

THE OFFENCE OF ACTING CONTRARY TO MEASURES TO CONTAIN CONTAGIOUS DISEASE (TPC ART. 195)

BULAŞICI HASTALIKLARA İLİŞKİN TEDBİRLERE AYKIRI DAVRANMA SUÇU (TCK m. 195)

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Abstract: With the transition to sedentary life by human beings, who have struggled with various epidemic diseases throughout history, and the increase in interaction between societies, the rate of spread of epidemics has also increased. At the end of December 2019, we encountered a new epidemic that has changed our agenda, life and our expectations related to the future. This epidemic, the novel coronavirus COVID-19, has revealed consequences that will radically affect social relations, behavioral patterns, social, political, cultural and economic infrastructure, as well as the deep-rooted problems it has caused in terms of human health. Various measures are taken by the competent authorities in order to prevent the COVID-19 epidemic, which will be felt all over the world for many years and is declared as a pandemic (global epidemic) by the World Health Organization. In order to protect public health in the fight against such contagious diseases, acting contrary to the quarantine measures taken by the competent authorities regarding the location of the person who contracted a contagious disease or died due to such a disease is defined as a crime, and is regulated under the heading “Acting Contrary to Measures to Contain Contagious Disease” of Article 195 of the Turkish Penal Code No. 5237. The commission of this type of offence, which arises if it is conducive to violating measures regarding contagious diseases, can be carried out through active or passive actions. The transmission of the disease to others or certain people being harmed due to the disease are not necessary for the completion of the offence. The offence is completed by violating the quarantine measures taken by the competent administrative authorities. Although the type of crime in Article 195 of the TPC is not subject to complaint, prison sentence is prescribed as a sanction.

Keywords: Contagious Disease, Principle of Legality, Public Health, Quarantine Measures, Acting Contrary to Measures

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Özet: Tarih boyunca çeşitli salgın hastalıklarla mücadele eden insanlığın yerleşik hayata geçmesi ve toplumlar arasındaki etkileşimin artması ile birlikte salgınların yayılma hızı da artmıştır. 2019 yılının Aralık ayının sonunda gündemi, yaşamı ve gelecekle ilgili beklentilerimizi değiştiren yeni salgın hastalıkla tanıştık. Yeni tip Koronavirüs COVID-19 olarak adlandırılan bu salgın, insan sağlığı bakımından sebebiyet verdiği derin sorunların yanında toplumsal ilişkileri, davranış kalıplarını, sosyal, siyasal, kültürel ve ekonomik alt yapıyı köklü şekilde etkileyecek sonuçlar doğurmuştur. Bütün dünyada etkisini uzun yıllar hissettirecek ve Dünya Sağlık Örgütü tarafından pandemi (küresel salgın) olarak ilan edilen COVID-19 virüsü salgınının önüne geçebilmek amacıyla yetkili makamlar tarafından çeşitli tedbirler alınmaktadır. Bu tür bulaşıcı hastalıklarla mücadelede kamu sağlığının korunması amacıyla, bulaşıcı hastalığa yakalanan ya da bulaşıcı hastalıktan dolayı ölmüş olan kişinin bulunduğu yere ilişkin olarak yetkili makamlar tarafından alınan karantina tedbirlerine aykırı hareket edilmesi suç olarak nitelendirilmiş olup 5237 sayılı Türk Ceza Kanunu'nun 195. maddesinde “*Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu*” başlığı altında düzenlenmiştir. Bulaşıcı hastalıklara ilişkin tedbirleri ihlal etmeye elverişli olması şartıyla ortaya çıkan bu suç tipinin aktif ya da pasif hareketlerle gerçekleştirilmesi mümkündür. Hastalığın başkalarına bulaştırılması ya da hastalıktan dolayı bazı kişilerin zarar görmüş olması suçun tamamlanması için gerekli değildir. Yetkili makamlar tarafından alınan karantina tedbirlerine aykırı hareket edilmesiyle suç tamamlanmış olur. TCK'nın 195. maddesinde yer verilen suç tipi şikâyete tabi olmamakla birlikte yaptırım olarak hapis cezası öngörülmüştür.

Anahtar Kelimeler: Bulaşıcı Hastalık, Kanunilik İlkesi, Kamu Sağlığı, Karantina Tedbirleri, Tedbirlerin İhlal Edilmesi

INTRODUCTION

At the end of December 2019, after the emergence of a new type of Coronavirus (COVID- 19) pandemic in the People's Republic of China and its recognition as a pandemic by the World Health Organization, the (COVID- 19) pandemic came to the forefront of the agenda in Turkey in mid-March 2020. Public statements on quarantine measures reflected in the press and social media have frequently emphasized Article 195 of the Turkish Penal Code. In the upcoming period, it is important to examine the criminal norm in question, as well as other criminal law sanctions that are likely to be applied in the cases that judicial authorities will encounter in this context, as the issue will remain highly topical.¹

¹ Murat R. Önok, “Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK m. 195)”, *Anayasa Hukuku Dergisi*, Y. 2020, C. 9, V. 17, p. 149-150.

The offence of acting contrary to the measures regarding contagious diseases is regulated in Article 195 under the heading of “*Offences Against Public Health*” in the third section of the third part of the heading of “*Crimes Against Society*” in the second book titled “*Special Provisions*” of the TPC No. 5237. The relevant article stipulates that “*The person who does not comply with the measures taken by the competent authorities regarding the quarantine of the place where a person infected with one of the contagious diseases or who has died from these diseases is punished with imprisonment from two months to one year*”. The grounds of the article include the following sentence: “*In the article, failure to comply with the measures taken by the competent authorities to quarantine the place where people infected with contagious diseases or who have died from these diseases are located is defined as an offence. Thus, the aim is to protect public health*”.²

According to the aforementioned regulation, the legislator aims to prevent the acts and actions of persons who jeopardize the public health by failing to comply with these measures despite the decision of the competent authorities to quarantine the place where the person who has contracted a contagious disease or died from such diseases is located.³

I. LEGAL REGULATION

The protection of public health by taking necessary measures through the introduction of legal regulations is among the most prioritized and important issues for all societies. Article 56 of our Constitution states that “*Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the environment, protect environmental health and prevent environmental pollution*”. This provision of our Constitution, which imposes a duty of protection, states that the right to life as a human right can only be realized in a healthy and balanced environment.⁴ Article 1 of the

² TBMM, Dönem, 22, Yasama Y. 2, Sıra S. 664, p. 592; İzzet Özgenç, Gazi Şerhi, Türk Ceza Kanunu Genel Hükümler, 2. Baskı, Seçkin Yayınevi, Ankara, 2005, p. 941.

³ Özlem Y. Çakmut, “Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu”, Prof. Dr. Feridun Yenisey’e Armağan, İstanbul, 1. Baskı, Beta Yayıncılık, C. I, 2014, p. 543-544.

⁴ It is stated that since the general grounds for limitation have been abolished in the Constitution, some problems may arise in terms of the legitimate purpose of limitations in terms of some rights and freedoms where the ground of “protection of

Public Health Law No. 1593 states that controlling all diseases that pose a threat to public health is one of the requirements of public service. Likewise, in Article 1 of the Turkish Penal Code No. 5237, the protection of public health is listed among the purposes of the law.

As stated above, in the offence of acting contrary to the measures regarding contagious diseases under Article 195 of Law No. 5237, the legislator sanctioned non-compliance with the quarantine measures decided to be implemented by the competent authorities in the place where the person infected with the contagious disease or died due to the disease, with the aim of protecting public health.⁵

Article 195 of Law No. 5237 requires a number of conditions to be met in order for the offence to occur. In order for the material element of the offence to occur, there must first be an existing contagious disease in the concrete case. Issues such as the type of contagious disease, the way it spreads or the area it covers are not important.⁶ In subparagraph (c) of paragraph 1 of Article 4 of the Regulation on Surveillance and Control Principles of Communicable Diseases, a communicable disease is defined as *“a disease caused by a microorganism or its toxic products that is transmitted from person to person through direct contact with an infected person or indirectly, such as exposure to a vector, animal, product or environment, or through the exchange of fluids contaminated with*

public health” is not included, and that although these problems can be overcome to a certain extent through interpretation, the inclusion of a clear regulation may ensure clarity; in this respect, it is suggested that Article 56 of the Constitution, titled health services and protection of the environment, should include a provision stating that fundamental rights and freedoms may be restricted for the prevention of dangerous epidemics.; Tolga Şirin, “Tehlikeli Salgın Hastalıklarla Anayasal Mücadeleye Giriş”, *Anayasa Hukuku Dergisi*, 2020, V. 9, I. 17, p. 132.

⁵ Zeki Hafizoğulları/Muharrem Özen, *Türk Ceza Hukuku Özel Hükümler Toplum Karşı Suçlar*, USA Yayınevi, Ankara, 2017, p. 128; Osman Yaşar/Hasan Tahsin Gökcan/Mustafa Artuç, *Yorumlu ve Uygulamalı Türk Ceza Kanunu, C. IV, Adalet Yayınevi*, 2. Baskı, Ankara, 2014, p. 6035; Ali Parlar/Muzaffer Hatipoğlu, *Türk Ceza Kanunu Yorumu, Yayın Matbaacılık, 2. Cilt, (Madde 141-345)*, Ankara, 2007, p. 1463; Necati Meran, *Açıklamalı İçtihatlı Yeni Türk Ceza Kanun*, Seçkin Yayınevi, 2. Baskı, Ankara, 2007, p. 971; İsmail Malkoç, *Açıklamalı Türk Ceza Kanunu Cilt 3, (Madde 150-241)*, Sözkese Matbaacılık, Ankara, 2013, p. 3232; Çetin Arslan/Bahattin Azizağaoğlu, *Yeni Türk Ceza Kanunu Şerhi, Asil Yayınevi*, Ankara, 2004, p. 818; Çakmut, p. 544.

⁶ Recep Kahraman, “Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu (TCK md 195),” *Y. 2020, C. 78. S. 2, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, p. 744.

a contagious substance".⁷ The concept of epidemic, on the other hand, is defined in the dictionary as "infecting a large number of people, animals or plants in the environment in a short time", "contagious" and "the spread of a disease or other condition and infecting many people at once".⁸ As can be seen, contagiousness refers to the quality of a disease, while epidemic refers to the quantitative prevalence of a contagious disease.⁹

In the offence of acting contrary to the measures regarding contagious diseases, it is not sufficient to identify the disease-causing source in order to take quarantine measures. The second element to be sought here is that at least one person must have fallen ill or died due to the contagious disease.¹⁰ It is not important whether the contagious disease has reached large segments of society or only a certain part of the society has been affected.¹¹

If a quarantine declaration has not been made by the competent authorities despite the presence of a person who has contracted or died from one of the contagious diseases in an area, or if a quarantine declaration has been made by the competent authorities despite the absence of a person who has contracted or died from an contagious disease in an area, the offence will not occur due to failure to comply with the measures taken under Article 195 of the TPC.¹²

Another element that must be present regarding the offence is that quarantine measures must have been taken by the administrative authorities in order to prevent the spread of the contagious disease in relation to the place where the person who contracted the disease or died from the disease was located.¹³ These quarantine measures are taken in relation to the place where the disease is located, not the

⁷ Önok, p. 162; The List of Notifiable Communicable Diseases in Annex-1 of the Regulation lists which contagious diseases are considered as notifiable contagious diseases. COVID-19 virus is listed as a contagious disease in the 50th place of the relevant list.; Kahraman, p. 744; fn. 16.

⁸ Tdk Türkçe Sözlük, 11. Baskı, Ankara, 2011, p. 2018.

⁹ Şirin, p. 53, fn. 18.

