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## **Corona Ignorers – Only Annoying or Already Punishable? A Consideration of §§178, 179 Austrian Criminal Code (Endangering People by Infectious Diseases)**

### **ABSTRACT**

The Corona pandemic, which has dominated everyday life since the beginning of 2020, has brought Sections 178 and 179 of the Austrian Criminal Code (StGB) into the focus of criminal law discussion. They criminalize endangering other people through certain diseases: The perpetrator can be punished if he or she risks to transfer a disease, of which the presence must be reported to public authorities according to the law, to at least about ten other persons. Not least because these offenses have not had particular practical relevance up to date, several dogmatic questions remain unresolved, to which this paper provides an answer. These include, in particular, the extent to which a behavior must be dangerous for the health of others to lead to a criminal liability, how to deal with a lack of dangerousness that is determined ex post, and whether and under what conditions criminal liability by omission can exist. The proposed solutions are examined for their practical suitability based on typical “Corona cases” such as visiting so-called “Corona parties”, ignoring a segregation duty or concealing contacts during contact tracing. To answer the unresolved dogmatic questions, it is first necessary to present the relevant literature and second to interpret the criminal law provisions according to the recognized interpretation methods (especially systematic interpretation and historical will of the legislator). This will lead to new solutions that partially differ from the prevailing opinion.

**Key words:** Corona, Covid-19, pandemic, criminal liability, endangering, infectious diseases

## Introduction<sup>1</sup>

The Corona pandemic has dominated daily life since the beginning of 2020. In the general interest of “solidarity” and “common good”, individual freedoms that have long been taken for granted are being withdrawn from each and every person. Anyone who refuses to obey these commandments – in addition to administrative penalties – also will be confronted with criminal penalties under certain circumstances, especially if a mere ignorance of the common good turns into a common danger for others. The current situation, apart from offenses against life and limb (§§75, 83 et seq. Austrian Criminal Code, short: StGB<sup>2</sup>), moves above all §§178, 179 StGB from a criminal statistics side stage to the center of the judicial desks. These provisions criminalize the (intentional or negligent) endangerment of people by certain diseases. Not least because of their lack of practical relevance, they raise a whole series of doctrinal questions that are sometimes answered in very different ways.

The following paper therefore concentrates on §§178, 179 StGB. After a presentation of the dogmatic questions (1.1.), a brief look is taken at the structure of the offenses of §§178, 179 StGB (1.2.), before the problems mentioned are to be countered with possible solutions<sup>3</sup> (1.3.-3.). In a further step, the practical suitability of these approaches is examined in the light of current examples of “Corona” (4.), before a conclusion finalizes the discussion.

<sup>1</sup> The content of this paper was initially presented on March 26, 2021, as a lecture at the habilitation colloquium for obtaining the *venia* for “Criminal Law and Criminal Procedure Law”. The paper is already published in German in the Austrian Law Journal (ALJ): N. Schallmoser-Schweiberer, *Corona-Sünder – „Geht’s noch?!“ oder schon strafbar?*, “Austrian Law Journal” 2021, 102.

<sup>2</sup> In practice, there will be few convictions for these offenses because it will hardly ever be possible to establish a causal link between misconduct of one person infected with Corona and damage to the health of another person. Due to the highly variable incubation periods, a frequently incomplete contact tracing and the fact that a person has rarely transmissible contact with only one other person within a period of about two weeks so that an infection due to other circumstances can be excluded, it will often remain an attempt (especially according to §§15, 83 f StGB).

<sup>3</sup> Some of these approaches can already be found in current literature; Cohen and Rebisant, for example, base the potential for risk on whether “suspicious circumstances beyond the current pandemic situation” (freely translated from German) exist for the individual. Cohen also speaks of concrete suspicious facts; L. Cohen, *Isolation, Quarantäne, Coronapartys – Anwendbarkeit der §§178 f StGB bei Missachtung von COVID-19-Verkehrsbeschränkungen*, “Journal für Strafrecht” 2020, 206 (similar also in “COVID-19 und Recht” 2020, vol. 24); and following her, G. Rebisant, *Strafrechtliche Risiken aufgrund COVID-19, “Grauzonen”* 2020, vol. 22, 76.

## 1. Basics

### 1.1. Problem definition

It is initially unclear who can be a perpetrator of §§178, 179 StGB (see 1.3.). It is questionable whether, in addition to a person who suffers from a certain disease that must be disclosed, a non-infected contact person can also be criminally liable simply by maintaining contact with a person with the disease that is suitable for transmission. The prevailing opinion<sup>4</sup> denies this with the argument that the offenses could not be realized at all without the involvement of at least two persons; the non-infected contact person is thus unpunishable as a so-called necessary co-actor (“notwendig Mitwirkender”). New views<sup>5</sup> affirm criminal liability: According to these views, it is not a question of necessary cooperation. Rather, the contact person can also commit the general offenses of §§178, 179 of the Criminal Code, because the risk of transmission to others already exists if only one’s own infection is at risk.

Furthermore, it is disputed which acts show an (abstract) risk suitability within the meaning of §§178, 179 StGB (see 2.1. and 2.). The law does not provide for a “minimum risk” of a transfer which leads to a punishment. Rather, an extremely low probability that the disease could spread is *prima facie* sufficient to constitute a criminal offense. However, a look firstly at any rules or sanction mechanisms under administrative criminal law and secondly at certain risks that are simply unavoidable from a medical point of view shows that not every minimal risk, that human behaviour could lead to the spread of a disease, should give rise to criminal liability. The question is therefore, at which Archimedean point the punishability according to the StGB should begin.

