laws and legal acts, the negative effect of this epidemic could be significantly mitigated, because the imposition of adequate criminal sanctions would affect possible future perpetrators of such crimes, and at the same time raise the awareness of citizens about the danger of such behavior. Unjustifiably neglected in our judicial practice, which also had an impact on the weakening of collective awareness of the necessity of adhering to the prescribed measures for the prevention and suppression of infectious diseases. In addition, the increase in the volume of sales of various products intended for human use, without prior control of the product's correctness, motivated us to remind the public within the framework of this paper of the incrimination that foresees punishment for the production and placing on the market of harmful products. In this regard, we remind you of the judgment from 1995, Kž. 1809/94. by the District Court in Belgrade, concluded that "the defendant who keeps a worker at work without a sanitary examination and who was infected with a certain bacteria, so she sells ice cream that was harmful to people's health due to the presence of the said bacteria with which the worker was infected, thereby produces for the purpose of selling and selling harmful foodstuffs". We are of the opinion that there are many life situations in which the application of this incrimination would be adequate, but in judicial practice it is interpreted and applied quite restrictively.

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