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HUMAN RIGHTS, THE RIGHT TO A FAIR TRIAL AND COVID-19 IN SERBIA – Impact of the pandemic on criminal and misdemeanor law –***

The subject of this paper is the analysis of specific human rights that make up the segments of the right to a fair trial, in the context of the state of emergency that was introduced in Serbia to combat the COVID-19 pandemic. Authors pay special attention to regulations introducing the "right of priority" for trials concerning violations of the norms adopted during the state of emergency and the possibility of conducting trials using the "Skype" platform. Also, the issue of temporal validity of regulations in misdemeanor law is analyzed, as well as the violation of the principle of ne bis in idem. Finally, authors evaluate the extent to which certain human rights were violated during the state of emergency in the Republic of Serbia, as well as the extent of the possible consequences that occurred.

Key words: *COVID–19. – Constitution of Serbia. – Constitutional Law. – Human Rights Law. – Criminal Law. – The right to a fair trial.*

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1. A FEW COMMENTS ABOUT THE INTRODUCTION OF THE STATE OF EMERGENCY IN SERBIA

On March 15th, 2020, the Republic of Serbia declared a state of emergency due to the danger of spreading an infectious virus (COVID–19).[1] Serbian Constitution[2] (2006) prescribes that the state of emergency is introduced when the survival of the state or its citizens is threatened by a public danger.[3] The National Assembly shall proclaim the state of emergency, but when the National Assembly is not in a position to convene, the decision proclaiming the state of emergency shall be adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, under the same terms as by the National Assembly.[4]

Specific and intricate conditions, with potentially disastrous consequences, in which our country has resorted, required the adoption of special measures law and the protection of health and life. In that way, the first step was the introduction of the state of emergency, which allowed the restriction and suspension of a number of human rights and freedoms.

The question arises whether introducing the state of emergency and all accompanying measures was the only possible legal solution in a given situation or whether the decision-makers could have resorted to a more legally acceptable option. There has been a public debate whether the introduction of a state of emergency was formally appropriate, i.e., whether there was a factual basis for its introduction and, finally, whether all measures introduced during the state of emergency were enacted and implemented in accordance with the Constitution and laws.[5] It is indisputable that the whole world faced great danger,

1 Odluka o proglašenju vanrednog stanja, *Službeni glasnik Republike Srbije*, br. 29/2020.

2 Ustav Republike Srbije, *Službeni glasnik Republike Srbije*, br. 98/2006.

3 Art. 200, para. 1 of the Serbian Constitution

4 Art. 200, para. 5 of the Serbian Constitution

5 For more details see: V. Petrov, M. Stanković, *Ustavno pravo*, Izdavački centar Pravnog fakulteta Univerziteta u Beogradu, Beograd 2020, 248–249; Z. Tomić, "Vanredno stanje i vanredna situacija u srpskom pravu", *Arhiv za pravne i društvene nauke,* 2/2020, 9–31; T. Marinković, "Ustavna hronika Republike

and it is clear that intervention by states was a necessity in a crisis in which the general interest was threatened. However, the legal profession is obliged to give its judgment in the future on how the state of emergency was introduced and implemented, as well as on the expediency of the measures in the state of emergency since the inconveniences we find today will be debated even after the end of this global catastrophe.

The problem of introducing a state of emergency in the Republic of Serbia in particular situation should be analysed taking into account at least four aspects, which are: justification for introducing a state of emergency in general; justification of the introduction of a constitutionally regulated category of state of emergency despite the existence of an emergency situation as a legal category; analysis of procedural regulation of the introduction and implementation of a state of emergency (formal aspect) and analysis of the implementation of measures introduced during the state of emergency (material aspect).

However, the subject of this paper will be the analysis of the position of human rights in the Republic of Serbia from the beginning and during the coronaviruspandemic (COVID – 19). In this regard, special attention will be paid to violations of certain human rights, such as the right to a fair trial in the context of certain decisions or actions of the competent authorities.