It is also open how those cases are to be classified in terms of criminal law in which the behaviour of the perpetrator was abstractly dangerous at the time of the crime and thus suitable of causing the spread of a disease, but it subsequently turns out (especially at the time of the verdict) that this suitability was not given, first and foremost because the perpetrator did not carry the disease (further 2.3.). Voices in the literature<sup>6</sup> and initial judicial decisions<sup>7</sup> assume that the

<sup>4</sup> Instead of many, M. Flora, §178, [in:] O. Triffterer, C. Rosbaud, H. Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, No. 41, Vienna 2019; D. Kienapfel, K. Schmoller, *Strafrecht Besonderer Teil III*, Vienna 2009, §§178-179 No. 17; V. Murschetz, §179, [in:] F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Vienna 2020, No. 8, each using the example of HIV.

<sup>5</sup> L. Cohen, “Journal für Strafrecht” 2020, 207 (similarly also in “COVID-19 und Recht 2020”, vol. 24); G. Rebisant, *Grauzonen* 2020, 76: “Aggravating this is the fact that even that person may be liable to prosecution who has neither an infection nor a suspicion of infection if he or she comes into contact with a person infected or suspected of infection.” (freely translated from German).

<sup>6</sup> L. Cohen, “Journal für Strafrecht” 2020, 209 (similarly also in “COVID-19 und Recht” 2020, vol. 24); following her, E. Ayasch, *COVID-19 – eine Renaissance für §§178, 179 StGB?*, “Zeitschrift für Gesundheitsrecht” 2020, 54, 56.

<sup>7</sup> Judgment of the Higher Regional Court Graz of 5 June 2021, 1 Bs 10/21m; on this decision N. Schallmoser, “Juristische Blätter” 2021; Judgment of the Higher Regional Court Linz of 22 April 2021, 7 Bs 48/21i.

perpetrator is not liable to prosecution in these cases if he or she was not infected with the transmissible disease at all, but was healthy. Two strands of reasoning for this approach are emerging: some deny the abstract dangerousness of the perpetrator's behaviour. For the others, the objective condition of criminal liability does not apply if there is no infection at all.

Finally, a look at the relevant literature on §§178, 179 StGB shows that there is an unanimous agreement that both offenses can also be committed by omission.<sup>8</sup> Mostly this is affirmed undiscussed under the conditions of §2 StGB. §2 of the Criminal Code states that a person can be punished for causing a success even if he or she has not brought it about by doing something, but by omitting to do something, i.e. by doing nothing. The prerequisite is always that the perpetrator would have been obligated by the legal system to act for certain reasons – a so-called guarantor position is required (in particular arising from law, contract or inference).<sup>9</sup> §2 StGB is consequently linked to a success by omission, but §§178 and 179 are no offenses that require a “success”, as will be shown below (1.2.). Therefore, §2 StGB does not fit (more on this in IV.).

### *1.2. Offense structure of §§178, 179 StGB*

According to §§178 and 179 StGB, anyone who intentionally or negligently commits an act that is likely to cause the risk of spreading a disease among people is liable to prosecution if the disease is of a type that is subject of at least limited disclosure to an authority. The collective legal interest of life and health of the members of the general public is protected.<sup>10</sup>

Accordingly, the objective elements of the offense require an action that could typically cause the danger that a disease will spread among several people. The disease must therefore firstly be potentially transmissible from person to person via a pathogen. Secondly, the punishability starts from a possible spreading effect to about ten persons different from the perpetrator, who could be endangered.<sup>11</sup> In the subjective elements of the offense, it is sufficient for §178

<sup>8</sup> M. Flora, op. cit., §178 No. 43, §179 No. 11; D. Kienapfel, K. Schmoller, op. cit., §§178-179 No. 7; A. Tipold, §178, [in:] O. Leukauf, H. Steininger (eds.), *Strafgesetzbuch-Kommentar*, No. 8, Vienna 2017.

<sup>9</sup> Instead of many others, M. Hilf, §2, [in:] F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Vienna, No. 1 ff; E. Steininger, §2, [in:] O. Triffterer, C. Rosbaud, H. Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, Vienna, No. 1 ff; M. Stricker, §2, [in:] O. Leukauf, H. Steininger (eds.), *Strafgesetzbuch-Kommentar*, Vienna 2017, No. 1 ff.

<sup>10</sup> See M. Flora, op. cit., §178 No. 5; H. Hinterhofer, *Zur Strafbarkeit von Sexualkontakten HIV-infizierter Personen nach den §§178, 179 StGB*, “Journal für Rechtspolitik“ 2002, 99; H. Hinterhofer, C. Rosbaud, *Strafrecht Besonderer Teil II*, Vienna 2016, §§178, 179 No. 1; V. Murschetz, op. cit., §179 No. 1; partially different: D. Kienapfel, K. Schmoller, op. cit., §§178-179 No. 1; A. Tipold, op. cit., §178 No. 1.

<sup>11</sup> M. Flora, op. cit., §178 No. 10; D. Kienapfel, K. Schmoller, op. cit., §§178-179 No. 5; V. Murschetz, op. cit., §179 No. 3.

StGB that the perpetrator seriously believes that the disease is transmissible and that the behaviour is dangerous, and accepts both. The negligence variant of §179 StGB is already fulfilled if the offender could have recognized both. The offenses anchor an objective condition of punishability: The transmissible disease must belong according to its kind to the at least limitedly notifiable or reportable<sup>12</sup> diseases. Whether such a disease exists in detail is determined by relevant laws outside the StGB, such as the EpidemieG<sup>13</sup> or the AIDS-G<sup>14</sup>. According to a decree of the Minister of Health<sup>15</sup>, Covid-19, which can be transmitted by the pathogen SARS-CoV-2, also belongs to the notifiable diseases according to §1 para 1 No. 1 EpidemieG. The offender must neither subjectively recognize nor be able to recognize this circumstance.

