

# — The use of criminal law to fight Covid-19-related emergencies and the Danish case: *placebo* or *panacea*?\*

*L'uso del diritto penale nel contrasto alle emergenze legate al virus Covid-19 ed il caso danese: placebo o panacea?*

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**Abstract.** *The purpose of this paper is to conduct an analysis of the role of criminal law in the fight of Covid-19-related emergencies in Denmark. By adopting reflections typical of the Italian criminal legal school on panpenalismo, i.e. the pathological expansion of the field of application of criminal law, the investigation will focus on how criminal sanctions have been used and portrayed as an efficient tool to contrast the pandemic in the Danish legal system, focusing on the role played by the media discourse. Interestingly so, it can be observed that often criminal tools and, in general, governmental responses to the virus have been associated with war-like metaphors: «Vi er i krig» stated the Justice Minister of Denmark Nick Hækkerup. Indeed, in early April the Danish Parliament adopted an urgent bill which reformed the Danish Criminal Code in response to the uproar emerged by the news of thefts of hand sanitizer and protective equipment from hospitals. The bill is characterized by an increase of criminal penalties for a number of offenses when committed in*

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\* Il contributo riprende e amplia il testo dell'intervento tenuto nel Workshop dottorale di eccellenza Freedom v. Risk? Social control and the idea of law face to Covid-19 emergencies – Università degli Studi di Firenze, 29 giugno 2020 – e destinato alla pubblicazione nell'omonimo volume della collana "Legal Dimension/Dimensione Giuridica", Giappichelli, Torino 2020. Si ringraziano gli organizzatori del Workshop per aver acconsentito alla pubblicazione su questa Rivista.

*relation with the corona pandemic. Thus, the numbers of "corona-crimes" committed in Denmark never reached worrying numbers. So was there really an emergency situation calling for such urgent criminal legislation? Is "criminal maximalism" the solution or has it been used as a placebo to quiet concerned citizens? This paper will explore such questions, using Covid-19 emergency law as a paradigm for a broader investigation into the tangle of the idea of criminal law to face emergencies*

**Abstract.** *Lo scopo di questo contributo è quello di condurre un'analisi del ruolo del diritto penale nel contrasto alle emergenze legate al Corona virus in Danimarca. Adottando le riflessioni tipiche della scuola giuridica penale italiana sul panpenalismo, ovvero l'espansione patologica del campo di applicazione del diritto penale, l'indagine si concentrerà su come le sanzioni penali sono state utilizzate e rappresentate come uno strumento efficace per contrastare la pandemia nel sistema giuridico danese, concentrandosi sul ruolo svolto dal media discourse. Spesso gli strumenti criminali e, in generale, le risposte dei governi al virus sono stati associati a metafore belliche: «Vi er i krig» ha dichiarato il ministro della Giustizia danese Nick Hækkerup. E infatti, all'inizio di aprile il Parlamento danese ha adottato un disegno di legge urgente che ha riformato il codice penale danese in risposta al clamore suscitato dalle notizie di furti di disinfettanti per le mani e di dispositivi di protezione negli ospedali. Il provvedimento è caratterizzato da un severo aumento delle pene per una serie eterogenea di fattispecie di reati nel caso in cui vengano commessi in relazione alla epidemia di Covid-19. Tuttavia, i numeri dei "corona-crimes" commessi in Danimarca non hanno mai raggiunto cifre preoccupanti." Quindi, si era davvero in presenza di una situazione di emergenza criminale tale da richiedere una legislazione penale così urgente? Il "criminal maximalism" è la soluzione o è stato usato come placebo per tranquillizzare i cittadini preoccupati? Questo contributo esplorerà tali quesiti, utilizzando il caso danese come paradigma per una più ampia indagine sull'idea di diritto penale come strumento per affrontare le emergenze.*

SUMMARY: 1. Introduction: on *panpenalismo*, populist criminal law and war-like metaphors. – 2. The legal framework for management of epidemics in Denmark. – 3. "Dropping the hammer": law n. 349/2020 - Increased punishment for offenses based on or committed in the context of Covid-19 (*Lov om ændring af straffeloven, retsplejeloven og udlændingeloven - Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19*). – 4. Conclusive remarks: placebo or panacea?