¹⁰ Tuğba Bayzit, COVID-19 Salgınının Hukuki Boyutu (Editör Muhammet Özokes), Onikilevha Yayınevi, İstanbul, 2020, p. 867.

¹¹ Zeynel Temel Kangal, "Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu", Özel Ceza Hukuku Cilt V, Onikilevha Yayınevi, İstanbul, 2019, p. 438.

¹² Yaşar/Gökcan/Artaç, p. 6036- 6037.

¹³ Kahraman, p. 745

person.¹⁴ The administrative authorities authorized to take quarantine measures are regulated in Article 69 of the Public Health Law No. 1593. Article 303 of the same law specifies the health officers authorized to determine the quarantine measures and their scope are as follows: “Physicians employed in state, municipal and administrative affairs, and minor health officers who are in the service of physicians in matters deemed necessary and authorized by the Ministry of Health and Internal Medicine”.¹⁵ Articles 66, 67, 72, 73 of the Public Health Law No. 1593 explain the measures that can be considered within the scope of quarantine.¹⁶

Quarantine is defined in the dictionary as “a health measure applied in the form of keeping a certain region or place under control and preventing entry and exit in order to prevent the spread of a contagious disease”.¹⁷ In general terms, the word “quarantine” is used to refer to a set of restrictions intended to prevent the spread of a contagious disease.¹⁸

According to the definition of “the place where the infected person or the person who died from the disease was found” in Article 195 of the TPC, it is understood that quarantine measures are measures applied only in an area limited to the place where the infected person or the person who died from the disease was found.¹⁹ In other words, the legislator does not recognize acting contrary to measures taken outside the quarantine area as an offence.²⁰ As a matter of fact, in case of acting contrary to measures to prevent the emergence or spread of contagious diseases, such as the obligation to wear a mask or to comply with the social distancing rule, the offence of acting contrary to the measures regarding contagious diseases will not occur.²¹ Since quarantine measures are implemented through regulatory procedures issued by

¹⁴ Önok, p. 163.

¹⁵ Kahraman, p. 748-749; Önok, p. 168-169.

¹⁶ Önok, p. 169.

¹⁷ TDK Türkçe Sözlük, p. 1320-1321; In the Law No. 5996 on Veterinary Services, Plant Health, Food and Feed, quarantine is defined as “the control of animals, animal products, plants, herbal products and other substances, as well as potentially contaminated substances and materials, in order to prevent the introduction or spread of diseases or harmful organisms within the country”. (Art. 3/1-41). OG. of 13.10.2010 and no. 2760.

¹⁸ Kahraman, p. 745.

¹⁹ Önok, p. 164; Kahraman, p. 748.

²⁰ Kahraman, p. 745.

²¹ Kahraman, p. 745.

the competent authorities, the offence committed here is the failure to comply with the regulatory procedures of the administration.

Therefore, failure to comply with the quarantine measures taken by the competent authorities will not constitute a crime if the regulatory procedure is not in accordance with the law.²²

According to the principle of ultima ratio, criminal law instruments should be used as a last resort. Considering the type of offence in Article 195 of the TPC, it is understood that the legislator did not prefer to punish every action in the fight against contagious diseases.²³ In the case *Enhorn v. Sweden*, the European Court of Human Rights, in its decision known as the “Enhorn criteria”, stated that “States are not directly authorized to deprive persons of liberty in the measures they must take in terms of public health and safety in order to prevent the spread of contagious diseases” and determined two basic conditions when evaluating the “legality” of depriving a person of liberty. These are; (1) the disease constitutes a “danger” to public health/safety and (2) the person carrying the contagious disease is subjected to compulsory isolation. Quarantine measures must be a “last resort” to prevent the spread of the disease, as the use of lesser measures is inadequate. As soon as these criteria are not met, the deprivation of liberty will cease.”²⁴

²² Hafizoğulları/Özen, p. 128.

²³ Kahraman, p. 745.

²⁴ Şirin, p. 50; Dilaver Nişancı, “Salgın Hastalıklar ve Salgın Hastalıklar Özelinde Sağlık Hakkına Avrupa İnsan Hakları Mahkemesinin Bakış Açısı ile Ulusal Mevzuatın Covid-19 Özelinde Değerlendirilmesi”, *Türkiye Barolar Birliği Dergisi*, Y. 2020, S. 150, p. 97; In *Enhorn v. Sweden*, the applicant, a homosexual man, was found to be HIV-positive and, following his refusal to attend medical appointments given to him by the district health officer, was ordered by the administrative court, in accordance with the Contagious Diseases Act, to undergo compulsory isolation in hospital for a total of seven years, each time for a period not exceeding six months, and in practice for one and a half years, as the applicant had absconded each time. According to the ECHR, while HIV is indisputably dangerous for public health and safety, it is necessary to examine whether the deprivation of the applicant’s liberty is a last resort to prevent the spread of the virus, when less drastic measures are possible. According to the Court, in the circumstances of the concrete case, subjecting the applicant to compulsory isolation without exploring other measures to prevent the spread of the HIV virus cannot be considered as a last resort. On the other hand, the ECHR found that the compulsory isolation, which lasted for a total of seven years and was in fact imposed by keeping the applicant in hospital against his will for one and a half years, violated the Con-

On the other hand, it has been emphasized that the regulation in the offence of acting contrary to the measures regarding contagious diseases is insufficient to protect the public health, that it does not meet the legal needs arising from the current COVID-19 outbreak as its scope is regulated quite narrowly, and that the place where the measures are taken should not be included in the law; it has also been emphasized that in order to make the provision functional, it would be appropriate to remove the requirement of “*the place where a person who has been infected with one of the contagious diseases or who has died from these diseases*” from the law or to make an amendment as “*to quarantine a person*”,²⁵ since it is the legislator who can change the content of the rule by taking this into account if the rule is not in line with the purpose.²⁶ In the doctrine, some researchers have suggested that Article 195 of the TPC should be redefined in a broader and more inclusive manner, and thus, there would be no need for Article 284 of the Public Health Law No. 1593, which refers to Article 195 of the TPC.²⁷

II. EVALUATION OF ARTICLE 195 OF TPC IN TERMS OF THE PRINCIPLE OF LEGALITY

For the purpose of this study, it would be useful to address the problem of the contradiction to the principle of legality of Article 195 of the TPC, which is a subject of debate in the doctrine, and the

vention, as it was considered to have upset the fair balance that had to be struck between the objective of preventing the spread of the HIV virus and the protection of the applicant’s liberty. Enhorn/Sweden, ECHR, 56529/00, 25.01.2005, § 44.

²⁵ Kahraman, p. 745; Önok, p. 181.

²⁶ Önok, p.167.

²⁷ In the doctrine, Önok’s proposed amendment to Article 195 of the TPC is as follows: “A person who fails to comply with the orders given by the competent authorities or the procedures and actions regarding the quarantine of the place where a person who is infected or suspected of being infected with a contagious disease is found or where a substance causing such a disease is found or suspected to be found, or the quarantine of a person who is infected or suspected of being infected with a contagious disease, shall be sentenced to imprisonment from three months to three years.” Önok, p. 182; Kahraman’s amendment proposal regarding relevant article is as follows: “A person who fails to comply with the measures taken by the competent authorities for quarantine to prevent the emergence or spread of contagious diseases shall be sentenced to imprisonment from six months to two years.” Kahraman, p. 743.

prohibition of the imposition of crimes and penalties by the regulatory acts of the administration. As is known, one of the fundamental principles of the rule of law is the principle of legality. In order not to leave citizens unprotected against arbitrary and excessive intervention of the state, limitations must be imposed on the exercise of the power of punishment. The rule of law must not only protect individuals through criminal law, but also against criminal law (German: *den Einzelnen nicht nur durch das Strafrecht, sondern auch vor dem Strafrecht schützen*).²⁸

Article 2, paragraph 1 of the TPC No. 5237 stipulates that (1) "No one shall be punished or subjected to security measures for an act that the law does not explicitly criminalize. No penalty or security measure other than the penalties and security measures stipulated in the law may be imposed", and in paragraph 2 (2) "Crimes and penalties cannot be imposed by the regulatory procedures of the administration". According to the principle of legality in the article, in order to guarantee individual rights and freedoms, the legislator must determine which acts constitute crimes and the legal sanctions (sanctions) to be imposed on those who commit these crimes in the law in a clear, precise and enforceable manner, without leaving any room for doubt.²⁹ As adopted in a decision of the Constitutional Court, in this case, individuals have the opportunity to learn which of their behaviours constitute a crime and to adjust their actions accordingly.³⁰ Thus, by ensuring *predictability* through the principle of

²⁸ Claus Roxin, *Strafrecht, Allgemeiner Teil, Band I, Grundlagen, der Aufbau der Verbrechenslehre*, 4. Auflage, München, 2006, § 5, kn. 1, p. 138; Bahri Öztürk/Mustafa Ruhan Erdem, *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 14. Baskı, Seçkin Yayıncılık, Ankara, 2014, p. 36; kn. 26; The author prefers to use this definition not only for the Criminal Law, as Roxin states, but for legal rules in general. Berrin Akbulut, *Ceza Hukuku Genel Hükümler*, 6. Baskı, Adalet Yayınevi, Ankara, 2019, p. 98.

²⁹ Mahmut Koca/İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler*, 12. Baskı, Seçkin Yayınevi, Ankara, 2019, p. 54-55; Timur Demirbaş, *Ceza Hukuku Genel Hükümler*, 11. Baskı, Seçkin Yayıncılık, Ankara, 2016, p. 118; Mehmet Emin Artuk/Ahmet Gökçen/Mehmet Emin Alşahin/Kerim Çakır, *Ceza Hukuku Genel Hükümler*, 14. Baskı, Adalet Yayınevi, Ankara, 2020, p. 164; Nur Centel/Hamide Zafer/Özlem Çakmut, *Türk Ceza Hukukuna Giriş*, 6. Baskı, Beta Yayınları, İstanbul, 2010, p. 56; Kayıhan İçel, *Ceza Hukuku Genel Hükümler*, Beta Yayınları, Yenilenmiş Baskı, İstanbul, 2016, p. 126; İzzet Özgenc, *Türk Ceza Hukuku Genel Hükümler*, 15. Baskı, Seçkin Yayıncılık, Ankara, 2019, p. 132.

³⁰ Veli Özer Özbek/Koray Doğan/Pınar Bacaksız, *Türk Ceza Hukuku Genel Hükümler*, Seçkin Yayıncılık, 10. Baskı, Ankara, 2019, p. 66; Koca/Üzülmez, p. 55;

“legality” in crimes and punishments, legal security is preserved in the field of criminal law.³¹ Although an exception is made in Article 7, the principle of legality is incorporated in the European Convention on Human Rights.³²

The definition and sanctioning of a criminal act in the law is called “full criminal law” (German: *Vollstrafgesetz*) or “closed criminal law” (German: *Geschlossene Gesetze*) in the doctrine.³³ Although controversial, in some cases, the legislator does not clearly define what the act in question is in the law, although it shows the sanction that corresponds to the criminal act, in other words, the punishment to be imposed. It leaves the determination of this to the administrative authorities,

Önok, p. 154; In a decision of the Constitutional Court: “19. Article 2 of the Constitution characterizes the Republic of Turkey as a state of law. One of the fundamental elements of the state of law is the principle of “certainty”. According to this principle, legal regulations must be clear, precise, comprehensible, applicable and objective in a way that leaves no room for any hesitation and doubt for both individuals and the administration, and must also include protective measures against arbitrary practices of public authorities. The principle of certainty is linked to legal security, and the individual should know with certainty which legal sanction or consequence is attached to which concrete action or fact. Only in this case can the individual foresee their obligations and adjust their behavior.