From the wording of the offense, it is clear that §§178 and 179 StGB are so-called abstract endangerment offenses (abstrakte Gefährdungsdelikte).<sup>16</sup> Because the wording explicitly refers to the mere dangerousness of the perpetrator's behaviour, it must be examined for criminal liability whether ex ante, from the perspective of a participating observer<sup>17</sup>, there is a behaviour that could theoretically cause the spread of the disease. Conversely, it is not relevant whether the behaviour in retrospect actually became "dangerous" for other persons or whether it even led to an infection of other persons (no so-called "success" required).<sup>18</sup> This strictness of the objective criteria is considerably limited by the objective obligation to notify or report. Otherwise, it would be forbidden to greet another person with a kiss when having sniffles. Applied to "Corona cases", for example, anyone who goes shopping or allows visits despite being aware of a Covid-19 infection is criminally liable.

<sup>12</sup> The terms are synonymous because they both mean a substantively identical duty to inform an authority; however, the different laws that provide for such a duty use both terminologies. For an overview of diseases subject to disclosure in Austria, see <https://www.sozialministerium.at/Themen/Gesundheit/Uebertragbare-Krankheiten/Rechtliches.html> (accessed: 04.06.2021).

<sup>13</sup> Epidemiegesetz 1950, "Federal Law Gazette" No. 186/1950 as amended by "Federal Law Gazette" I No. 104/2020.

<sup>14</sup> AIDS-Gesetz 1993, "Federal Law Gazette" No. 728/1993.

<sup>15</sup> 15. Verordnung des Bundesministers für Arbeit, Soziales, Gesundheit und Konsumentenschutz betreffend anzeigepflichtige übertragbare Krankheiten 2020, "Federal Law Gazette" II 2020, No. 15.

<sup>16</sup> A. Birkbauer, Chapter 16, [in:] R. Resch (ed.), *Das Corona-Handbuch – Österreichs Rechtspraxis zur aktuellen Lage*, Vienna 2020, No. 18; M. Flora, op. cit., §178 No. 3, 14, §179 No. 2; H. Hinterhofer, C. Rosbaud, op. cit., §§178, 179 No. 2; D. Kienapfel, K. Schmoller, op. cit., §§178-179 No. 8; V. Murschetz, op. cit., §179 No. 1; A. Tipold, op. cit., §178 No. 8.

<sup>17</sup> ZB M. Flora, op. cit., Vorbem §§169 ff No. 40 f (only for the dangerousness of the action); H. Hinterhofer, C. Rosbaud, op. cit., Vorbem §§169 ff No. 4; D. Kienapfel, K. Schmoller, op. cit., Vorbem §§169 ff No. 30 (only for the dangerousness of the action).

<sup>18</sup> Instead of many others, M. Flora, op. cit., Vorbem §178 No. 14; V. Murschetz, op. cit., §179 No. 2.

### ***1.3. Contact persons: Self-endangerment not sufficient***

According to the unambiguous wording of §§178 and 179 StGB, anyone can be a perpetrator regardless of certain specific characteristics. Both offenses are (undisputedly<sup>19</sup>) so-called general offenses (Allgemeindelikte), because the elements of the offense do not refer to any individual requirements for the quality of the subject. Irrespective of this, the prerequisite for the criminal liability of the offender is an abstractly dangerous behaviour for the health of the members of the general public. Of course, the offense can only be realized if at least two persons are involved, because the danger of spreading already conceptually presupposes that the pathogen can “jump from person to person”. However, this involvement of several persons must be strictly distinguished from a joint collaboration of several perpetrators.

Above all, however, the contact person with the mere contact suitable for transmission does not yet set an abstract dangerous behaviour in the meaning of §§178, 179 StGB: Such contact is indeed risky insofar as one could infect oneself. Nevertheless, the risk does not go beyond this self-endangerment. For criminal liability under §§178, 179 there must be a potential suitability to transmit the disease to third parties and this requirement is not met by mere contact with an infected person. This becomes clear if one considers the case where the uninfected person takes the risk, e.g. out of love, and then immediately goes into isolation until he or she can no longer be infectious. This person is correctly exempt from punishment for lack of abstractly dangerous behaviour for others. In order to be punishable, following the possible infection after a incubation period he or she would have to set an abstractly dangerous behaviour, which could lead to transmission of the disease to third parties.

## **2. Extent of the potential endangerment?**

### ***2.1. Indications of individually increased risk***

The law does not set any minimum limit for the risk of a person transmitting a disease to be liable to prosecution for endangering others within the meaning of §§178 and 179 StGB. However, many diseases are asymptomatic for a long time and thus remain completely undetected, or they heal without being noticed. In addition, there are diseases whose transmission can never be completely ruled out, even with the most careful interaction with others, unless one places oneself in complete isolation for the rest of one's life. §§178, 179 certainly do not include these (borderline) cases among those worthy of punishment.

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<sup>19</sup> See for the type of offense e.g. M. Flora, op. cit., §178 No. 3; V. Murschetz, op. cit., §179 No. 1. Both sources only mention the specific requirements for the offenses and thus tacitly assume a general offense in the absence of any other mention.

An abstract dangerousness of the act is namely only given if there are sufficient indications at the time of the act that the behaviour of the individual perpetrator in particular could lead to the spread of a disease. Ex ante for an accompanying observer there must be objective indications that the perpetrator, due to certain reasons affecting him or her, set a behaviour that entailed an increased risk of spreading a disease compared to other human behaviours. Thus, the recognizability of an individually increased risk at the time of the offense must be taken into account.

Such sufficient indications within the meaning of §§178, 179 StGB exist in two constellations: The first includes those cases in which the perpetrator might suffer from a disease. The second includes situations in which the perpetrator engages in certain activities that are typically dangerous and could particularly cause the spread of a disease. The essential point in each case is that the accompanying observer would urge increased caution because of these circumstances.