2. THE POSITION OF HUMAN RIGHTS IN SERBIA

Legal protection of human rights has strong historical roots in our country. In the recent history of Serbia, human rights were recognized for the first time as a result of the struggle against the despotic rule, as evidenced by the norms contained in the *Sretenje* Constitution of 1835.[6] For the first time, the afore-mentioned Constitution guaranteed one form of the right to a fair trial and the right to a trial within a reasonable time. Thus, Art. 112 guaranteed that "no one may be prosecuted or imprisoned if this is not in accordance with the law", i.e., "that no one may be detained for more than three days" (Art. 113).[7] After

Srbije za prvu polovinu 2020. godine", *Novi Arhiv za pravne i društvene nauke,* 1/2021, 124–154.

6 Arts. 108–131 of the Sretenje Constitution

7 Of course, one should bear in mind that this right was guaranteed only nominally. For more details about normative, nominal and semantic Constitution

that, all subsequent constitutions of the Principality and Kingdom of Serbia, as well as the first and second Yugoslavia, normatively guaranteed the mentioned rights. Although, "the role of the judiciary in the protection of rights and freedoms is particularly evident in disputes between the citizens and the state: when passing judgment in criminal proceedings brought by an individual against the state: as well as in reviews of constitutionality the object of which is the protection of human rights from acts of legislative power".[8] However, as Rodoljub Etinski notes, "the biggest problem in the field of human rights in Serbia is not the constitutional catalogue of human rights but the ineffective protection of human rights".[9]

Human rights and freedoms are a constitutive part of the current Constitution of the Republic of Serbia (The *Mitrovdan* Constitution). They are regulated by a special, Second Part of the Constitution of Serbia from 2006 in 64 articles (Arts. 18–81). Also, as a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR),[10] the Republic of Serbia is obliged to incorporate and implement, into its legal system, the provisions stipulated by these international documents, including the provisions regarding the fair trial. However, given the fact that Serbia has ratified the most important international legal documents on human rights and freedoms, including ICCPR and ECHR, one gets the impression that their constitutional standardization unnecessarily duplicates these norms.[11] However, that should not come as a surprise, having in mind that in that way, the Serbian constitution-maker wanted to additionally emphasize the importance of human rights in the legal system of the Republic of Serbia, but also to make a departure from the earlier authoritarian past.[12]

see: K. Loewenstein, *Political Power and the Governmental Process*, University of Chicago Press, Chicago 1957, 148–149.

8 T. Marinković, *International Encyclopedia of Law: Constitutional Law – Serbia*, Wolters Kluwer, Alphen aam den Rijn 2019, 226.

9 R. Etinski, "Srpski i evropski kodeksi ljudskih prava", *Proširenje Evropske unije na Zapadni Balkan* (eds. D. Dimitrijević, I. Lađevac), Institut za međunarodnu politiku i privredu, Beograd 2009, 233.

10 SFR Yugoslavia ratified the International Covenant on Civil and Political Rights on January 30th, 1971 while Serbia ratified ECHR on March 3rd 2004.

11 For more details see: A. Nikolić, "Kulturna prava u Republici Srbiji – trenutno stanje i perspektive", *Strani pravni život,* 3/2019, 74.

12 For a different opinion see: R. Marković, "Ustav Republike Srbije od 2006. godine – kritički pogled", *Anali Pravnog fakulteta u Beogradu,* 2/2006; 11–13;

3. THE RIGHT TO A FAIR TRIAL

It can be said that "fair trial" is a universal principle that is in one form or another binding for virtually all legal systems and which – in spite of differences in interpretation – enables a given country's judiciary system or a specific judicial procedure to be assessed by the outside world.[13] In addition to international agreements, the term has also found its way into national constitutions and procedural codes. In many countries – including Serbia – Constitutional courts had an active and significant interpretative role, constantly expanding the scope of the concept.