²⁰ The principles of legal security and certainty are prerequisites of the state of law. The principle of legal security, which aims to ensure the legal security of individuals, requires that legal norms should be predictable, that individuals should be able to trust the state in all their actions and transactions, and that the state should avoid methods that undermine this sense of trust in its legal regulations.

²¹ The principle of certainty refers not only to judicial certainty but also to legal certainty in a broader sense. Legal certainty can also be ensured by court precedents and regulatory acts of the enforcement authority, provided that they meet the requirements of being accessible, known and predictable on the basis of legal regulation. What is essential in the principle of legal certainty is that the consequences of the application of a legal norm should be prescribed in that legal order.” R.G. 20.4.2018, S. 30397; Constitutional Court decision Case No. 2017/172, Decision No. 2018/32.

³¹ According to Article 38 of the Constitution, “No one shall be punished for an act which the law in force at the time it was committed does not criminalize; no one shall be punished with a heavier penalty than the penalty prescribed for that crime in the law at the time the crime was committed.”, Önok, p. 152; İçel, p. 83; Demirbaş, p. 63.

³² Önok, s. 151.

³³ Jürgen Baumann/Ulrich Weber/Wolfgang Mitsch, *Strafrecht Allgemeiner Teil*, Giesseking Verlag, 11. Baskı, Bielefeld, 2003, kn:100-101, p. 131-132; Artuk/Gökçen/Alşahin/Çakır, p. 157-158; Özgenç, p. 125; Demirbaş, p. 115; Özbek/Doğan/Bacaksız, p. 72; Koca/Üzülmez, p. 67.

provided that it is within the limits drawn.³⁴ In this way, flexibility is provided in determining the content, which varies according to place and time to meet the needs that may arise in the future. In the doctrine, laws that allow such arrangements are called “open criminal law, framework law, blind criminal law” (German: *Blankettdelikte*).³⁵

Under Article 195 of the TPC No. 5237, “failure to comply with the measures taken by the competent authorities” is subject to penalty. Therefore, it is the “competent authorities” who will determine what the measures for quarantine are and which measures should be taken in the offence of acting contrary to the measures regarding contagious diseases.³⁶ These measures to be taken by the competent authorities in the fight against the disease will be determined by referring to the provisions of the Public Health Law No. 1593, taking into account various factors such as the nature, type, effect, speed of spread of the contagious disease and how it is transmitted.³⁷

The fact that our country, like many countries in the world, is unprepared in the fight against dangerous epidemics in terms of legislation leads to the disregard of the principle of legality.³⁸ Although reasons such as the difficulty of predicting the scope and impact of the epidemic in advance and the inability to concretize the measures are put forward³⁹, the end does not justify the means.⁴⁰

In the type of offence regulated under Article 195 of the TPC, the fact that the element of the act regarding the quarantine measures is not defined in the text of the article is contrary to the principle of legality. Moreover, since the discretionary power to determine the content of the prohibited act is left to the administrative authorities, the provision of Article 195 of the TPC should be considered as an

³⁴ Doğan Soyaslan, *Ceza Hukuku Genel Hükümler*, 6. Baskı, Yetkin Yayınları, Ankara, 2016, p. 97; Artuk/Gökçen/Alşahin/Çakır, p. 157-158; Demirbaş, p. 115.

³⁵ Roxin, § 5, kn. 40, p. 157; Baumann/Weber/Mitsch, kn:100-101, p. 131-132; Özgenci, p. 125; Artuk/Gökçen/Alşahin/Çakır, 157-158; Demirbaş, p. 115; Özbek/Doğan/Bacaksız, p. 72; Koca/Üzülmez, p. 67.

³⁶ “The offence is failure to comply with a regulatory act of the administration”. See Hafizoğulları/Özen, p. 123.

³⁷ Kahraman, p. 747.

³⁸ Şirin, p. 130.

³⁹ Kahraman, p. 747.

⁴⁰ Şirin, p. 130.

open criminal norm.⁴¹ It can be said that the future completion of the open criminal norm with the regulatory acts of the administration also contradicts the principle of “*No crime and punishment shall be imposed by the regulatory acts of the administration*” in paragraph 1 of Article 2 of the TPC.⁴² According to contemporary criminal law principles, such norms should not be preferred by the legislator.⁴³

III. THE FORMATION PROCESS OF THE NORM AND THE COMPARISON OF THE FORMER TURKISH PENAL CODE NO. 765 AND THE TURKISH PENAL CODE NO. 5237

The Italian Penal Code of 1889, which was the source of the former Turkish Penal Code No. 765, which entered into force on July 1, 1926, also included the offence of acting contrary to measures regarding contagious diseases.⁴⁴ The offence of acting contrary to measures

⁴¹ Hafizoğulları/Özen, p. 128; Artuk/Gökçen/Alşahin/Çakır, p. 161; Özbek/Doğan/Bacaksız, p. 76.

⁴² Onok, p. 159; Fighting against dangerous epidemics without relying on the principle of legality may seem justifiable at first glance, but when considered in depth, this opens the door to risks such as arbitrariness and disregarding the principles of transparency and equality. In other words, leaving the fight against dangerous epidemics solely to the discretion of the executive may paradoxically hinder this effort. Moreover, this problem may spill over into the processes following the eradication of the disease..” See Şirin, p. 131.

⁴³ See, the Constitutional Court for a precedent opinion. “Turkish Criminal Code No. 5237. Paragraph (1) of Article 297 prohibits bringing or carrying weapons, drugs or stimulants or electronic communication devices into the execution institution or detention center and stipulates that those who ate this prohibition shall be punished with imprisonment. Paragraph (2) of the aforementioned article, in which the rule subject to objection is included, states that the person who intentionally brings into the execution institution or detention center, knowing this prohibition, or possesses or uses the items other than those listed in paragraph (1), which are prohibited by the competent authorities to be brought into the execution institution or detention center, will be punished with imprisonment. Although paragraph (1) of Article 297 lists the qualifications of the items that may be the subject of the crime one by one, the rule subject to objection does not specify such qualifications, and authorizes the competent authority within the administration to determine the items that may be the subject of the crime in an unlimited, uncertain and wide area. Accordingly, since the rule does not clearly and distinctly specify the qualifications that the competent authority within the administration will take as basis when determining the items that may be subject to the crime, the rule is not specific and foreseeable and does not comply with the principle of legality of the crime”, Constitutional Court decision Case No. 2010/69, Decision No. 2011/116; O.G. 21.10.2011, I. 28091.

⁴⁴ Kangal, p. 434.

regarding contagious diseases was regulated in Article 263 of the former Penal Code No. 765 under the title of *Violence and Resistance against the Government and Opposition to the Laws* in the chapter 3, section 8 of the second book of the Penal Code, which was designated for crimes, under the title of crimes committed against the state administration. The text of the mentioned article reads as follows: *“Those who actively disobey the orders and actions taken by the Government to cordon off houses and other places infected with cholera and other contagious diseases or where deaths occur shall be imprisoned from one month to one year, depending on the extent of their actions.”*⁴⁵

Article 256 of the draft of 1997 Turkish Penal Code, which was prepared based on the text and general justification of the preliminary text of 1989 TPC, stipulated that the offence of acting contrary to the measures regarding contagious diseases was punishable by *“imprisonment from two months to one year for those who actually obstruct the orders given by the competent authorities regarding the cordoning off of houses and other places where people who are infected with one of the diseases or who have died from these diseases are found, or for those who actually obstruct the efforts in this regard”*.⁴⁶ Article 261 of the 2004 Ministerial Bill on contagious diseases stipulates that *“Those who obstruct the orders given by the competent authorities regarding the cordoning off of houses and other places where a person who is infected with one of the contagious diseases or a person who has died from one of these diseases is found, or those who actually obstruct the efforts in this regard, shall be sentenced to imprisonment from two months to one year, depending on the extent of their actions”*.⁴⁷ As seen here, the provision in Article 256 of the draft of the 1997 TPC, which is a translated version of Article 263 of the former TPC No. 765, was also included in Article 261 of the 2004 Ministerial Bill.⁴⁸

The offence of acting contrary to the measures regarding contagious diseases is regulated in Article 195 under the heading of *Offences*

⁴⁵ İsmail Malkoç/Mahmut Güler, (Uygulamada) Türk Ceza Kanunu Özel Hükümler-2, Adil Yayınevi, Ankara, (Yayın yılı belirtilmemiş,) p. 1977; Kangal, p. 434; Çakmut, p. 544.

⁴⁶ Önok, p. 149.

⁴⁷ TBMM, Dönem, 22, Yasama Y. 2, Sıra S. 664, p. 320.

⁴⁸ Çakmut, p. 543; fn. 1.

against Public Health in the TPC No. 5237.⁴⁹ Although the measures in the TPC No. 765 criminalized the contradiction to the measures taken to cordon off *houses and other places* where contagious diseases are seen according to Article 263, Article 195 criminalizes the contradiction to the measures taken to quarantine *the place* where a person who has been infected with a contagious disease or who has died.⁵⁰

While in the TPC No. 765, the measures were aimed at cordoning off houses or other places, the TPC No. 5237 addresses measures related to *the implementation of quarantine*.⁵¹ Although there are differences in the wording in both legal regulations regarding which diseases are within the scope of the criminal offence, their contents are the same. In the TPC No. 765, the term *cholera and other contagious diseases* were used, while in the TPC No. 5237, the term *contagious disease* was used without specifying what the disease was.⁵² While in the TPC No. 765, *the violation of the orders and actions taken by the government* was the element of the crime, in the TPC No. 5237, this issue was expressed as *acting contrary to the measures taken by the competent authorities* and the action in accordance with the definition was handled more comprehensively.⁵³

In the TPC No. 765, the typical act was *to actually obstruct*, in other words, to actually resist. In TPC No. 5237, on the other hand, *failure to comply with the measures* is deemed sufficient. Actions that are not of a material nature and do not involve actual opposition may also cause the crime to occur.⁵⁴

⁴⁹ Çakmut, p. 544; When the Law No. 5237 is compared with the Law No. 765, it is seen that the verbal expression, the title and the systematic structure of the offence have been completely changed in the Law No. 5237. For this reason, it is partially not possible to use the provision of Art. 263 of the Law No. 765, doctrine and judicial decisions in the interpretation of the offence under Art. 195 of the Law No. 5237. This situation partially harms the principles of progress in doctrine and continuity in jurisprudence. Hafızoğulları/Özen, p. 127.

⁵⁰ Kahraman, p. 742.

⁵¹ Yaşar/Gökcan/Artuç, p. 6035.

⁵² Çakmut, p. 544.

⁵³ Kangal, p. 435.

⁵⁴ Kangal, p. 443.

IV. THE LEGAL VALUE TO BE PROTECTED

The meaning and purpose of modern criminal law is the protection of legal values. The individual's freedom, being an independent entity and developing their personality under the conditions of social life is a requirement of the doctrine of the protection of legal values.⁵⁵ Both the fact that the section title of the offence of acting contrary to the measures regarding contagious diseases in the TPC No. 5237 is regulated by the legislator as "*offences against public health*" and the examination of the article justification of the relevant offence, it will be seen that the legal value that is protected here is the "*protection of public health*".⁵⁶ In order to protect public health from danger and attacks, states have the responsibility of taking the necessary measures to combat epidemics through the competent authorities as per the legislation. As a matter of fact, Article 56 of the Constitution states that the State is obliged to ensure that everyone lives their lives both physically and mentally healthy.⁵⁷ Therefore, the regulation aims to prevent the possible harm and threats to the health of the individuals constituting the society by preventing the further spread of contagious diseases.⁵⁸

On the other hand, although the doctrine predominantly states that the legal value aimed to be protected is public health, there are also researchers who hold the opposite view. For example, according to German criminal jurist Roxin, only individual legal interests are protected in criminal law. A criminal norm cannot be based on the

⁵⁵ Yener Ünver, *Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer*, 1. Baskı, Seçkin Yayınevi, Ankara, 2003, p. 37.