In the more frequent case that the perpetrator might be ill and pass on this disease, special indications of a preceding, own infection must consequently be present at the time of the offense, so that the act is abstractly dangerous.<sup>20</sup> Such indications exist, firstly, if the perpetrator at an earlier time had contact with a person with the disease, of whose infection he or she knows or at least must know in the meantime, and this circumstance would thus be recognizable ex ante also for the observer. The perpetrator therefore entered into personal contact with another person before the act in a way that is suitable for transmitting the disease (e.g. prolonged conversation with an arm's length distance from each other in the case of an infection that can be transmitted by droplets). This was either already at least recognizable at the time of contact or became known subsequently (e.g. because the infected person informed about it after later medical clarification). Secondly, a suspicion of self-disease exists if the perpetrator knows that he or she is ill, in particular because a corresponding diagnosis is available or he or she already shows typical symptoms of the disease. The perpetrator has either been informed by a doctor about the infection with the transmissible disease (e.g. in course of medical advice because of symptoms or after a random finding in a blood count analysis) or suffers from symptoms that are recognizable to him or her and an accompanying observer as symptoms of a transmissible disease (e.g. red skin spots with fever and poor general condition as a known appearance of a measles infection). Third, the relevant evidence of infection may result from the fact that the person was informed of a possible infection by a third party, usually an official body, before the time of the crime (e.g. by the competent health authority due to contact tracing).

<sup>20</sup> In this regard, L. Cohen distinguishes between persons who are ill, suspected of being ill, and suspected of being infected ("Journal für Strafrecht" 2020, 207 f).

If the person has no specific indication of a possible illness of its own in the sense of these explanations, there may nevertheless be indications in individual cases of an increased risk potential for the health of others, which would warn an accompanying observer in the perpetrator situation to be careful. They result from a hazardous activity of the perpetrator: He or she is called upon to take special care because he or she is engaged in certain activities (for example, in the medical field) that indicate such care. If, for example, the medical employee of a laboratory works with isolated tuberculosis pathogens and thereby disregards the intended safety and hygiene measures, there is an *ex ante* danger that the pathogens will be “released”. As a result, careless actions during specific activities may provide sufficient evidence that the disease could spread. If the person nevertheless disregards the measures, it may be liable to prosecution.

### *2.2. No mere violation of generally applicable standards of care*

Conversely, it is not sufficient for criminal liability if the suitability for danger is below the threshold set out under 1., even in the case of a breach of generally applicable standards of care serving the purpose of prevention. These are mere obligations that apply generally and thus without further differentiation to all or many subjects of the law. They do not give cause for special caution on an individual basis, but result from risk situations that (can) affect all or many.<sup>21</sup> Sources of such standards of care are, in particular, legally or officially imposed requirements or prohibitions and non-binding recommendations of public bodies and organizations, such as the Federal Government or the AGES<sup>22</sup>.

Such violations are mere “disobedience” and therefore, based on the *ultima ratio* principle, not a matter of criminal law, but of administrative (criminal) law. A view that deviates from this would leave hardly any room for administrative criminal law norms, because as a result of the *ne bis in idem* rules, judicial criminal law would usually take precedence, even if it were merely a matter of the (otherwise harmless) violation of nighttime curfew restrictions. Moreover, cases in which the potential danger does not exceed that which more or less threatens everyone also do not belong to judicial criminal law. Whoever ignores the virtue of coughing into one’s elbow or blowing into a handkerchief in public, for example, is behaving annoyingly, but as a rule (even in times of a pandemic!) not criminally liable.

Impunity is all the more appropriate when persons do not even behave “disobediently” but rather comply with all available protective measures and

<sup>21</sup> See also L. Cohen, “Journal für Strafrecht” 2020, 208 (“nonspecific risk of infection is not sufficient to speak of a typical suitability to cause a risk of spreading”, freely translated from German); following her G. Rebisant, “Grauzonen” 2020, 76.

<sup>22</sup> Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH (Austrian Agency for Health and Food Security), [www.ages.at](http://www.ages.at) (accessed: 04.06.2021).

nonetheless a minimal residual risk of transmission of a disease cannot be completely prevented. These persons do not set a socially inadequate behaviour, but act permitted.<sup>23</sup>

### *2.3. Lack of potential endangerment determined ex post?*

If the behaviour is considered to be abstractly dangerous ex ante, this must be proven at the time of the verdict. If it now turns out before the court that the suitability for endangerment was actually lacking, in particular because the perpetrator was not infected with the disease in question at all, it is sometimes argued that in this case he or she should generally remain unpunished, either because the act was not dangerous<sup>24</sup> or because the objective condition for punishability was not fulfilled<sup>25</sup>. Both views are problematic for several reasons.

First, this thesis presupposes a threefold logical break with the offense structure (1.2.) of §§178, 179 StGB. Since the endangerment of others by transmittable diseases is a so-called abstract endangerment offense, the potential dangerousness of the act must be examined strictly ex ante: The unlawfulness of such offenses lies in the recognizability of the potential endangerment in the situation of the perpetrator at the time of the act committed. The person is punished for a behaviour because it could at least recognize that it could pose a danger to others at that moment. The law consequently requires the offender to make a certain assessment of danger, which he or she finally did not do adequately. This alone is the reason for a punishment. This recognizability had to be present at the time of the offense and therefore ex ante. The situation is quite different in the case of offenses that require a so-called “success”: Here, this success (primarily) constitutes the unworthiness of the act. As this unvalue always occurs after the act itself (e.g. bodily injury after a fight), it is necessary to examine ex post whether this success occurred and, if so, what its nature is. If one, conversely, includes more knowledge in the evaluation of the abstract dangerousness of a behaviour than the accompanying observer can have ex ante, one disregards the reason why abstract dangerousness offenses were created

<sup>23</sup> This was worked out for the first time for infections with the HI virus: A person who knows that he or she is infected with HIV and properly uses a condom during sexual intercourse with another person acts in a socially adequate manner and is not liable to prosecution, even though a minimal residual risk of transmission remains despite the use of a condom; for more details, see e.g. H. Hinterhofer, “Journal für Rechtspolitik” 2002, 104 f; with further references V. Murschetz, op. cit., §179 No. 6.

<sup>24</sup> Judgment of the Higher Regional Court Graz of 5 June 2021, 1 Bs 10/21m; on this decision N. Schallmoser, “Juristische Blätter” 2021, 1, 473; Judgment of the Higher Regional Court Linz of 22 April 2021, 7 Bs 48/21i.