The right to a fair trial is guaranteed by Art. 32 of the Constitution of Serbia and, implicitly, by Art. 33. It is a right that sublimates a number of specific rights and procedural guarantees such as the right to judicial protection, the right to defense, the right of a party to take all actions taken by the other party, publicity of the proceedings, attendance at evidentiary actions, right to free assistance of an interpreter if the person does not speak or understand the language officially used in the court, the right to free assistance of an interpreter if the person is blind, deaf, or unable to defend itself, etc. In addition, this right is guaranteed and elaborated by numerous laws. The Law on Civil Procedure of the Republic of Serbia and the Criminal Procedure Code, in the first article immediately refer to the fairness of the trial, and both guarantee the right to a fair trial. The following discussion will, thus, be dedicated to some aspects of the right to a fair trial and their possible violation in the context of the state of emergency declared during the pandemic of the COVID-19 virus.

3.1. The delay of the trials of "second priority"

The right to a trial within a reasonable time became a component of the standard of the independent and fair trial in the 20th cen-

V. Petrov, "Ustav i ljudska prava danas – jesu li ljudska prava najvažniji deo Ustava?", *Ustavne i međunarodne garancije ljudskih prava* (ed. Z. Radivojević), Pravni fakultet Univerziteta u Nišu, Niš 2008, 321.

13 A. Badó, "Foreword", *Fair Trial and Judicial Independence – Hungarian Perspectives* (ed. A. Badó), Springer, Cham-Heidelberg-New York-Dordrecht-London 2014, x.

tury.[14] The reasonable time guarantee is an important protection that provides a defendant who is not guilty the opportunity to clear his name without excessive delay. It also prevents a guilty defendant from undergoing the additional punishment of protracted delay, notices Richard Moules.[15]

On May 17th, 2020, the Ministry of Justice of the Republic of Serbia issued Recommendations for Courts and Public Prosecutor's Offices During a State of Emergency.[16] They suggested that in a criminal matter, courts and public prosecutor's offices act in cases in which custody is ordered or is requested, in criminal cases concerning criminal offenses from Arts. 235, 248 and 249 of the Criminal Code (hereinafter: the CC)[17] or domestic violence, in cases against juvenile offenders, in which there is a danger of elapsing the limitation period, as well as in other cases for which significant number of reports were received and were committed during the state of emergency and in connection with the state of emergency.

The day after, on May 18th, the High Judicial Council issued a Recommendation on the work of the courts during the state of emergency and determined that proceedings shall continue in cases that do not suffer delays.[18] In all other cases, hearings shell be postponed.

One day after the declaration of the state of emergency (on May 16th), the Republican public prosecutor issued a mandatory instruction to all public prosecutors[19] to urgently act and take legally prescribed actions against persons suspected of having committed the

14 M. Milošević, A. Knežević Bojović, "Trial within reasonable time in EU acquis and Serbian Law", *Procedural Aspects of EU Law* (eds. D. Duić, T. Petračević), PRAVOS, Osijek 2017, 448.

15 R. Moules, "The Right to a Trial within a Reasonable Time", *The Cambridge Law Journal,* 2/2014, 265.

16 Preporuke za rad sudova i javnih tužilaštava za vreme vanrednog stanja proglašenog 15. marta 2020. godine, *https://bit.ly/3l7PsOQ*, last visited 20 September 2021.

17 Krivični zakonik, *Službeni glasnik Republike Srbije*, br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

18 Zaključak Viskog saveta sudstva, *https://bit.ly/3DYxHdl*, last visited 20 September 2021. The list of urgent cases is similar to the one given by the Ministry of Justice.

19 Based on the provision of Art. 25 of the Law on Public Prosecution (Zakon o javnom tužilaštvu, *Službeni glasnik Republike Srbije*, br. 116/2008, 104/2009,

criminal offense of failure to comply with health regulations during the epidemic under Art. 248 of the CC and to "organize work during the state of emergency in such a way that in cases that do not suffer delay and in which it is necessary to take urgent measures prescribed by special laws, cases of increased social danger, detention cases and cases in which taking action is time-bound, actions are taken without delays and in accordance with the law." The mandatory instruction also requires urgent action in criminal cases causing panic and disorder under Art. 343 of the CC.