⁵⁶ Çakmut, p. 545; Hafızoğulları/Özen, p. 128; Yaşar/Gökcan/Artuç, p. 6035-6036.

⁵⁷ VIII. Health, Environment and Housing. A. Health services and environmental protection. Article 56 of the Constitution- "Everyone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the environment, protect environmental health and prevent environmental pollution. The State shall ensure that everyone maintains their life healthy both physically and mentally, and shall regulate the planning and service provision of health institutions from a single authority in order to promote cooperation by increasing savings and efficiency in manpower and material resources. The State shall fulfill this duty by utilizing and supervising public and private health and social institutions. General health insurance may be established by law for the widespread provision of health services." In addition to the general regulation in the Constitution, the Law on Public Health No. 1593 (Art. 57-96. and Art. 282, 284) also contains some regulations on this matter; Çakmut, p. 545.

⁵⁸ Yaşar/Gökcan/Artuç, p. 6035-6036; Bayzit, p. 879.

protection of a hypothetical legal interest. It is not possible to create abstract concepts and protect them as legal interests through criminal law. Since the word “people” (German: *Volk*) is an abstract concept in the narrow sense of the word and has no real physical existence (German: *Keinen realen Körper*), the legal benefit should not be considered as “protection of public health” (German: *Volksgesundheit*). What should be understood here is the protection of the health of more than one member of the public. Therefore, an additional reason for punishment should not be created by justifying the protection of public health.⁵⁹ Again, Kangal argues that the legal value protected by the offence of acting contrary to the measures regarding contagious diseases is not the protection of public health, but rather the health of each individual constituting the society, and that the perpetrator endangers the health of all individuals inside and outside the quarantine zone by not complying with the quarantine measures taken due to a contagious disease.⁶⁰ In addition, according to Önok, it is not possible to consider an abstract concept such as public health as a legal value.⁶¹

V. ELEMENTS OF OFFENCE

A. Objective Elements of Offence

In the offence of acting contrary to the measures regarding contagious diseases, the examination of the objective elements of the offence is carried out in a certain order. Initially, the perpetrator of the crime, the victim, the criminal act will be examined and then finally the subject of the crime will be examined.

1. Perpetrator

Article 195 of the TPC No. 5237 defines the perpetrator as “*the person who fails to comply with the measures taken by the competent authorities*”.⁶² Accordingly, anyone who fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of

⁵⁹ Roxin, § 2, kn. 46, p. 28.

⁶⁰ Kangal, p. 435-436.

⁶¹ Önok, p. 159.

⁶² Hafızoğulları/Özen, p. 128.

the place where a person who has contracted or died from one of the contagious diseases is located can be the perpetrator of the offence.⁶³ Since the relevant article does not require a special qualification for the perpetrator, there is no specific crime here.⁶⁴

Measures within the scope of quarantine may be taken by the competent authorities to prevent the risk of the spread of contagious diseases throughout the country, or they may be applied only to certain regions, places, people practicing certain professions and arts, or only for certain dates and time intervals, or only for certain age groups. In this case, only these persons can be the perpetrators of the offence of acting contrary to the measures regarding contagious diseases.⁶⁵

It is possible for persons other than the addressees of the measures taken by the competent authorities to be the perpetrators of the crime in question by acting contrary to these measures.⁶⁶ It is not necessary for the perpetrator to be the person to whom the quarantine measure is directed or to live or be present in the quarantined area.⁶⁷

The perpetrator of this offence may also be a public official. This is because it is also possible for a public official to fail to comply with the measures of the competent authorities regarding quarantine during the performance of their duty. In this case, if other conditions are also observed, the penalty will be increased in accordance with Article 266 of the TPC, which states that *"The penalty to be imposed on a public official who uses the tools and equipment in their possession as a requirement of their duty during the commission of a criminal offence shall be increased by one-third, unless the title of public official has been taken into account in the definition of the relevant offence."*⁶⁸

In addition, only natural persons can be the perpetrators of the offence of acting contrary to the measures regarding contagious diseases. It is not possible for legal persons to be the perpetrator of this offence (Art. 20/2 of the TPC).⁶⁹

⁶³ Kangal, p. 436.

⁶⁴ Yaşar/Gökcan/Artuç, p. 6036.

⁶⁵ Kahraman, p. 749.

⁶⁶ Kangal, p. 437.

⁶⁷ Kangal, p. 436-437.

⁶⁸ Kangal, p. 436.

⁶⁹ Kangal, p. 437.

2. Victim

Although there is no specific victim of the offence of acting contrary to the measures regarding contagious diseases, the legal value intended to be protected by this offence is the health of each individual. Therefore, since the health of everyone living in the society is likely to be harmed, the victim of the offence is every single member of the society.⁷⁰ Some authors in the doctrine express the victim of the offence as “the whole society in general”.⁷¹

Hafızoğulları/Özen, on the other hand, argue that the victim of the offence is not the society, but the “competent authority”, i.e. the public administration, whose quarantine measures are not complied with.⁷² However, the type of offence included in Article 195 is regulated under the section of *offences against public health under the title of crimes against society* within the system of the new Turkish Criminal Code No. 5237. Therefore, contrary to the former TPC No. 765, since it is no longer accepted that the relevant crime is committed against the public administration, the public official whose measures regarding contagious diseases are not followed should not be considered as the victim of the crime.⁷³

3. Act (Offence)

Article 195 of the Turkish Criminal Code No. 5237 defines the offence as “*failure to comply with the measures taken by the competent authorities to quarantine the place where a person who has contracted or died from one of the contagious diseases is located*”.⁷⁴ Failure to comply with

⁷⁰ Kangal, p. 437.

⁷¹ Çakmut, p. 546; Yaşar/Gökcan/Artuç, p. 6036.

⁷² “...However, unlike other crimes, the victim of the crime is not society. Since the core of the crime is “failure to comply with the measures taken by the competent authorities regarding quarantine”, and despite the legal issue, the victim of the crime is the “competent authority”, namely the public administration, whose quarantine measures are not complied with. This regulation, which is incompatible with the norm-making technique, indicates that the Historical Legislator did not have a consistent “system idea”. Hafızoğulları/Özen, p. 128.

⁷³ See also, Kangal, p. 437.

⁷⁴ According to the Court of Cassation, it should be clearly stated in the verdict which actions constitute a contradiction to the measures taken in the concrete case. “According to the facts, it is illegitimate to hold the defendant liable for the offence of acting contrary to the measures regarding contagious diseases without

the quarantine measures taken by a non-authorized authority does not constitute this offence.⁷⁵ Since the relevant article does not limit the manner in which the relevant measures may be contradicted, it cannot be said to be commit a crime. Article 195 of the TPC considers “failure to comply with the measures” sufficient. Therefore, non-material, i.e. verbal non-compliance with the measures taken by the competent authorities also constitutes this offence.⁷⁶

The offence of acting contrary to the measures regarding contagious diseases is a result crime since it can be committed by any action. For the crime to be committed, it is sufficient that the perpetrator does not comply with the measures taken by the competent authorities in any way. In addition, there is no need to use force, violence or threats in order not to comply with the measures taken.⁷⁷ Since Article 195 of the TPC does not require a result in the form of concrete danger or damage, the offence is an abstract endangerment offence.⁷⁸

The act of acting contrary to the measures taken by the competent authorities regarding quarantine or failing to comply with the measures they have implemented can be committed by an executive act or a negligent act. For example, the perpetrator entering the quarantined area by removing the tape set up at the entrance of the quarantine zone, taking down the notices and signs hung in certain places regarding quarantine, leaving the place where they should be without the decision of the competent authority (absconding) are acts of an executive nature.⁷⁹

On the other hand, examples of negligent acts include the perpetrator continuing to stay in the park despite being ordered by the competent authorities to go home, not handing over the items that

explaining how the defendant’s actions actually constituted a contradiction to the measures taken.” Kahraman, p. 751, fn. 56.

⁷⁵ Parlar/Hatipoğlu, p. 1463.

⁷⁶ For example, continuously saying something to intimidate public officials who want to implement the measures also constitutes a crime. However, it is not enough for the perpetrator to simply say that they will not comply with the measures taken or criticize the measures; Malkoç, p. 3233; Kangal, p. 442; Kahraman, p. 752. fn. 60.

⁷⁷ Yaşar/Gökcan/Artuç, p. 6037.

⁷⁸ Önok, s. 161; Kangal, p. 441; Yaşar/Gökcan/Artuç, p. 6038; Kahraman, p. 752.

⁷⁹ Kangal, p. 441.

need to be cleaned with special disinfectants to the officials, and not going to the health institution in the quarantine zone despite being summoned.⁸⁰

The perpetrator's conduct in not complying with the measures regarding contagious diseases must be "capable of preventing the measures taken or implemented by the competent authorities". Suitability can be objectively determined according to the assessment of a reasonable observer, taking into account the circumstances at the time of the incident.⁸¹ The fact that the act of acting contrary to the measures regarding contagious diseases is an abstract endangerment does not affect the necessity to make such an assessment.⁸² When it is concluded that the act committed by the perpetrator is capable of preventing the implementation of the measures taken by the competent authorities, the existence of the offence must be accepted.⁸³ In addition, for the offence to be committed, it is not required that the measures taken or implemented are prevented or that the behaviour in the form of non-compliance is carried out in the presence of the officials who take or implement the measures.⁸⁴

If the perpetrator resists against the authorized public officials by using force or threats due to the measures taken and implemented by them regarding quarantine, the act constitutes the crime of resisting against a public official by using force or threats to prevent them from performing their duties as defined in Article 265 of the TPC.⁸⁵ Here, the

⁸⁰ Kangal, p. 441; Kahraman, p. 751; Önok, p. 171.

⁸¹ Kangal, p. 441.

⁸² Önok, p. 170.

⁸³ Kangal, p. 441.

⁸⁴ Kangal, p. 442.

⁸⁵ The crime of resisting to prevent the execution of duty TPC Article 265- "(1) A person who uses force or threat against a public official in order to prevent them from performing their duties shall be sentenced to imprisonment from six months to three years. (2) If the offence is committed against persons performing judicial duty, imprisonment from two to four years shall be imposed. (3) If the offence is committed by making oneself unrecognizable or by more than one person together, the penalty to be imposed shall be increased by one third. (4) If the offence is committed with weapons or by taking advantage of the intimidating power created by existing or deemed to exist criminal organizations, the penalty to be imposed according to the paragraphs above shall be increased by half. (5) In the event that aggravated forms of the crime of intentional injury occur during the commission of this crime, the provisions regarding the crime of intentional injury shall also apply."; Çakmut, p. 548.

provisions on the offence of acting contrary to the measures regarding contagious diseases regulated under Article 195 of the TPC are no longer applicable.⁸⁶

4. Subject of the Offence

One of the objective elements of the offence is the subject of the offence. The existence of a crime without a subject cannot be mentioned.⁸⁷ The act performed by the perpetrator may be directed against an object or the physical, material structure or bodily integrity of a person.⁸⁸ For example, in the crime of theft, the subject of the crime is the movable property taken from its location,⁸⁹ and in the crime of property damage, the subject of the crime is movable or immovable property. In some crimes, the subject of the crime and the victim may be different from each other. For example, in the crime of intentional injury, the victim is the injured person. The subject of the crime is the body of this person.⁹⁰

In the doctrine, crimes are divided into “damage” and “endangerment” according to the intensity of the impact on the subject of the crime.⁹¹

Endangerment crimes are divided into two as “abstract endangerment” and “concrete endangerment”. In abstract endangerment, the legislator assumes that a danger will arise in terms of the subject of the crime by performing the act in the legal definition of the crime.⁹² In abstract endangerment crimes, the performance of the act in the legal definition of the crime is sufficient for the completion of the crime. Abstract crimes of endangerment are formal crimes (the consequence of which is contiguous to the act).⁹³ For this reason, as in concrete crimes of endangerment, there is no need for the judge to

⁸⁶ Kangal, p. 442.