<sup>25</sup> L. Cohen, “Journal für Strafrecht” 2020, 209 (similar in “Covid-19 und Recht” 2020, vol. 24); following her Ayasch, “Zeitschrift für Gesundheitsrecht” 2020, 54, 56.

(1<sup>st</sup> structural break).<sup>26</sup> The accompanying observer would then have special knowledge acquired later, from which the offender benefits although he or she behaved irresponsibly *ex ante* at the time of the offense. Thus, the differences between offenses with and without success level out. The legal view that the *ex post* determination of a lack of dangerousness should lead to impunity is also at odds with the legal materials from 1971<sup>27</sup>: They emphasize that §§178, 179 are abstract endangerment offenses. This “mixed view” of *ex ante* and *ex post* consideration did not exist at that time and consequently could not have been intended by the legislator.

Moreover, under the premise that a person must in principle be ill themselves in order to fulfil the offense, the wording of the paragraphs would not be correctly formulated (2<sup>nd</sup> structural break). Then, in reality, only a person infected with a notifiable or reportable, transmissible disease could be a perpetrator of §§178, 179 StGB. In reality, therefore, these would be special offenses and no general offenses, because a certain quality of the subject (the perpetrator) is required. However, this is not expressed at all in the wording. In addition, cases such as that in the example of the laboratory employee (above 1.) would no longer be subsumable under the elements of the offense.

Finally, the legal opinion that the objective condition of punishability is not fulfilled in such cases is not convincing (3<sup>rd</sup> structural break): The legal materials<sup>28</sup> emphasize that the sole purpose of the objective condition is to restrict the punishability to diseases of which an authority must be informed under certain circumstances in order to exclude harmless infections. Thus, the objective condition does not focus on the presence of an infection of the offender.<sup>29</sup> It fits in with this that there are official notifications or reporting obligations that already intervene in the case of a mere suspicion of illness and not only in the case of confirmed infection.<sup>30</sup> This is precisely why §178 StGB states that a disease that must be disclosed “of its nature” is a prerequisite – because it explicitly does not depend on the infection of the perpetrator.

Apart from these structural breaks, the consideration that a lack of dangerousness determined *ex post* leads to impunity would furthermore cause unacceptable gaps in punishability, because important cases would no longer be

<sup>26</sup> Apparently, a position is taken that is similar to the perspective advocated by H. Fuchs concerning the attempts (§15 StGB); to this position H. Fuchs, I. Zerbes, *Strafrecht Allgemeiner Teil*<sup>f</sup>, Vienna 2018, Chapter 30 No. 33 ff.

<sup>27</sup> On “Federal Law Gazette” 1974, No. 60: Explanatory remarks on the government bill 30 BlgNR XIII. GP, 322.

<sup>28</sup> On “Federal Law Gazette” 1974 No. 60: Explanatory remarks on the government bill 30 BlgNR XIII. GP, 322 f.

<sup>29</sup> Also G. Rebisant, “Grauzonen” 2020, 76.

<sup>30</sup> Overview under <https://www.sozialministerium.at/Themen/Gesundheit/Uebertragbare-Krankheiten/Rechtliches.html> (accessed: 04.06.2021).

subsumable under the elements of crime. Two examples: A person who works in a hospital and accepts blood reserves with the inscription “Attention – Suspicion of HIV infection!” and gives them to accident victims as a blood donation for purely cost reasons would not be punishable under §178 StGB if later turns out that the HIV infection did not exist. Pure coincidence leads in this respect to the impunity of this highly reprehensible behaviour. A person who has been suffering for days from a severe, dry cough, cold and sore throat, no longer has any sense of smell or taste and nevertheless organizes a party with twenty guests, would be exempt from punishment if it turned out afterwards that it was “only” a flu infection and not Covid-19. Moreover, the person might even be tempted not to go to a doctor or not to have a rapid antigen or PCR test despite the relevant symptoms. In this case, the disease probably would no longer be detectable at a later stage, which means that criminal liability according to §§178, 179 StGB can possibly be avoided by such an additional carelessness. Correctly, the perpetrators in both examples are punishable according to §§ 178, 179 if all other prerequisites are fulfilled, because in each case there was sufficient evidence *ex ante* for dangerousness.

### 3. Committing the crime by omission

§§178 and 179 StGB use the phrase “wer eine Handlung begeht” (“whoever commits an act”) to describe the punishable behaviour. It is questionable whether this is to be understood exclusively as an active behaviour or also as an omission. If one assumes that an “act” can only be an active doing, the punishability cannot be extended to inactive persons, even if they are “guarantors” within the meaning of §2 StGB. §2 StGB extends the circle of punishable persons to those who, despite a legal obligation to become active, cause a crime by omission by failing to do something (i.e., by *not doing* something). The managers of a nursing home or a large business facility who do not take precautions to prevent the spread of a disease in their area would thus not be liable to prosecution.<sup>31</sup> The reason is, that, according to the prevailing opinion, §2 applies only to crimes that demand a “success” for their fulfilment.<sup>32</sup> §§178 and 179 undisputedly do not require such a success (see 1.2.). Consequently, a crime of omission can only be considered if the behaviour describes at least includes an omission (so-called genuine crimes of omission, “echte Unterlassungsdelikte”).<sup>33</sup> The contrary view,

<sup>31</sup> Unless one follows the not very widespread view that §2 with “success” only means any crime realization.

<sup>32</sup> E.g. H. Fuchs, I. Zerbes, op. cit., Chapter 37 No. 6; M. Hilf, op. cit., No. 6; D. Kienapfel, F. Höpfel, R. Kert, *Strafrecht Allgemeiner Teil*, Vienna 2020, Chapter 29 No. 19; E. Steininger, op. cit., No. 2; M. Stricker, op. cit., No. 8.