As we can see, all previous acts constituted two types of cases requiring urgent action: the first group consists of "new" cases that arose from infringement of the law during the state of emergency – namely, criminal acts prescribed in Arts. 235, 248, 249, and 343 of the CC. This can be characterized as a reasonable and expected decision, bearing in mind all the circumstances, particularly that during the state of emergency, there were many cases of violation of the curfew and general failure to comply with the measures imposed to curb the pandemic. This is especially important if we consider that one of the primary purposes of criminal law, in general, is to deter others from committing criminal offenses, which can also be achieved through swift prosecution of perpetrators. The second group includes cases in which the need for urgent action is a consequence of their nature – "time-sensitive cases" which, even in ordinary circumstances, are considered to be a high priority (e.g., detention cases).[20]

The question is, what happened to all the other cases that did not fit into one of the two mentioned categories? All were postponed since courts, prosecutors' offices, and lawyers worked to a lesser extent, but also due to the beforementioned "change of priorities." This brings us to the possibility of violation of the right to a trial within a reasonable time, that is, whether this right was compromised due to the fact that trials were not held during the state of emergency. Even though ECHR imposes an obligation for member states to organize their judicial systems in such a way that their courts can

101/2010, 78/2011 – dr. zakon, 101/2011, 38/2012 – odluka US, 121/2012, 101/2013, 111/2014 – odluka US, 117/2014, 106/2015, 63/2016 – odluka US).

20 For detailed analysis of the work of courts during the state of emergency see. M. Vasić, S. Mandić, *Rad sudova tokom epidemije zarazne bolesti COVID-19, Analiza i preporuke*, OEBS, Beograd 2021, 13–17, 21–24.

comply with any requirement of the provision of Art. 6, para. 1, including the obligation to decide cases within a reasonable time,[21] we believe that in this case, the inability of the courts to "organize their work" is not a consequence of a systemic lack but of objective circumstances that can be characterized as force majeure. Illness of the members of councils or parties, restrictions on the number of people on the premises, a complete ban on movement on certain days are just some of the extraordinary events that could have completely disabled the possibility of conducting trials. One should also consider that under the Criminal Procedure Code (hereinafter: the CPC)[22] provisions, first-instance courts adjudicate in panels comprising one judge and two lay judges for criminal offenses punishable by a term of imprisonment exceeding eight years and up to twenty years. As lay judges are usually retired citizens aged 65 or over who were banned from leaving their homes, trials in such cases could not occur.

3.2. The right time for the question of temporal applicability of laws

The strongest guarantee of the human rights realisation is their direct realisation on the basis of the Constitution.[23] In addition, it is equally important to establish legal protection mechanisms in case of their violation. However, the most important thing is to qualify the injury itself correctly. Therefore, when it comes to the temporal applicability of regulations, the question is whether certain decisions enacted during the state of emergency violated the right to a fair trial, particularly the principles of fairness and equity.

The Law on Misdemeanors (hereinafter: the LoM)[24] in Art. 4, para. 1 states that misdemeanors may be prescribed by the Law or Decree or by a decision of the Assembly of the Autonomous Province, the Municipal Assembly, the City Assembly, and the City Assembly of

21 I. Krstić, T. Marinković, *Evropsko pravo ljudskih prava*, Savet Evrope, Beograd 2016, 251.

22 Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – odluka US, 62/2021 – odluka US.

23 V. Petrov, M. Stanković, *op. cit.*, 518.

24 Zakon o prekršajima, *Službeni glasnik Republike Srbije*, br. 65/2013, 13/2016, 98/2016 – odluka US, 91/2019, 91/2019 – dr. zakon.

Belgrade. During the state of emergency, authorities have enacted a significant number of decrees,[25] and some of them prescribed misdemeanors for violating the provisions of those acts.