⁸⁷ Artuk/Gökçen/Alşahin/Çakır, p. 374.

⁸⁸ Özgenç, p. 219.

⁸⁹ Sulhi Dönmezer/Sahir Erman, *Nazari ve Tatbiki Ceza Hukuku*, 14. Baskı, Der Yayınları, Cilt II, İstanbul, 2019, p. 33.

⁹⁰ Özgenç, p. 219-220.

⁹¹ Özgenç, p. 220.

⁹² İçel, p. 276; Özgenç, p. 221.

⁹³ Centel/Zafer/Çakmut, p. 256.

investigate and determine whether a danger has actually occurred on the subject of the crime, that is, the causal relationship.⁹⁴

As stated above, the offence of acting contrary to measures regarding contagious diseases is an abstract endangerment crime.⁹⁵ The offence of acting contrary to these measures can be committed if the measures taken by the competent authorities to quarantine a place are contradicted. Indeed, Article 195 of the TPC mentions measures *“regarding the quarantine of the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located”*.

Measures taken by the competent authorities to quarantine the place where a person who is infected with one of the contagious diseases or who has died due to these diseases is located and which are violated (not complied with) by persons constitute the subject of the offence of acting contrary to the measures regarding contagious diseases.⁹⁶ The occurrence of a concrete endangerment or damage is not necessary for this crime to occur. Failure to comply with the measures taken by the competent authorities is sufficient.⁹⁷ If a quarantine has not been declared by the competent authorities in a place within the scope of Article 195 of the TPC, then it is impossible for the crime to be committed since there is no measure taken by the competent authorities and violated by persons.⁹⁸

B. Subjective Elements of Offence

The offence of acting contrary to the measures regarding contagious diseases regulated in Article 195 of the Turkish Criminal Code No. 5237 is an offence that may be committed intentionally. This refers to the perpetrator’s knowledge of the measures taken by the competent authorities to quarantine the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located, and their failure to comply with these measures knowingly and willingly.⁹⁹ The existence of general intent is sufficient

⁹⁴ İçel, p. 276; Özgenc, p. 221.

⁹⁵ Kangal, p. 437.

⁹⁶ Kangal, p. 443; Önok, p. 161; Kahraman, p. 747-748; Bayzit, p. 877.

⁹⁷ Kangal, p. 443.

⁹⁸ Yaşar/Gökcan/Artuç, p. 6036- 6037.

⁹⁹ Hafızoğulları/Özen, p. 129.

for the relevant offence, and it is not necessary for the perpetrator to commit the offence with a special motive.¹⁰⁰ In addition, the negligent form of the act is not defined as an offence in Article 195 of the TPC.¹⁰¹

As mentioned above, since the offence of acting contrary to the measures taken by the competent authorities to quarantine the place where a person who has contracted one of the contagious diseases or who has died from these diseases is an offence that can be committed intentionally, the perpetrator must have knowingly and wilfully failed to comply with these measures.¹⁰² The measures taken by the competent authorities regarding quarantine must be announced to the public through various means.¹⁰³ For example, the measures taken can be announced by placing signs or warning notices at the entrance and exit of the area, making announcements by law enforcement officers or the municipal police, announcing the measures taken on radio and television, or sending text messages to mobile phones, etc. If the measures taken by the competent authorities are not announced, or if they are announced but the person is unable to learn about these measures due to their conditions or lack of means, it will be considered that there is a mistake in the material subject of the offence and it will not be concluded that the perpetrator has intent.¹⁰⁴

Mistake, which is accepted among the reasons that eliminate or reduce criminal responsibility in criminal law, is regulated in four paragraphs in Article 30 of the TPC No. 5237. A person who does not know the subjective elements of the legal definition of the offence during the execution of the act is not considered to have

¹⁰⁰ Hasan Gerçeker, *Yorumlu ve Uygulamalı Türk Ceza Kanunu Cilt II*, 5. Baskı, Seçkin Yayınevi, Ankara, 2020, p. 1838; Yaşar/Gökcan/Artuç, p. 6038; Kangal, p. 443.

¹⁰¹ Kangal, p. 443.

¹⁰² Kangal, p. 442.

¹⁰³ Çakmut, p. 549; Yaşar/Gökcan/Artuç, s. 6038.

¹⁰⁴ Kangal, p. 443; see Hafızoğulları/Özen, p. 129; The fact that the person does not know the measures taken by the competent authorities should be evaluated according to Art. 30/4, not Art. 30/1 of the Turkish Penal Code No. 5237. In accordance with the fourth paragraph, if the mistake is unavoidable, it is not punished. According to Article 4 of the Turkish Penal Code No. 5237, although lack of knowledge of the penal code is not considered an excuse, if the person is unable to learn the measures due to the environment in which they live, in other words, if there is an inevitable mistake about the act constituting an injustice, they benefit from this mistake and cannot be held responsible.

acted intentionally (TPC Art. 30/1). Pursuant to this provision of law, if the person misjudges the boundaries of the quarantined area, it should be accepted that the person's intent to commit an offence has been eliminated due to the error in the material conditions of the offence.¹⁰⁵ Since there are no qualified cases in the offence of acting contrary to measures regarding contagious diseases, it is not possible for the perpetrator to make a mistake in qualified cases (TPC Art. 30/2). A person who makes an unavoidable mistake about the realization of the conditions of the reasons that remove or reduce criminal liability will benefit from this mistake (TPC Art. 30/3). For example, if the mistake of the public official who thinks that they are authorized to enter or leave the quarantine zone in accordance with the provision of the law is inevitable, their act will not be considered as a violation of the quarantine measures, and they will benefit from their mistake. A person who makes an unavoidable mistake as to whether their act constitutes an injustice shall not be punished (TPC Art. 30/4). For example, a person who, despite knowing the quarantine measures, takes the cattle to graze or goes outside the quarantine zone to irrigate the land, not knowing that their act constitutes an injustice should be considered as an acceptable mistake.

Article 31 of the TPC No. 5237 on minority (TPC Art. 31), mental illness (TPC Art. 32), being deaf-mute (TPC Art. 33) and being temporarily unable to perceive the legal implications and consequences of the act committed under the influence of alcohol or drugs or having a significant decrease in the ability to direct their behaviour in relation to this act (TPC Art. 34) can also be applied to the offence of acting contrary to measures regarding contagious diseases.¹⁰⁶

On the other hand, the offence of acting contrary to the measures regarding contagious diseases should be evaluated in terms of the provisions of unjust provocation regulated in Article 29 of the TPC. In order to be able to claim unjust provocation, there must be an unjust act arising from the victim and causing rage or severe pain in the

¹⁰⁵ Kangal, p. 443.

¹⁰⁶ Kangal, p. 443.

perpetrator and the perpetrator must be under the influence of this condition at the time the offence is committed. Within the scope of Article 195 of the TPC, the measures taken by the competent authorities regarding the quarantine of a place cannot be qualified as an unjust act.¹⁰⁷ Therefore, it will not be possible to benefit from the provisions on unjust provocation if the person does not comply with the measures taken by the competent authorities on the grounds that it leads to rage or severe pain (TPC Art. 29).¹⁰⁸

According to Kangal, the perpetrator who does not comply with the measures taken in response to the situation where the person in charge of implementing the quarantine measures taken by the competent authorities exceeds the limits of their duty or causes the wrongful act by acting arbitrarily will be able to benefit from the unjust provocation remission.¹⁰⁹ According to Kahraman, when the person in charge of implementing the quarantine measures taken by the competent authorities acts arbitrarily while implementing the measures, unjust provocation remission should not be applied in case of contradicting the measures as a reaction to the unfair practices of the official. This is because the reaction to unjust provocation must be directed against the person who committed the unjust act. Although the excessive, disproportionate or arbitrary practices of the official cause the wrongful act, in order to benefit from unjust provocation, the reaction must be directed at the official. However, if the reaction is directed towards the quarantine measures taken by the competent authorities, it will not be possible to benefit from the provisions of unjust provocation, as the reaction will be directed towards a third party. The reaction towards the unjust practices of the official may constitute the crimes of insult,¹¹⁰

¹⁰⁷ Kangal, p. 444.

¹⁰⁸ Bayzit, p. 883; Kangal, p. 444.

¹⁰⁹ Kangal, p. 444.

¹¹⁰ See. "Establishing a conviction for the crime of resistance to prevent the performance of duty in writing on insufficient grounds without discussing whether all the words and actions were based on the intent to insult"; 5th Criminal Chamber of the Court of Cassation, Case No.2013/8093, Decision No.2014/12058, 02.12.2014; Ramazan Keklik, "Görevi Yaptırmamak İçin Direnme Suçu", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Y. 2015, C. 19, S. 4, p. 287, fn. 122

threat,¹¹¹ intentional injury¹¹² or intentional killing, depending on the nature of the act. In this case, since these crimes will be committed as a reaction to the wrongful act of the official, there is no obstacle to the implementation of the provisions of unjust provocation in the case of the perpetrator.¹¹³

C. Element of Unlawfulness

One of the essential elements of the crime is that the act should be unlawful. If the act is not unlawful or if there is a reason that renders the act lawful, the crime will not occur.¹¹⁴ In order to talk about unlawfulness, two conditions must coexist. The first of these is that the act is in contradiction and conflict with the rules of law, and the other is that there is no reason that eliminates the illegality, in other words, there is no other rule that allows the act to be done by the legal order.¹¹⁵ Although it is evaluated that the reasons for lawfulness in the general provisions section of the TPC No. 5237 can find an application area in terms of the offence of acting contrary to the measures regarding

¹¹¹ "When the defendant was taken to the hospital for a forensic report to be prepared, although the plaintiff M.N. stated that they would write all the complaints of the defendant in the report, the defendant repeated to the plaintiff that he could not use his arm at all and stated that he wanted to write this point in the report, but the defendant did not sit on the stretcher to be examined, so they could not examine the defendant, then the defendant said to the plaintiff "I sacrificed my arm, I will have no mercy on you, I will take revenge", and since the defendant committed this act with the intention of preventing the plaintiff from performing the duty, it was decided to establish a conviction for the crime of resistance to prevent the performance of duty instead of threatening," 18th Criminal Chamber of the Court of Cassation, Case No.2015/19047, Decision No.2015/1279, 12.05.2015; Keklik, p. 280, fn. 93.

¹¹² "...in his defense, the defendant stated that he did not have any wrongful act until he came to the police station, that one of the police officers kicked his foot and pushed him because he crossed his legs while the procedures were being carried out at the police station, and that he hit the police officer; in the face of the fact that the forensic reports available in the file confirm the defense of the defendant, a verdict of conviction was given for the crime of resistance to prevent the performance of duty in writing, as a result of an erroneous evaluation in the crime qualification, without considering that the action constitutes the crime of intentional injury to a public official under unjust provocation." 5th Criminal Chamber of the Court of Cassation, Case No.2013/809, Decision No.2014/4286, 16.04.2014; Keklik, p. 279, fn. 86.