<sup>33</sup> Instead of others M. Hilf, op. cit., No. 9; E. Steininger, op. cit., No. 1; M. Stricker, op. cit., No. 5 f.

that “wer eine Handlung begeht” in any case covers an omission means, that, in addition to the above-mentioned managers, also mere visitors in the nursing home or the cleaning staff in the business facility are included in the circle of offenders if they (could) notice the maladministration but did nothing, in particular because they were not responsible for it.<sup>34</sup>

A systematic interpretation of the phrase “wer eine Handlung begeht” provides information about its content: The wording is also found in provisions of the General Part of the StGB<sup>35</sup>, in parts of environmental criminal law<sup>36</sup>, in the offense of criminal association under §278<sup>37</sup> and in §287 StGB. § 287 limits a possible higher punishment to a maximum of three years’ imprisonment for a person who, in a state of full intoxication, commits an act that would be attributed to it as a crime or misdemeanor if it were not fully intoxicated. §287 clearly shows that this provision should also apply if the offender would be criminally liable for an offense of omission (and not for an “act” in the literal sense). A lifeguard intoxicated with drugs who lets a bather drown, therefore, also benefits from §287. A similar argument can be made for the other mentioned provisions, which use the same formulation; they thus also cover an omission.<sup>38</sup>

It follows from this that the formulation “wer eine Handlung begeht” is used by the StGB to describe an omission in addition to an active behaviour. As a result, §§178 and 179 StGB are also genuine crimes of omission. Criminal liability is consequently possible for anyone who causes a potential risk of a disease spreading by an omission, regardless of a guarantor position. The manager of a nursing home or a large business facility who fails to take precautions to prevent a risk of transmission is liable to prosecution under §178 and 179 StGB (without §2). The visitor or the cleaning staff there can in principle, also be punishable under §§178, 179. However, as with all offenses of omission in Austria, the same applies to the endangerment of people by transmissible diseases: Only an action that is actually possible and personally reasonable can be demanded.<sup>39</sup>

<sup>34</sup> In this case, §2 would have the effect of restricting punishability, but it is not needed because §§178, 179 are conceived as real crimes of omission anyway, as will be shown below.

<sup>35</sup> This is the case, for example, in §39 para 1 that deals with the aggravation of punishment in the case of recidivism.

<sup>36</sup> Namely in §181c, e and i (Negligent environmentally hazardous treatment and transport of waste, grossly negligent environmentally hazardous operation of facilities and grossly negligent damage to habitats in protected areas) as well as §182 (Other hazards to animal or plant populations).

<sup>37</sup> In para 3, where it is defined who participates in a criminal organization as a member.

<sup>38</sup> In view of some other elements of the Criminal Code, e.g., coercion under §105, which mentions omission separately from action, this does not appear to be entirely concise in terms of language; however, these terminological ambiguities cannot be eliminated in the present paper, but can be clarified by interpretation.

<sup>39</sup> On these criteria in detail e.g. M. Hilf, op. cit., No. 46 ff, 149; E. Steininger, op. cit., No. 26, 127; M. Stricker, op. cit., No. 10 ff.

## 4. Conclusions for typical “Corona cases”

From the foregoing, conclusions can be drawn for current Corona cases, which will be illustrated by typical examples (mainly from the media).

### 4.1. Organizers and guests of a “Corona party”

The organizers or guests of a banned Corona party<sup>40</sup> are to be punished exclusively according to administrative criminal law standards as long as ex ante there is no one at the event who at least shows a concrete suspicion of infection. If the organizer notices that obviously ill persons with typical Covid-19 symptoms are present, then in the case of intent or negligence the liability according to §§178, 179 StGB applies, either – depending on the constellation – because of action or because of omission, e.g. because the organizer omits to send home persons with indications of illness. Recourse to §2 StGB is not necessary for this. The sickly guest is criminally liable for the visit of the party if the subjective elements of crime are fulfilled.<sup>41</sup> All other guests at the party are liable only under two conditions: Firstly, they have recognized or could have recognized that Covid-19-sick persons are present. Secondly, after the party they themselves engage in abstractly dangerous behaviour that is suitable for causing a further spread of the disease. This is true even though they attend the party knowing that in pandemic times there is a certain higher risk of infection among a crowd of people and even whether or not they are actually infected.

### 4.2. Demonstrators against Corona measures

The same applies, mutatis mutandis, to the demonstrators against Corona measures: Attending the demonstration in itself is not relevant under criminal law – except in cases of suspected infection in one’s own person – even if the demonstrators do not wear an FFP2 mask during the entire visit or ignore the prescribed minimum distance. The “criminally sensitive” period only begins when they, for their part, could be carriers of the disease as a result of the visit and, in this (possible) state, intentionally or negligently take abstractly dangerous actions for the health of third parties.

<sup>40</sup> Understood as a gathering of people from several households for celebration purposes.

<sup>41</sup> Of course, these persons are all the more liable to prosecution if it is a party for the purpose of becoming infected with Corona from the outset and therefore infected persons were explicitly invited (cf. the example of so-called measles parties see L. Cohen, *Die Strafbarkeit von Masernpartys*, Vienna 2020, 1; L. Cohen, *Masernpartys aus der Sicht des Kindeswohls – Strafrechtliche Überlegungen zur Reichweite des elterlichen Erziehungsrechts bei Eingriffen in die körperliche Integrität*, “Zeitschrift für Familien- und Erbrecht” 2020, vol. 66, 158). Then the infected persons are liable as direct perpetrators of §178 (§12 1<sup>st</sup> case), and the organizer is at least a contributory offender under §12 3<sup>rd</sup> case StGB.