When the state of emergency ended, the National assembly first enacted the Law on Ratification of Decrees Adopted by the Government with Co-signature of the President of the Republic during the State of Emergency,[26] and later the Law on the Validity of Decrees Passed by the Government with Co-signature of the President of the Republic During the State of Emergency and approved by the National Assembly (hereinafter: the Law).[27] Art. 1, para. 1 of the latter mentioned act enumerates all the acts which validity ceased on the day the emergency state ended. Among listed acts is also the Decree on Measures during the State of Emergency,[28] which prescribes the violation of the curfew as a misdemeanor. However, in Art. 2, para. 2, the Law states that the provisions of those regulations shall be applied to the perpetrators of misdemeanors prescribed by the decrees referred to in para. 1 of this Art. during the state of emergency and *after* the state of emergency has ended. This created a rather unusual situation – the Law first repealed the decrees as a whole, which included the decriminalization of all misdemeanors contained in those acts, and after that allowed for some of its provisions to be applied. This means that Arts. 1 and 2 are in direct collision with each other. If we consider this to be only a terminological confusion, that would imply that the Law allowed a non-effective regulation to be applied to a perpetrator of a misdemeanor if the misdemeanor was committed during the state of emergency.

To better understand the situation, we first need to tackle the question of temporal applicability of regulations. The Law on

25 List of all acts can be found on the following address: *https://bit.ly/3BMpkQl*, last visited 20 September 2021.

26 Zakon o potvrđivanju uredaba koje je Vlada uz supotpis predsednika Republike donela za vreme vanrednog stanja, *Službeni glasnik Republike Srbije*, br. 62/2020.

27 Zakon o važenju uredaba koje je Vlada uz supotpis predsednika Republike donela za vreme vanrednog stanja i koje je Narodna skupština potvrdila, *Službeni glasnik Republike Srbije*, br. 65/2020.

28 Uredba o merama za vreme vanrednog stanja, *Službeni glasnik Republike Srbije*, br. 31/20, 36/20, 38/20, 39/20, 43/20, 47/20, 49/20, 53/20, 56/20, 57/20, 58/20, 60/20.

Misdemeanors in Art. 6 prescribes that the perpetrator of the misdemeanor is subject to the regulation that was valid at the time of the commission of the misdemeanor and that if the regulation has been changed one or more times after the violation, the regulation that is the most lenient for the offender shall be applied. The latter rule also includes the decriminalization of the offense – if the committed act ceases to be punishable, the misdemeanor procedure shell not be instituted, or the defendant shell be acquitted. The same rules apply to criminal acts, but with one major exception in the form of "temporal laws" – a person who commits an offense prescribed by the law with a definite period of application shall be tried under such law, regardless of the time of trial, unless otherwise provided by the law itself. This allows the court to apply the law that is no longer in force if the aforementioned conditions are met. The problem arises from the fact that the misdemeanor law does not contain this type of provision. Not only that, but there is no *mutatis mutandis* application of the provisions of the CC to the misdemeanor proceeding.[29]

However, in similar cases regarding laws with limited validity, our case law generally did not accept the rule of application of more lenient law, considering that would make the concept of temporal act meaningless.[30] Similar approaches can be found in legal theory, but some authors question that perspective.[31]

Firstly, we must agree with the argument that the application of a more lenient law in the mentioned situation makes the whole concept of temporal laws meaningless. However, for the sake of legal certainty, we think that in the existing legal framework, the application of a law whose validity has ceased would be directly *contra legem.*[32] This is especially true if we consider that this form of validity of legal

29 Contrary, Art. 99 allows for the application of the provisions of the CPC.

30 See for example the ruling of the Federal court, Kzs. No. 39/81 and the ruling of Chamber for Second Instance Misdemeanor Proceedings of the Ministry of Finance, Pzc. No. 1138/06, T. Delibašić, *Praktična primena Zakona o prekršajima*, Službeni glasnik, Beograd 2012, 31–32.

31 For more details see: I. Vuković, *Prekršajno pravo*, Izdavački centar Pravnog fakulteta Univerziteta u Beogradu, Beograd 2021, 32.