¹¹³ Kahraman, p. 754.

¹¹⁴ Centel/Zafer/Çakmut, p. 280.

¹¹⁵ Centel/Zafer/Çakmut, p. 281.

contagious diseases, different opinions are put forward in the doctrine regarding the applicability of lawfulness within the scope of this crime. There are authors¹¹⁶ who state that it is not practically possible to apply lawfulness in terms of Art. 195 of the TPC, and there are also authors who find that the reasons for lawfulness are incompatible with this offence, but that the state of necessity can be taken into consideration in terms of the offence of acting contrary to the measures regarding contagious diseases.¹¹⁷

The offence of acting contrary to the measures regarding contagious diseases may be lawful if it is committed within the scope of “*implementation of the provision of the law*” under Article 24/1 of the TPC. In the case of the implementation of the provision of the law, the legislator did not accept responsibility for the person who follows the provision of the law and decriminalized the act.¹¹⁸ For example, the acts of public officials¹¹⁹ who have the authority to enter the quarantine zone in accordance with the law, as required by their duties and within these limits, are considered lawful.¹²⁰ Two conditions are necessary for the act of the person who follows the provision of the law to be considered lawful. There must be a rule or provision related to the act committed, the person concerned must fulfil the requirements of this provision or rule, or the person who follows the provision must be the addressee of that provision. Because no one can exercise an authority that is not granted to them by law.¹²¹ The lack of one of these conditions renders the act unlawful and renders the addressee’s right of resistance lawful.¹²²

¹¹⁶ Önok, p. 174.

¹¹⁷ According to some authors in the doctrine; “as a rule, the reasons for lawfulness may find an application area”, Çakmut, p. 548; Kangal, p. 444; according to another view, the reasons for lawfulness are incompatible with this crime, but it is possible to consider the state of necessity; Hafizoğulları/Özen, p. 124.

¹¹⁸ Soyaslan, p. 361.

¹¹⁹ According to Article 6, paragraph 1, subparagraph (c) of the TPC No. 5237, a “public official” in the application of criminal laws is defined as a person who participates in the execution of public activity by appointment or election or by any means, permanently, for a period of time or temporarily.

¹²⁰ Kangal, p. 444.

¹²¹ Soyaslan, p. 362; Zeki Hafizoğulları/Muharrem Özen, Türk Ceza Hukuku Genel Hükümler, US-A Yayıncılık, 8. Baskı, Ankara, 2015, p. 214.

¹²² Soyaslan, p. 362.

As a rule, the provisions on legitimate defence in Article 25/1 of the TPC do not apply to the offence of acting contrary to the measures regarding contagious diseases. Legitimate defence refers to the fact that a person is not punished for the acts that they have committed in order to defend an unjustified attack on their own or someone else's right.¹²³ In order for legitimate defence to be applicable, there must be an unjustified attack. Measures taken or implemented by public officials regarding contagious diseases within the scope of their public duty should not be considered as an "unjustified attack" since they are based on a provision of law.¹²⁴ Because the act that Article 195 of the TPC seeks to punish is the failure to comply with a lawful measure.¹²⁵ However, if the competent authorities exceed the limits of their duties or resort to measures or act arbitrarily in matters that do not fall within the scope of their duties, it will be considered as an "unjustified attack" and the act of not complying with the measures in the form of a defensive action against this will be considered within the scope of legitimate defence.¹²⁶

The state of obligation or necessity as a reason for lawfulness (TPC Art. 25/2) is applicable for the offence of acting contrary to the measures regarding contagious diseases.¹²⁷ The state of obligation or necessity can be defined as a situation that requires a person to commit an act that constitutes a crime and is sufficient to eliminate the danger in the face of the obligation to save themselves or others from a danger that they did not intentionally cause.¹²⁸ If the act of acting contrary to the measures taken or implemented by the competent authorities is carried out under the obligation to eliminate a grave and certain danger or to save someone else and to protect a legal interest that is significantly superior to public health, in other words, if the protection of a legal value that is more important than the right to health, i.e. the right to life, is the case¹²⁹, the crime will not occur since the act will be lawful due to the state of obligation. For example, if the person

¹²³ Soyaslan, p. 369.

¹²⁴ Kangal, p. 446.

¹²⁵ See also Hafizoğulları/Özen, *Özel Hükümler*, p. 124.

¹²⁶ Kangal, 446; Önok, p. 175.

¹²⁷ Hafizoğulları/Özen, *Özel Hükümler*, p. 129.

¹²⁸ Demirbaş, p. 293-294.

¹²⁹ Önok, p. 176.

leaves the quarantined area due to an earthquake, natural gas leak, fire, explosion, etc. In the quarantined area, or if they have to enter the quarantined area while trying to escape from stray animals chasing them, the act will be lawful, provided that the other conditions in paragraph 2 of Article 25 of the TPC are met.¹³⁰

On the other hand, the exercise of a right by a person is generally accepted as a reason for lawfulness. While the legal order authorizes a person to exercise a certain right, it also considers the exercise of that right as lawful.¹³¹ The exercise of the right in Article 26/1 of the TPC cannot be accepted as a reason for lawfulness in terms of the type of offence in Article 195 of the TPC. In order to exercise a right within the context of Article 26/1 of the TPC, there must be a subjective right recognized by the legal order and this right must be directly exercisable by the perpetrator. Acting contrary to the measures regarding contagious diseases is considered an offence according to Article 195 of the TPC. It is inconceivable that the relevant behavior can be considered as the exercise of a right.¹³²

In addition, since the lack of consent of the victim or the relevant person is necessary for the existence of the crime, the consent of the relevant person is very important in criminal law. When the holder of the legal interest protected by the crime gives consent to the violation of the interest, this consent affects the element of unlawfulness and renders the act lawful.¹³³ The consent of the relevant person does not constitute a reason for lawfulness in every case. In order for the consent of the relevant person to render the act committed lawful, certain conditions must be met. In order for the declaration of consent to constitute a reason for lawfulness, first of all, there must be a matter that the person can freely have disposition over.¹³⁴ In cases that directly affect the interests of the state and society and harm these interests, the existence of the consent of the relevant person is not taken into account, since the state and society are the ones who are primarily harmed

¹³⁰ Kangal, p. 445.

¹³¹ Mehmet Emin Artuk/Ahmet Gökçen/Ahmet Caner Yenidünya, *Ceza Hukuku Genel Hükümler*, Turhan Kitabevi, 4. Baskı, Ankara, 2009, p. 425; Özgenç, p. 323.

¹³² Kangal, p. 445-446; Kahraman, p. 753.

¹³³ Artuk/Gökçen/Yenidünya, p. 459.

¹³⁴ Koca/Üzülmez, p. 292.

by the crime.¹³⁵ Since the offence of acting contrary to the measures regarding contagious diseases does not have a specific victim and the offence is committed against all members of society, the “consent of the relevant person” in Article 26/2 of the TPC cannot be applied in this type of offence as a reason for lawfulness.¹³⁶

VI. FACTORS AFFECTING THE OFFENCE

Article 195 of the TPC No. 5237 does not include any aggravating or mitigating factors. However, if a public official uses the tools and equipment that they possess due to their duties during the commission of the offence of acting contrary to the measures regarding contagious diseases, in other words, if there is a possibility of application of the provision of Article 266 of the TPC in the concrete case, the punishment of the perpetrator will be increased.¹³⁷

VII. SPECIAL APPEARENCE FORMS OF CRIME

A. Attempt

As stated above, the offence of acting contrary to the measures regarding contagious diseases under Article 195 of Law No. 5237 is a crime of action.¹³⁸ The existence of an action against the measures is sufficient for the completion of the offence.¹³⁹ In such offence, the offence is completed when the act is completed. The offence is completed if the perpetrator fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of the place where the person infected with one of the contagious diseases or who died from these diseases is located. In the event that the offence cannot be completed due to an exceptional reason that is not under the control of the perpetrator, there will be an attempt. For example, if the perpetrator is caught by security guards while trying to bypass the barrier to enter the quarantined area surrounded by iron barriers or while trying to jump over the barriers to leave the quarantined

¹³⁵ Soyaslan, p. 356.

¹³⁶ Kangal, p. 446; Önok, p. 175; Kahraman, p. 753.

¹³⁷ Kangal, p. 446; Önok, p. 177.

¹³⁸ Kangal, p. 441.

¹³⁹ Kangal, p. 441-442.

area without permission from the authorities, the perpetrator will be responsible for the attempt.¹⁴⁰

It is possible to apply the provisions on voluntary renunciation for the offence of acting contrary to the measures regarding contagious diseases.¹⁴¹ If the perpetrator voluntarily gives up the performance of the crime or prevents the completion of the crime or the realization of the result by their own efforts, they will not be punished for the attempt; however, if the completed part constitutes a crime, they will only be punished with the penalty of that crime (TPC Art. 36).¹⁴² For example, if a person who wants to leave the place where they are kept under quarantine, injures the authorized officers and gives up when they are about to carry out their action, they will not be responsible for the offence of acting contrary to the measures regarding contagious diseases, but will be responsible for the crime of intentional injury.¹⁴³ On the other hand, in order for the perpetrator to benefit from the provisions of effective remorse, it must be clearly stipulated in the law. Since Article 195 of the TPC does not include effective remorse, it is not possible for the perpetrator to benefit from the effective remorse provisions in relation to the offence of acting contrary to the measures regarding contagious diseases.¹⁴⁴

B. Concurrence

In the event that the perpetrator fails to comply with the quarantine measures regarding contagious diseases taken by the competent authorities in more than one place and more than once at different times within the scope of the execution of a criminal decision, the provisions of successive offences will be applied. (Art. 43/1 of the TPC)

¹⁴⁰ The crime of violating the measures regarding contagious diseases is completed when the measures taken are violated. Since it is not a crime of harm, the act and the result cannot be separated from each other, and the act cannot be divided into parts. For the views that it is not possible to attempt the crime since the executive movements cannot be divided into parts, see Hafızoğulları/Özen, p. 129; Kangal, p. 442; Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 550.

¹⁴¹ Kangal, p. 442-443.

¹⁴² Hüseyin Acar, *Türk Ceza Hukukunda Gönüllü Vazgeçme Kurumu*, Adalet Yayınevi, Ankara, 2013, pp. 41-55.

¹⁴³ Kahraman, p. 756.

¹⁴⁴ Kahraman, p. 756.

Here, there are more than one act, each of which constitutes the same crime. Accordingly, the perpetrator will be punished according to the number of acts by resorting to actual concurrence. However, if the perpetrator repeatedly fails to comply with the measures taken for the same quarantine zone, the principle of uniqueness of the act arises and a single crime is committed. If there is a single act in the legal sense, the penalty of the perpetrator shall not be increased according to the provisions of successive offences.¹⁴⁵

In the event that the perpetrator infects others due to not following the measures taken by the competent authorities, the provisions on intentional injury¹⁴⁶ (TPC Art. 86- 88) are applied if the perpetrator acted intentionally, and the provisions on negligent injury (TPC Art. 89) are applied if the perpetrator violated the measures by not showing the necessary caution and attention although they did not act with the intention of making another person sick.¹⁴⁷ In this case, since it is not possible to apply the subsidiary norm to the act in cases where the primary norm exists (in accordance with the principle of subsidiarity of the subsidiary norm)¹⁴⁸, Article 195 of the TPC cannot be applied.¹⁴⁹

On the other hand, when the measures taken within the scope of Article 195 of the TPC are violated by using force or threat against a public official, the perpetrator will be held responsible for the offence of resisting a public official to prevent them from performing their duties, which is punishable by imprisonment from six months to three years, in accordance with the first paragraph of Article 265 of the TPC¹⁵⁰ titled “*resistance to prevent the performance of duty*”. It is not possible to commit the offence referred to in Article 265 of the TPC with the behaviour of “*passive resistance*” and the perpetrator must have used “*force or threat*”.¹⁵¹ The victim of the crime of resistance to prevent the performance of duty must be a public official. A public official is defined in Article 6/1-c of the TPC as “*a person who participates in the*

¹⁴⁵ Kangal, p. 446; Önok, p. 178.