#### 4.3. “Corona spitters”, sneezers and coughers

Corona spitters, sneezers or coughers are those persons who spit, sneeze or cough in particular for provocation purposes or to ward off others.<sup>42</sup> The typical case is that of police officers being attacked by a person in the course of its arrest (whether to avoid the official act within the meaning of §269 StGB or merely to relieve frustration). Consequently, this is only punishable under §§178 and 179 of the Criminal Code if the person spitting, sneezing or coughing already suspects or must suspect that he or she is infected with Covid-19 at the time of the crime due to certain circumstances. Such a presumption exists in the cases described above (contact with a person with the disease that is suitable for transmission, relevant diagnosis, presence of typical symptoms of the disease, official information about possible infection). The Higher Regional Court of Graz recently ruled on a case in which the defendant demonstratively coughed at police officers from a short distance and stated that she had left a risk area under official quarantine a few days ago without permission.<sup>43</sup> The acquittal of the defendant was appropriate here, since the mere violation of the generally valid isolation of entire communities or districts results in a violation of administrative law, but not yet in a sufficiently increased danger as described.<sup>44</sup>

#### 4.4. Wearing a “wrong” mask

The same principle also applies to all other persons who spit, sneeze or cough outside their own four walls, e.g. when shopping in a supermarket: One is protected from criminal prosecution if there is no sufficient evidence of a transmissible disease before leaving the private area. In terms of criminal law, it is irrelevant whether prescribed or recommended protective and preventive measures were observed or not. In the absence of such indications from an ex ante perspective, the mere omission of a prescribed mask, especially an FFP2 mask<sup>45</sup>, does not lead to criminal liability, regardless of whether no mask at all or only a self-sewn protection is put on instead.

<sup>42</sup> Also E. Ayasch, “Zeitschrift für Gesundheitsrecht“ 2020, 54, 56, with another solution.

<sup>43</sup> Judgment of the Higher Regional Court Graz of 5 June 2021, 1 Bs 10/21m.

<sup>44</sup> On the other hand, the Court’s reasoning was not convincing, according to which criminal liability was not given because a subsequently conducted PCR test showed that the defendant was not infected with SARS-CoV-2 and that her coughing was therefore not dangerous per se. This argumentation contradicts the ex-ante perspective; see 2.3. above; as well as in detail N. Schallmoser, “Juristische Blätter” 2021, 1, 473.

<sup>45</sup> §5 para 1 No. 2 of Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz, mit der besondere Schutzmaßnahmen gegen die Verbreitung von COVID-19 getroffen werden (4. COVID-19-Schutzmaßnahmenverordnung – 4. COVID-19-SchuMaV) as amended by “Federal Law Gazette” II 2021, No. 162.

#### 4.5. Visits from multiple households despite two-household rule

If “only” regulations of administrative law are disregarded and thus e.g. the exit and contact restrictions or the official isolation of individual communities or even districts are ignored, without having a suspicion of infection in one’s own person as an indication of endangerment, only an administrative punishment can be considered. For example, anyone who welcomes guests from three households at the same time despite a two-household rule<sup>46</sup> in force violates administrative law, but is not a criminal perpetrator.

#### 4.6. Home office refusal by the employer

The foregoing must apply all the more to those cases in which mere recommendations by public authorities are not followed. An example is the employer’s refusal to grant employees “home office”, i.e. working from home, as has been urgently recommended by the Austrian government on several occasions<sup>47</sup> during the pandemic. This applies even if home office would be possible without complications due to the specific field of activity of the employees. Such behaviour on the part of the employer can certainly be criticized, but it is once again not relevant under criminal law as long as no employee shows symptoms of illness or, for example, reports that he or she has received a segregation order.

#### 4.7. Littering despite segregation duty

Anyone who is required to remain in quarantine by a segregation order<sup>48</sup> (see also 6.) will, as a rule, find oneself in the middle of criminal law whenever this order is violated. The Salzburg Regional Court recently ruled on a case in which a man left his apartment in a block of apartments in order to take the garbage down to the garbage can, although he was in quarantine.<sup>49</sup> Ex ante, it is clear: There is a suspicion of infection in this case, even if the person subject to quarantine was only isolated as a K1 person<sup>50</sup> for prevention.<sup>51</sup> For two reasons:

<sup>46</sup> A maximum of 4 adults plus 6 minor, supervised children may meet on private occasions at the same time, provided they do not come from more than 2 households in total, see §13 para 3 No. 12 of 4. COVID-19-SchuMaV as amended by “Federal Law Gazette” II 2021 No. 162.

<sup>47</sup> E.g. <https://orf.at/stories/3181200> (accessed: 04.06.2021).

<sup>48</sup> §§5, 7 para 1, 1a and 2, 17 para 1 and §46 Epidemiegesetz 1950 in the current version together with §§1, 2, 4 and 5 of Verordnung betreffend die Absonderung Kranker, Krankheitsverdächtiger und Ansteckungsverdächtiger (Absonderungsverordnung), Reich Law Gazette. No. 39/1915 as amended by “Federal Law Gazette” II 2020, No. 21.

<sup>49</sup> On this decision <https://www.nachrichten.at/panorama/chronik/oberoesterreicher-trug-waehrend-quarantaene-muell-aus-dem-haus-bedingte-haft;art58,3348866> (accessed: 04.06.2021).

<sup>50</sup> Understood as contact person with high-risk exposition; for details [https://www.sozialministerium.at/dam/jcr:0606b9e2-72f6-4589-9816-2107c7c46e7f/Behoerdliche\\_Vorgangsweise\\_bei\\_SARS-CoV-2\\_Kontaktpersonen\\_Kontaktpersonennachverfolgung.pdf](https://www.sozialministerium.at/dam/jcr:0606b9e2-72f6-4589-9816-2107c7c46e7f/Behoerdliche_Vorgangsweise_bei_SARS-CoV-2_Kontaktpersonen_Kontaktpersonennachverfolgung.pdf) (accessed: 04.06.2021).

<sup>51</sup> In the original case, he was definitely infected and suffering from respiratory distress.