32 Similarly, I. Milić, "O tzv. policijskom času za vreme vanrednog stanja proglašenog zbog epidemije zarazne bolesti COVID-19", *Zbornik radova Pravnog fakulteta u Novom Sadu,* 2/2020, 752–753. Author suggests that in this case the courts should acquit all the defendants on the basis that the act which he/she

acts is considered to be an exception from the general rule, and that in criminal and misdemeanor law, creative analogy, especially if it is used against the perpetrator, is not allowed.[33]

Even though we are aware that this reasoning could be met with criticism, we conclude that the introduction of temporal regulations in misdemeanor law should be considered a violation of the right to a fair trial. The reason for this claim lies in two simple facts. Firstly, the law which validity expired at the time of application was applied. Secondly, the applied law was not in favor to the perpetrator. Although, in the doctrinal sense, such conduct could be justified (as we explained earlier), at that moment, there was no legal basis for such interpretation.

3.3. Bypassing the double jeopardy clause

Art. 4c, para. 6, Art. 4g, para. 6, and Art. 4d, para. 2 of the Decree on measures during the state of emergency and Art. 2 of the Decree on Misdemeanor for Violation of the Order of the Minister of Interior Affairs on Restriction and Prohibition of Movement of Persons in the Republic of Serbia[34] contained a provision that "a misdemeanor procedure may be initiated and completed for the misdemeanor referred to those acts, if criminal proceedings have been initiated against the perpetrator for a criminal offense that includes the characteristics of that misdemeanor, regardless of the prohibition under Art. 8, para. 3 of the LoM". After the adoption of the mentioned acts, the question of the conformity of said provision with the Constitution was raised for potential violation of the rule on the prohibition of double jeopardy – *ne bis in idem.*

The referred Art. 8, para. 3 of the LoM prescribes that no proceedings may be instituted against a perpetrator of a misdemeanor who has been found guilty in a criminal proceeding for a criminal offense that includes the characteristics of the misdemeanor, and if it has been

has been charged with is not a misdemeanor according to the regulation (Art. 250, para. 1, subpara. 1).

33 I. Vuković, Krivično pravo. Opšti deo, Izdavački centar Pravnog fakulteta Univerziteta u Beogradu, Beograd 2021, 20.

34 Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije, *Službeni glasnik Republike Srbije*, br. 39/2020, 126/2020.

initiated or is in progress, it cannot be continued and completed. In our legal doctrine and legislation, the opposite rule has long been valid –the perpetrator could be tried for both types of criminal offenses in connection with the same event.[35] However, after some decisions of the European Court of Human Rights (hereinafter: ECtHR), mainly the decision *Milenković vs. Serbia,* our regulation has adapted to the new concept of understanding of *ne bis in idem* rule, which is expressed in the mentioned Art. 8 of the LoM.[36]

Bearing in mind that the change of attitude on the principle of *ne bis in idem* is not a novelty in our law and has been discussed excessively in legal theory, it seemed that the legislator made an inadmissible mistake by passing the mentioned decrees. In addition Art. 202, para. 4 of the Constitution clearly prohibits the derogation of the right to legal certainty[37], which includes the principle *ne bis in idem*, during the state of emergency. The Constitutional Court had no dilemma this time either – on October 25th, 2020, it ruled the decision No. IUo-45/2020 establishing that articles allowing "double jeopardy" were unconstitutional.

35 This was a consequence of the different treatment of misdemeanors and criminal offenses in our legal system. However, in recent years our law has been characterized by a sort of "merging" of these two types of criminal offenses and the loss of a clear distinction between them. Consequently, this raised a question of application of some rules traditionally associated with criminal acts to the misdemeanors. See: I. Radisavljević, "Sličnosti i razlike između prekršaja i krivičnog dela u srpskom pravu", *Kaznena reakcija u Srbiji – tom IX* (ur. Đ. Ignjatović), Izdavački centar Pravnog fakulteta Univerziteta u Beogradu, Beograd 2019, 365–378.