SOMMARIO: 1. Introduzione. Su *panpenalismo*, populismo penale e metafore belliche. – 2. Il quadro giuridico della gestione delle epidemie in Danimarca. – 3. "Dropping the hammer": la legge n. 349/2020 - Aumento delle pene per i reati basati su o commessi nel contesto di Covid-19 (*Lov om ændring af straffeloven, retsplejeloven og udlændingeloven - Skærpet straf per lovovertrædelser med baggrund i eller sammenhæng med covid-19*). – 4. Osservazioni conclusive: placebo o panacea?

## 1. Introduction: On *panpenalismo*, penal populism and war-like metaphors.

The purpose of this paper is to conduct an analysis of the role of criminal law in the fight of Covid-19-related emergencies in Denmark. By adopting reflections typical of the

Italian criminal legal scholars on *panpenalismo*<sup>1</sup>, i.e. the pathological expansion of the field of application of criminal law, the investigation will focus on the interplay between how criminal sanctions have been used and portrayed as an efficient tool to contrast the pandemic in the Danish legal system and the role played by the **media discourse**<sup>2</sup>.

To begin with, it is undoubted that the Covid-19 crisis poses unprecedented risks which lead to legal responses. Yet, when it comes to criminal law and its basic principles, certain questions arise: is “criminal maximalism” the way to go or has criminal law been used as a palliative to quiet concerned citizens? What was the role of media discourse in the depiction of the “criminal law vs. corona virus” conflict? This paper will explore such questions, using Danish Covid-19 emergency law as a paradigm for a broader investigation into the tangle of the idea of criminal law to face emergencies.

At the outset, it can be observed that many countries, including Italy, have adopted emergency law and regulations correlated with criminal sanctions in case of noncompliance, as a fast-response to compel people to conform with lockdown measures<sup>3</sup>. As a matter of fact, the spread of the virus has been accompanied by a more subtle – and likely characterized by longer-lasting side effects – expansion of a phenomenon referred to as *panpenalismo*: a distorted usage of criminal law as the cure-all in the fight towards new emerging issues<sup>4</sup>.

Indeed, *panpenalismo* is not something new. Italian academics, for example, have been denouncing for a long time now the tendency of the Italian legislator to regulate with

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<sup>1</sup> The word is derived from attaching the Greek prefix “*pan-*”, which means “all, every, whole, all-inclusive” to “*penalismo*” which in Latin-derived languages means “inherent to the criminal area”, as in referring to that specific branch of law. It can be referred to as “criminal law hypertrophy” or “criminal maximalism”.

<sup>2</sup> «Media discourse refers to interactions that take place through a broadcast platform, whether spoken or written, in which the discourse is oriented to a non-present reader, listener or viewer» in A. O’Keeffe, *Investigating Media Discourse*, Routledge, 2006, p. 31.