¹⁴⁶ Çakmut, p. 550; Bayzit, p. 889.

¹⁴⁷ Kangal, p. 447; in terms of injuring, See also. Çakmut, p. 550.

¹⁴⁸ Demirbaş, p. 525-526.

¹⁴⁹ Kangal, p. 447.

¹⁵⁰ See also Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 548; Kangal, p. 442; Hafizoğulları/Özen, Genel Hükümler, p. 213.

¹⁵¹ Önok, p. 178.

execution of a public activity by appointment or election or in any other way, permanently, for a period of time or temporarily".¹⁵² The person in charge of implementing the quarantine measures taken by the competent authorities will be considered a public official because they participate in a public activity within the scope of Article 6/1-c of the TPC, whether they are civil servants or not.¹⁵³

If the perpetrator prevented the implementation of the measures by insulting public officials who want to implement the measures taken by the competent authorities, since the act will also constitute the offence of insulting a public official (Art. 125/3- a of the TPC), subparagraph (a) of paragraph 3 of Article 125 of the TPC, which has a higher penalty, will be applied in accordance with the rule of different types of intellectual concurrence.¹⁵⁴

If the act of non-compliance with the measures taken by the competent authorities regarding contagious diseases takes place in the form of property damage (for example, if the perpetrator acts contrary to the measures taken by breaking and destroying the barriers in the quarantine zone), the perpetrator commits both the crime of property damage and the offence of acting contrary to the measures regarding contagious diseases with these actions. In this case, it is possible to apply Article 44 of the TPC. According to the rule of different types of intellectual concurrence, the perpetrator will be held responsible for the crime of damage to property with a heavier penalty in accordance with the provision of Article 152/1-a of the TPC.¹⁵⁵

The act of contradicting the measures regarding contagious diseases under Article 195 of the TPC is also regulated as a misdemeanour under Article 32 of the Second Part of the Misdemeanour Law No. 5326 under the title of "*Violation of Order*".¹⁵⁶ Accordingly, acting

¹⁵² Kahraman, p. 758.

¹⁵³ Kahraman, p. 758.

¹⁵⁴ Kangal, p. 447.

¹⁵⁵ Kangal, p. 447.

¹⁵⁶ Article 32 of the Law No. 5326 on Misdemeanors reads as follows "Any person who violates an order issued by the competent authorities in accordance with the law, for judicial proceedings or for the protection of public security, public order or public health, shall be imposed an administrative fine of one hundred Turkish Liras. This fine shall be decided by the authority issuing the order" (f. 1). "This Article may only be applied in cases where there is an explicit provision in the relevant law" (f. 2).

contrary to the orders issued by the administration for the protection of public health in accordance with the law in cases specified in the law constitutes both a misdemeanour and requires an administrative fine and constitutes the crime under Article 195 of the TPC. In this case, Article 195 of the TPC will be applied pursuant to the rule “*if an act is defined as both a misdemeanour and a crime, only the crime can be sanctioned*” in paragraph 3 of Article 15 of the Law on Misdemeanours No. 5326.¹⁵⁷ However, in cases where sanctions cannot be imposed for the crime, the corresponding sanction in the Law on Misdemeanours No. 5326 shall be imposed for the misdemeanour.¹⁵⁸

Regulations regarding the quarantine of a place due to contagious and epidemic diseases and the measures to be applied are included in Articles 72 and 73 of the Public Health Law No. 1593. Again, Article 282 of the Public Health Law No. 1593 stipulates; (Amended Article: 23.01.2008 Law No.5728/Article 48) “*Those who act contrary to the prohibitions stipulated in this Law or who do not comply with the obligations shall be imposed an administrative fine from 789 Turkish Liras to 3,180 Turkish Liras, unless their acts also constitute a crime*”.¹⁵⁹ Based on the phrase “*unless their acts also constitute a crime*” in the article, it is possible to conclude that Article 195 of the TPC, which is the primary norm, will be applied without taking into account Paragraph 3 of Article 15 of the Law on Misdemeanours No. 5326.¹⁶⁰

C. Participation

More than one person may have acted contrary to the quarantine measures regarding contagious diseases under Article 195 of the TPC No. 5237 in the form of participation, or one may have participated in the

¹⁵⁷ Kangal, p. 448.

¹⁵⁸ Malkoç, p. 3233.

¹⁵⁹ Article 17/7 titled “Administrative fine” of the Misdemeanor Law No. 5326 published in the Official Gazette of 31.3.2005 no. 25772 (Repeated) states as follows: “Administrative fines are applied by increasing the revaluation rate determined and announced in accordance with the provisions of Article 298 of the Tax Procedure Law of 4.1.1961 no. 213 for that year to be valid at the beginning of each calendar year. In this way, the fractions of one Turkish Lira shall not be taken into account in the calculation of the administrative fine. The provision of this paragraph shall not be applicable for administrative fines of a proportional nature”.

¹⁶⁰ Önok, p. 180; Kangal, p. 447.

act of the other as perpetrator, instigator or aider and abettor, depending on their contribution to the act.¹⁶¹ Since the aforementioned article does not stipulate a special regulation on participation, the general rules in our criminal code will be applied regarding participation.¹⁶² Each person who commits the act included in the legal definition of the crime with the will of participation by agreeing and cooperating among themselves is a joint perpetrator and each accomplice is responsible for the unlawful act committed in the status of perpetrator. (TPC Art. 37/1) For example, the person who encourages the perpetrator not to comply with the measures taken by the competent authorities will be punished as an instigator. (TPC Art. 38) A person who provides the perpetrator with ladders to climb over the iron barriers placed around the quarantine zone by the competent authorities or provides the perpetrator with appropriate clothing to enable them to escape from the quarantine zone by introducing themselves as health workers will be punished as an aider and abettor (TPC Art. 39).¹⁶³

VIII. SANCTIONS

The sanction stipulated in Article 195 of the TPC for the offence of acting contrary to the measures regarding contagious diseases is imprisonment from two months to one year. The sanction of the offence is determined only as imprisonment and no additional judicial fine is envisaged. Since the imprisonment sentence of one year or less envisaged under this article is a short-term imprisonment sentence according to paragraph 2 of Article 49 of the TPC, it can be converted to the alternative sanctions specified in Article 50 of the TPC. Again, the court may postpone the imprisonment sentence according to Article 51 of the TPC.¹⁶⁴ The discretionary reduction reasons set forth in Article 62 of the TPC may also be applied for this type of offence.¹⁶⁵ The court may decide to defer the announcement of the verdict under Article 231 of the Criminal Procedure Code No. 5271. Since the upper limit of the sentence

¹⁶¹ Çakmut, p. 551.

¹⁶² Yaşar/Gökcan/Artuç, p. 6038; Çakmut, p. 551; Kangal, p. 449; Arslan/Azizağaoğlu, p. 819.

¹⁶³ Kangal, p. 449.

¹⁶⁴ Çakmut, p. 551; Kahraman, p. 759.

¹⁶⁵ Çakmut, p. 550.

is imprisonment not exceeding two years, simple trial procedure may be applied in the trial according to paragraph 1 of Article 251 of the Criminal Procedure Code. Pursuant to Article 266 of the TPC, if a public official used the tools and equipment that they had in their possession as a requirement of their duty during the commission of the offence, the penalty to be imposed shall be increased by one-third.¹⁶⁶

IX. STATUTE OF LIMITATIONS

Statute of limitations is a concept of criminal law that results in the dismissal of a criminal case if a certain period of time has elapsed from the date of the commission of the offence and the case has not been filed, or if the case has been filed but has not been concluded within the statutory period.¹⁶⁷ Since the statute of limitations for crimes punishable by imprisonment for not more than five years or a judicial fine is eight years, the statute of limitations for the prosecution of the offence of acting contrary to the measures regarding contagious diseases should be applied as eight years from the date of the crime.¹⁶⁸

X. ADJUDICATION

The investigation and prosecution of the offence of acting contrary to the measures regarding contagious diseases are not subject to the complaint of the injured party. These offences are subject to investigation and prosecution *ex officio*. In terms of Article 11 of the Law No. 5235 on the Establishment, Duties and Powers of the Courts of First Instance and Regional Courts of Appeal, the criminal courts of first instance are authorized to hear the case. The competent court in terms of location is the court in the place where the measures regarding contagious diseases are not complied with by the perpetrator or where the measures are contradicted.¹⁶⁹

Since the offence is not within the scope of prepayment and the predicate offences listed in subparagraph (b) of paragraph 1 of Article 253 of Law No. 5271, it is not within the scope of reconciliation.¹⁷⁰

¹⁶⁶ Kangal, p. 449; Bayzit, p. 886.

¹⁶⁷ İçel, p. 759; Soyaslan, p. 592-593; Özgenc, p. 952-953.

¹⁶⁸ Kahraman, p. 760.

¹⁶⁹ Önok, p. 180; Yaşar/Gökcan/Artuç, p. 6039.

¹⁷⁰ Çakmut, p. 552.

XI. REGULATIONS IN COMPARATIVE LAW

The offence of acting contrary to the measures regarding contagious diseases is regulated in various ways in the legislation of countries. The regulations of various countries such as Germany, Austria, Switzerland, Italy and France, which are among the continental European legal systems, will be examined below respectively.

There is no provision in the German Criminal Code (*Strafgesetzbuch-StGB*) for the punishment of acting contrary to of measures taken to prevent the spread of contagious diseases. The provisions are regulated in the Infectious Disease Protection Act (*Infektionsschutzgesetz-IfSG*), which was enacted as a special criminal law for the purpose of preventing and combating contagious diseases and entered into force on 01.01.2001. This law has been amended three times in the last year by the German Bundestag (*Deutscher Bundestag*). The first amendment was made on 27.03.2020¹⁷¹, the second on 19.05.2020¹⁷² and the third on 18.11.2020¹⁷³. Article 28a of Chapter 5 (*Abschnitt Bekämpfung übertragbarer Krankheiten*) on combating contagious diseases regulates in detail the special protection measures for the prevention of the COVID-19 pandemic (*Besondere Schutzmaßnahmen zur Verhinderung der Verbreitung der Coronavirus-Krankheit 2019*). Article 73 of the Infectious Disease Protection Act, which was enacted to prevent the spread of contagious diseases, provides for administrative fines (§73 *Bußgeldvorschriften*), Article 74 provides for criminal penalties (§74 *Strafvorschriften*), and Article 75, paragraph 1, which regulates additional criminal penalties, provides for imprisonment for up to two years or a fine for acting contrary to quarantine measures.¹⁷⁴

Article 178 of the Austrian Criminal Code regulates the offence of intentionally endangering human health with contagious diseases (*Vorsätzliche Gefährdung von Menschen durch übertragbare Krankheiten*).

¹⁷¹ German Federal OG. 27.03.2020, S. 587, (Bundesgesetzblatt-BGBl. I 2020 S. 587; Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite).

¹⁷² German Federal OG. 19.05.2020, S. 1018, (Bundesgesetzblatt-BGBl. I 2020 S. 1018; Zweites Gesetz).

¹⁷³ German Federal OG. 18.11.2020, S. 2397, (Bundesgesetzblatt-BGBl. I 2020 S. 2397; Drittes Gesetz).