36 For more details about the decision see V. Bajović. "Slučaj Milenković – *ne bis in idem* u krivičnom i prekršajnom postupku", *Kaznena reakcija u Srbiji – tom VI* (ur. Đ. Ignjatović), Izdavački centar Pravnog fakulteta Univerziteta u Beogradu, Beograd 2016, 243–259. This, rather radical concept of ECtHC has somewhat been changed in order to enable double jeopardy in some situations. For detailed analysis see: M. Škulić, "Načelo *ne bis in idem* – sa stanovišta normi srpskog kaznenopravnog sistema, ustavnopravne prakse i stavova Evropskog suda za ljudska prava", *Bilten Vrhovnog kasacionog suda,* 2/2019, 241–243, 254–265.

37 Art. 4 of the Serbian Constitution.

3.4. Following technology but avoiding the law – Skype trials

Considering the epidemiological situation, and above all the fact that some defendants were tried precisely for violating the isolation measures (which means they were potential carriers of the virus), the question of how to conduct the main hearing in such conditions was raised. The government enacted a Decree on the Manner of Participation of the Accused in the Main Trial in the Criminal Proceedings Held during the State of Emergency Declared on March 15th, 2020.[38] In Art. 1, the decree stated that during the state of emergency in the criminal proceedings before the first instance court, when the president of the panel or the single judge found that securing the presence of the accused in custody is difficult at the main trial due to the danger of spreading infectious diseases, they may decide to ensure the participation of the defendant in the main trial through technical means for the transmission of sound and images if this is possible given the technical conditions. The High Judicial Council issued a Recommendation[39] on April 9th and gave an opinion that mentioned rule should only be applied to the defendants in custody regarding criminal acts from Arts. 235, 248, and 249 of the CC.

The idea on which the need for the introduction of "Skype trials" was based seemed justified. In the conditions of worsening of the epidemiological situation, it was necessary to protect the health of the parties, the judges, and other participants in the procedure, while enabling urgent trials in cases where the defendant was in custody, to be conducted.[40] This decision was met with criticism, mainly concerning the legality of the measures it had imposed. The Criminal Procedure Code allows the use of an audio and video link to interrogate the accused only in exceptional situations – during the session of the pan-

38 Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15. marta 2020. godine, *Službeni glasnik Republike Srbije*, br. 49/2020.

39 Zaključak Visokog saveta sudstva, *https://bit.ly/3Cdr9WE*, last visited 20 September 2021.

40 I. Miljuš, "Izazovi i rizici uvođenja video linka u krivični postupak", *Unifikacija prava i pravna sigurnost – tom 2,* Kopaonička škola prirodnog prava – Slobodan Perović, Beograd 2020*,* 6.

el[41] or a hearing before the court of the second instance[42]. Also, if the defendant was removed from the courtroom as a measure for maintaining order[43], he could follow the course of the proceedings from a separate room through an audio and video link. However, there are no regulations for using the mentioned technological means in the first instance court. That was enough reason to claim that the decree was unconstitutional. In addition, a number of authors considered it to be a violation of the Art. 32, para. 1 of the Constitution, where it is prescribed that "everyone shall have the right to a public hearing before an independent and impartial tribunal established by law within a reasonable time which shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them".[44] Therefore, T. Marinković points out that the defendant's ability to express himself freely on the charge, as well as his effective defense, were significantly endangered by the "Skype trials", since the right to a public hearing, as part of the right to a fair trial, implies the presence of the accused during the main trial, and also an effective participation in it.[45] On the other hand, G. P. Ilić extends the violation of the right to a fair trial to Art. 33 of the Serbian Constitution which guarantees the special rights of the persons charged with a criminal offense, which is also a point of view of the ECtHR.[46] Although the introduction of "Skype trials" enabled the trials in cases that would otherwise be potentially risky to conduct (i.e., if the defendant was potentially infected with the virus), we must agree with the mentioned authors that there was no legal basis for such decision.