Leaving the isolation area is abstractly dangerous to cause a spread of the disease, because firstly, considered *ex ante*, it cannot be excluded that one is at least temporarily infected with Covid-19 (for example because one lives together with the sick person, or after the officially ordered, initially negative PCR test, the viral load has subsequently increased to such an extent that one became infectious). Secondly, outside the perpetrator's sphere of influence and thus abstractly dangerous is the circumstance that the offender could unintentionally encounter other persons in the stairwell, in the entrance area or at the garbage can. A conviction according to §178 StGB was therefore justified.<sup>52</sup>

#### *4.8. Doctor's visit without information about infection*

Also in cases where someone visits a doctor and conceals a current Covid-19 infection or a corresponding suspicion of infection in advance, the perpetrator is liable to prosecution.<sup>53</sup> Of course, a visit to the doctor is in itself a socially adequate act, because someone in need of treatment must be able to visit a doctor's office, especially since this cannot be done by other people instead of the possibly ill person (whilst the garbage from example 7. can very well be taken away e.g. by a neighbour). The social inadequacy and thus the reason for the punishment consist in the failure to inform the doctor in advance about the possible or confirmed Covid-19 infection. A visit to a doctor's office without any foregoing information of this disease can consequently be punishable under §§178 or 179 StGB.<sup>54</sup>

#### *4.9. Concealment of contacts during contact tracing*

After a person has been found to be infected with Covid-19, he or she receives a request from the competent authority to disclose all contacts with others that are suitable for transmission in order to prevent the further spread of the disease. This is known as contact tracing<sup>55</sup>. Anyone who intentionally conceals or negligently fails to do such a disclosure, e.g. in order to avoid personal or economic disadvantages, may be liable to prosecution under §§178 and 179 StGB. It is true that there is no longer a risk of transmission to these persons because

<sup>52</sup> The situation could be different if the perpetrator's apartment was not in a block of flats. If, for example, the perpetrator lives completely secluded without neighbours at the edge of the forest and brings the garbage can from his private property twenty meters forward to place it on the public road for collection by the garbage collection service after he has made sure by looking through the window that no one is approaching, the abstract dangerousness of this behaviour is lacking from the perspective of the accompanying observer.

<sup>53</sup> On this example also A. Birkbauer, *op. cit.*, No. 18; as well as E. Ayasch, "Zeitschrift für Gesundheitsrecht" 2020, 55, who however assumes an omission.

<sup>54</sup> As (punishability-exhausting) doing: A. Birkbauer, *op. cit.*, No. 18.

<sup>55</sup> For contact tracing closer [https://www.sozialministerium.at/dam/jcr:0606b9e2-72f6-4589-9816-2107c7c46e7f/Behoerdliche\\_Vorgangsweise\\_bei\\_SARS-CoV-2\\_Kontaktpersonen\\_Kohntaktpersonenna\\_chverfolg\\_ung.pdf](https://www.sozialministerium.at/dam/jcr:0606b9e2-72f6-4589-9816-2107c7c46e7f/Behoerdliche_Vorgangsweise_bei_SARS-CoV-2_Kontaktpersonen_Kohntaktpersonenna_chverfolg_ung.pdf) (accessed: 04.06.2021).

the contact suitable for transmission has already ended. However, the failure to disclose their data means that other persons could possibly be infected by *them*. The virus could thus spread, because the perpetrator prevents the persons he or she may have infected from being identified. Depending on the specific facts, this behaviour may consist of action (e.g. lying) or omission (e.g. complete refusal to disclose contact persons). Recourse to §2 StGB is not necessary for the omission variant; the perpetrator does not have to be a guarantor for those who could be endangered by his contacts.

## Conclusion

Austrian criminal law is well equipped to deal with this pandemic, especially when criminal and administrative criminal law are viewed together. Administrative criminal law starts with mere disobedience, because preventive measures applicable to all or many are disregarded. Criminal law intervenes, as it should because of the ultima ratio principle, where there is no lesser means, such as administrative law in particular, because the behaviour was individually particularly dangerous. In these cases, however, criminal law knows no pardon: In particular, it does not protect against punishment if it is proven *ex post* that the offender was completely healthy at the time of the crime – this is the *ex ante* perspective.

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## SUMMARY

### Corona Ignorers – Only Annoying or Already Punishable? A Consideration of §§178, 179 Austrian Criminal Code (Endangering People by Infectious Diseases)

§§178, 179 Austrian Criminal Code, that punish the endangering of other people by infectious diseases, are so-called abstract endangerment offenses. This means, that the mere dangerousness of the perpetrator's behaviour leads to punishability: It must be examined from the view of a participating observer, if the behaviour could theoretically have caused the spread of the disease. It is neither relevant if the behaviour in retrospect actually became "dangerous" nor if it led to an infection of others. From this fact arise certain important consequences. A (healthy) contact person of an infected person does not set an abstract dangerous behaviour in the meaning of §§178, 179 StGB with the mere contact suitable for transmission: Such contact is risky insofar as one could infect oneself, but not abstractly dangerous for others. Although the law does not set any minimum limit for the risk of transmitting a disease to be criminally liable, an abstract dangerousness of the act is only given under certain conditions. It requires sufficient indications at the time of the act that the behaviour of the individual perpetrator in particular could lead to the spread of a disease from the perspective of an accompanying observer (*ex ante*). Such indications exist firstly in cases in which the perpetrator might suffer from a disease him- or herself and secondly in situations in which the perpetrator engages in activities that are typically dangerous and could particularly cause the spread of a disease. Conversely, it is not sufficient for criminal liability if the dangerousness is below these thresholds,

even in case of breaches of generally applicable prevention standards (*ultima ratio*). There is no space for a retrospective assessment of the dangerousness. Consequently, even if it turned out before the court that the dangerousness was actually lacking, in particular because the perpetrator was not infected with the disease in question at all, punishability can be given. The description of the punishable behaviour in §§178, 179 StGB must be interpreted in a way that not only an active behaviour, but also an omission is included. Therefore, criminal liability is possible for anyone who causes a potential risk of spreading a disease by an omission, regardless of a so-called guarantor position in the meaning of §2 StGB (understood as a special obligation arising from the law to set an active behaviour).