¹⁷⁴ German Infectious Disease Protection Act; Infektionsschutzgesetz-IfSG md.75/1, 20. Temmuz 2000, (BGBl. I S. 1045).

According to this article, whoever commits an act that may cause the spread of a contagious disease among people shall be punished with imprisonment of up to three years. If the acts specified in this article are committed through negligent acts, Article 179 stipulates a prison sentence of up to one year or a fine of 720 days.¹⁷⁵

Article 231 of the Swiss Criminal Code, titled “ Spreading Infectious Diseases” (*Verbreiten menschlicher Krankheiten*), stipulates that anyone who intentionally spreads a dangerous contagious disease shall be punished with imprisonment from one to five years. In addition, in order to combat the COVID-19 outbreak and to prevent contradictions to the quarantine measures taken, the Swiss Federal Council issued a Decree on Measures to be Taken in the Fight Against Coronavirus. Pursuant to Article 10(f) of Decree No. 2, a person who intentionally contradicts the measures taken to prevent the spread of a contagious disease at meetings, events or other organizations within the scope of Article 6 of the Decree is punishable by up to three years’ imprisonment or a fine, unless it is a crime punishable more severely under the Swiss Criminal Code. According to Article 185, paragraph 3 of the Swiss Constitution, a decree may be issued on measures to be taken to prevent the endangerment of internal and external security and the disruption of public order, provided that the duration is determined in advance.¹⁷⁶

This regulation has been criticized in the doctrine by some administrative and criminal law experts on the grounds that it is unconstitutional. According to Swiss criminal law expert Niggli, neither Article 7 of the Epidemic Diseases Act (*Epidemiengesetz-EpG*)¹⁷⁷ which authorizes the Federal Council to take necessary measures throughout the country or in a certain region in extraordinary circumstances, nor Article 185 of the Constitution authorizes the Federal Council to impose fines or imprisonment by decree. Indeed, Article 1 of the Swiss

¹⁷⁵ Article 178 of the Austrian Criminal Code; Strafgesetzbuch (§178 Vorsatzliche Gefährdung von Menschen durch Übertragbare Krankheiten).

¹⁷⁶ Swiss OG. 13.03.2020, (der Schweizerische Bundesrat, Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) vom 13. März 2020 (Stand am 20. Juni 2020).

¹⁷⁷ Swiss Epidemic Diseases Act, *Epidemiengesetz*; (EpG) vom 28. September 1912, ist seit 1.1.2016 in Kraft, Und ermöglicht eine früh zeitige Erkennung, Überwachung, Verhütung und Bekämpfung.

Criminal Code states that penalties must be expressly prescribed by law. It has been stated that if the Federal Council were to be given such a power of regulation, the legislator would have to explicitly specify this power in the law.¹⁷⁸

Article 650 of the Italian Penal Code imposes a penalty of up to three months' imprisonment or a fine of up to 206 Euros for anyone acting contrary to quarantine measures taken by the competent authorities for reasons of public safety, public order or public health.¹⁷⁹ According to Article 438 titled "Epidemic", anyone who intentionally causes an epidemic through the spread of pathogenic germs is punished with life imprisonment (life sentence). Article 452 of the Law regulates the negligent form of the aforementioned offence under the title "Criminal Negligence Against Public Health". According to this article, the person who, through negligence, imprudence or carelessness, causes the commission of the epidemic offence under Article 438, is punished with imprisonment from three to twelve years in cases of negligent violations punishable by the death penalty, and with imprisonment from one to five years in cases punishable by life imprisonment.¹⁸⁰ In France, the "Health Emergency Law" is in force, which consists of a series of exceptional measures to combat contagious diseases. In order to overcome the crisis caused by the COVID-19 outbreak, the French government announced a comprehensive package of regulations including health emergency measures. Under the State of Medical Emergency declared in France for two months as of March 24, 2020, entry to the country has been restricted for certain reasons. The Emergency Law provides for the possibility to declare a state of emergency in all or part of a region if necessary. According to Article 2 of the Health Emergency Law, those acting contrary to quarantine measures four times within one month are subject to fines and imprisonment for up to six months.¹⁸¹

¹⁷⁸ Marcel Alexander Niggli, Corona-Krise: Warum der Bundesrat keine Strafen erlassen darf, *Neue Zürcher Zeitung-NZZ*, 16.04.2020.

¹⁷⁹ Adil Maviş, "Covid-19 Küresel Salgınının Hukuktaki Yansımaları" *Covid 19 Salgınının Ceza Hukuku Bakımından Değerlendirilmesi*, Ed. Kemal Şenocak, Ankara, Yetkin Yayınları, 2021, p. 1004; Kahraman, p. 761.

¹⁸⁰ Maviş, p. 1004; Kahraman, p. 762.

¹⁸¹ Kahraman, p. 763.

CONCLUSION

The epidemic disease called Novel Coronavirus COVID-19 continues to spread around the world by expanding its impact since the beginning of 2020. The global outbreak of the virus, declared as a pandemic by the World Health Organization, has thrown the whole world into chaos with a wide range of problems. The negative impact of the pandemic on the social order has also deeply affected the legal orders.

In the current process, states are under the responsibility to take the necessary measures required by the situation to combat epidemics in order to protect public health and to ensure that all individuals act in accordance with these measures. Compliance with the measures taken by the competent authorities regarding the protection of public health is important in the fight against contagious diseases. In this direction, in our country, acting contrary to the measures regarding contagious diseases is regulated as an offence in our criminal code and is subject to criminal sanctions.

Article 195 of the Turkish Penal Code No. 5237 regulates the offence of “acting contrary to the measures regarding contagious diseases” in the section of offences against public health, which is among the crimes against society. It can be said that with the aforementioned regulation, the legislator aims to prevent the acts and actions of persons who expose public health to danger by not complying with the measures taken by the competent authorities regarding the quarantine of the place where the infected or deceased person is located.

On the other hand, various opinions are put forward in the doctrine that the measures taken by the competent authorities to quarantine the place where the disease is found, which are stipulated in Article 195 of the TPC, will constitute a violation of the “principle of definiteness” since they are not clearly defined in the text of the article; and that the determination of the content of the type of crime, which is in the nature of an open criminal norm, by leaving the definition of the content of the crime type to the administrative authorities by the regulatory acts of the administration and even by individual administrative acts will also constitute a violation of the principle of legality.

The legal value protected by the provision on Acting Contrary to Measures to Contain Contagious Disease in Article 195 is the protection

of public health. Therefore, the aim here is to prevent possible damages and dangers to the health of the individuals constituting the society by preventing the further spread of contagious diseases. In this regard, anyone who fails to comply with the measures taken or implemented by the competent authorities regarding the quarantine of the place where a person who has contracted one of the contagious diseases or who has died from these diseases is located may be the perpetrator of the offence. Since the relevant article does not require a special qualification for the perpetrator, there is no specific offence here. Since the health of everyone living in the society is likely to be harmed, the victim of the offence is each member of the society. The offence of acting contrary to the measures regarding contagious diseases is a result crime, since it can be committed by any action.

For the offence to be completed, it is sufficient for the perpetrator to fail to comply with the measures taken by the competent authorities in any way. In addition, it is not necessary to use force, violence or threats in order not to comply with the measures taken. Since Article 195 of the TPC does not require a result in the form of concrete danger or damage, the crime is an abstract endangerment. The act of contradicting the measures taken by the competent authorities regarding quarantine or not complying with the measures they apply can be committed through an executive or negligent act.

Article 195 of the Turkish Penal Code No. 5237 regulates the offence of acting contrary to the measures regarding contagious diseases, which is an offence that can be committed intentionally. The intention here is that the perpetrator knows the measures taken by the competent authorities to quarantine the place where the person who has contracted one of the contagious diseases or died from these diseases is located and does not comply with these measures knowingly and willingly. In terms of the relevant offence, the existence of general intent is sufficient and it is not necessary for the perpetrator to commit the offence with a special motive. In addition, the negligent form of the act is not defined as an offence in Article 195 of the TPC.

The offence of acting contrary to the measures regarding contagious diseases may be lawful if it is committed within the scope of *“fulfilment of the provision of the law”* in Article 24/1 of the TPC. In

the case of fulfilment of the provision of the law, the legislator did not accept responsibility for the person who fulfilled the provision of the law and decriminalized the act. In the offence of acting contrary to the measures regarding contagious diseases, as a rule, the provisions on legitimate defence in Article 25/1 of the TPC do not apply. The state of obligation or necessity as a reason for lawfulness (Art. 25/2 of the TPC) is applicable for the offence of acting contrary to the measures regarding contagious diseases. The exercise of the right in Article 26/1 of the TPC cannot be accepted as a reason for lawfulness in terms of the type of crime in Article 195 of the TPC.

Since the offence of acting contrary to the measures regarding contagious diseases does not have a specific victim and the offence is committed against everyone in the society, the “consent of the relevant person” in Article 26/2 of the TPC cannot be applied in this type of offence as a reason for lawfulness. In the event that the offence cannot be completed due to an exceptional reason not under the control of the perpetrator, the attempt to commit the offence under Article 195 of the TPC shall be taken into consideration.

In the event that the perpetrator infects others due to not complying with the measures taken by the competent authorities, the provisions on intentional injury (TPC Art. 86- 88) shall be applied if the perpetrator acted intentionally, and the provisions on negligent injury (TPC Art. 89) shall be applied if the perpetrator did not act with the intention of infecting another person, but acted contrary to the measures by not showing the necessary caution and care. If the infected person dies, the provisions of the crime aggravated by the consequences should be applied. In this case, Article 195 of the TPC shall not be applied.

The investigation and prosecution of the offence of acting contrary to the measures regarding contagious diseases do not depend on the complaint of the victim of the offence. These offences are subject to ex officio investigation and prosecution. The perpetrator is punished with imprisonment from two months to one year. The sentence may be suspended. When it is a short-term prison sentence, it may be converted into alternative sanctions. Article 11 of the Law No. 5235 on the Establishment, Duties and Powers of the Courts of First Instance and Regional Courts of Appeal, criminal courts of first instance are

authorized to hear the case. The competent court in terms of location is the court in the place where the measures regarding contagious diseases are not complied with by the perpetrator or where the measures are contradicted. The statute of limitations period should be applied as eight years from the date of the offence.

The offence is not within the scope of prepayment and reconciliation since it is not included in the predicate offences listed in subparagraph (b) of paragraph 1 of Article 253 of the Law No. 5271. The discretionary reduction reasons in Article 62 of the TPC may also be applied for this type of crime. Article 231 of the Criminal Procedure Code No. 5271 provides for the deferment of the announcement of the verdict. According to paragraph 1 of Article 251 of the Criminal Procedure Code, simple trial procedure may be applied in the proceedings.

As a consequence, it is seen that the sanctions for the offence of acting contrary to the measures regarding contagious diseases are also included in the legislation of other countries in various ways, and some countries have even enacted a specific Law on Combating Epidemic Diseases or Protection from Epidemic Diseases. It is understood that the Public Health Law of 1930 no. 1593, which was enacted during the 1924 Constitutional period in our country, is inadequate in combating dangerous epidemic diseases in many respects. The scattered, incomplete, ambiguous and inconsistent provisions in our legislation on the fight against dangerous epidemics should be identified, as well as the provisions that have problems in both comprehensibility and harmonization with the Constitution. Based on the knowledge and experience gained in the fight against the Covid-19 pandemic, it would be beneficial for the legislature to enact a self-contained Law on Combating Epidemic Diseases that can meet the emerging needs, is up-to-date, comprehensive and eliminates uncertainties after negotiating with all stakeholders.

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