41 Art. 447 of the Criminal Procedure Code.

42 Art. 449 of the Criminal Procedure Code .

43 Art. 371 of the Criminal Procedure Code.

44 S. Knežević, "Pravo na pravično suđenje", *Zbornik radova Pravnog fakulteta u Nišu,* 44/2004, 216–218.

45 T. Marinković (2021), *op. cit.*, 139.

46 G. P. Ilić, Virus neznanja nikada ne spava, *https://bit.ly/3htlhRd*, last visited 20 September 2021.

Darko Simović does not share this position, stating that, in principle, it cannot be said that trials via video link are unconstitutional, since it is an exceptional possibility in extraordinary circumstances, but he does not rule out that in specific cases, precisely for that reason, it could be a possible violation the right to a fair trial. See: D. Simović, "Vanredno stanje u Srbiji ustavni okvir i praksa povodom pandemije COVID-19", *Sveske za javno pravo,* 39/2020, 17.

4. CONCLUSION

Although the state of emergency imposed due to the COVID-19 pandemic ended more than a year ago, the measures that were introduced under the pretext of curbing the pandemic are still the subject of lively discussion and debate. Some of them could be deemed expected and forced by the circumstances in which the whole world and Serbia found themselves. This is the case with the postponement of the trials and giving priority to those cases that have arisen as a result of the violation of the measures imposed to keep the pandemic under control. Sadly, that cannot be said for most of the other decisions imposed during the state of emergency. Even though the new situation required an urgent response and that many decisions were made without serious consideration of their consequences, so we could "justify the ignorance of the legislator with good intentions", some mistakes are unforgivable.

First of such examples is the provision enabling double jeopardy for misdemeanor and criminal offenses. This question was debated excessively in our literature and has arisen before the Constitutional Court and ECtHR numerous times. Even though the European Court had somewhat softened its stance on this matter in its newer decisions, prescribing the possibility for a person to be tried for a misdemeanor regardless of the conviction in criminal proceedings, based on the same circumstances, is a violation of even the mildest position on this issue.

On the other hand, the state of emergency contributed to the consideration of introducing some changes in the criminal procedure. That is the case with broader use of technology in the form of "online trials". Even though this form of conducting the procedure has its (dis) advantages that need to be debated if the legislator decides to implement this form of trial into our legal system, we believe that during the emergency state, there were no legal conditions for trials to take place in such way.

The enactment of numerous laws and regulations during a state of emergency allowed the question of the temporal validity of regulations to be tackled (again). As this is an issue that is not explicitly resolved by the law, this could be the opportunity for the introduction of temporal laws in misdemeanor proceedings since, as we discussed, the case law has already accepted that concept.

Therefore, despite the many mistakes made by decision-makers during the state of emergency that can serve us as a warning, some of them may be the inspiration for the wind of change that will follow in the future.

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LJUDSKA PRAVA, PRAVO NA PRAVIČNO SUĐENJE I COVID-19 U REPUBLICI SRBIJI – UTICAJ PANDEMIJE NA KRIVIČNO I PREKRŠAJNO PRAVO –

Predmet ovog rada predstavlja analiza pojedinih ljudskih prava koja čine segmente prava na pravično suđenje, a u kontekstu vanrednog stanja koje je u Srbiji bilo uvedeno radi suzbijanja pandemije virusa COVID – 19. Autori se posebno osvrću na propise kojima su uvedene određene novine u krivični i prekršajni postupak, posebno „pravo prvenstva" za suđenja koja se tiču kršenja normi donetih tokom vanrednog stanja, i mogućnost odvijanja suđenja korišćenjem „Skype" platforme. Takođe, analizira se i pitanje vremenskog važenja propisa u prekršajnom pravu, ali i kršenje načela *ne bis in idem* izričitim propisivanjem mogućnosti dvostrukog vođenja krivičnog i prekršajnog postupka. Na kraju se daje konačna ocena u kojoj meri je došlo do kršenja pojedinih ljudskih prava za vreme trajanja vanrednog stanja u Republici Srbiji i kolikog obima su eventualne posledice koje su nastale.

Ključne reči: *COVID–19. – Ustav Republike Srbije. – Ustavno pravo. – Ljudska prava. – Krivično pravo. – Pravo na pravično suđenje.*

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