<sup>3</sup> The sanction in Italy was established by article 3, paragraph 4 of Decree Law no. 6 of 23 February 2020 (*Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*, d.l. 23 febbraio 2020, n. 6, convertito con modificazioni dalla l. 5 marzo 2020, n. 13 in G.U. 9 marzo 2020, n. 61) and was later confirmed by article 4, paragraph 2 of Decree of the President of the Council of Ministers of 8 March 2020 (*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19* in GU Serie Generale n. 59 dell'8 marzo 2020). The application of article 650 of the Italian Criminal Code was then repealed and non-compliance with the containment measures is today punished with an administrative fine from 400 € to 3,000 € according to article 4 of Decree Law n. 19 of 25 March 2020 (*Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19*, d.l. 25 marzo 2020, n. 19, convertito con modificazioni dalla l. 22 maggio 2020, n. 35, in GU Serie Generale n. 79 del 25 marzo 2020, available in English [at this link](#)). Afterwards, Decree Law n. 33 of 16 May 2020 was adopted (*Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19* in GU Serie Generale n. 125 del 16 maggio 2020), providing provisions which implement Decree Law n. 19/2020. In the most recent months, Italy has been facing a stratification of new norms, nevertheless Decree Law n. 19/2020 and Decree Law n. 33/2020 still represent the core of the criminal response to the spread of the virus in Italy. See Decree law n. 125 of 7 October 2020 (*Misure urgenti concesse con la proroga della dichiarazione dello stato di emergenza epidemiologica da COVID-19 e per la continuità operativa del sistema di allerta COVID, nonché per l'attuazione della direttiva (UE) 2020/739 del 3 giugno 2020* in GU Serie Generale n.248 del 07 ottobre 2020); Decree Law n.158 of 2 December 2020 (*Disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID* in GU Serie Generale n. 299 del 2 Dicembre 2020) and Decree Law n. 172 of 18 December 2020 (*Ulteriori disposizioni urgenti per fronteggiare i rischi sanitari connessi alla diffusione del virus COVID-19* in GU Serie Generale n. 313 del 18 dicembre 2020).

<sup>4</sup> D. Pulitanò, *Lezioni dell'emergenza e riflessioni sul dopo. Su diritto e giustizia penale*, in *Sistema Penale*, 28 April 2020.

a populist sentiment, through norms directed at stimulating fear and uncertainty in citizens together as hate towards a common enemy<sup>5</sup>. In Denmark, the anti-terrorism legal packages introduced after 9/11 and subsequent terrorist attacks were defined as «far-reaching forms of criminalization with indeterminate scope», «pre-active in nature» with vague *actus reus* and *mens rea* requirements and therefore problematic from a rule of law point of view<sup>6</sup>. In the international arena, where a flourishing debate is taking place, concepts such as populist punitiveness and penal populism were coined<sup>7</sup>.

Moreover, it is undoubted that criminal law hypertrophy, penal populism and the media discourse are deeply intertwined<sup>8</sup>. In fact, if we focus on the last few months, this peculiar use of criminal law has been manifesting itself hand in hand with extensive media coverage of both Corona-related news and norms: a situation that has been described with a bright word play as «Communication Virus Disease»<sup>9</sup>. Interestingly, what can be noticed is that the combination of these factors has led to the creation of a new vocabulary of terms referring specifically to the interaction of criminal law and Covid-19 (an occurrence which is not new to languages of Germanic nature, which often, and pragmatically so, create new idioms through the pairing of existing words). For example, newspapers in Denmark started referring to «*corona-kriminelle*» and «*coronaregler*»<sup>10</sup>. Similarly, Dutch criminal courts started dealing with the first «*coronamisdrijven*»<sup>11</sup>, in particular cases of life-threatening behavior with reference to acts of «*coronahoester*» and «*coronaspurger*»<sup>12-13</sup>.

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<sup>5</sup> «A criminal legislation which is employed in essence: a) more for its symbolic role than for its suitability to manage concrete problems; b) more for its ability to satisfy the expectations of the public than for its suitability to respond effectively to the social issues that are being raised; c) more for its suitability to spread an idea of order and security in the public than for its effective ability to control and repress criminal phenomena. [Author's translation]», R. Bianchetti, *Sentimenti, risentimenti e politica criminale: un'indagine quali-quantitativa in tema di legislazione penale compulsiva*, in *Archivio Penale* n. 1, 2019, pp. 6 ss. For an overview on criminal populism in the Italian scene, see *ex multis*: G. Fiandaca, *Populismo politico e populismo giudiziario*, in *Criminalia*, 201, pp. 96 ss.; L. Ferrajoli, *L'illusione della sicurezza-Intervento al Festival del Diritto*, 26 september 2018.

<sup>6</sup> J. Vestergaard, *Pre-Active Anti-Terrorism Legislation: The Case of Denmark*, in *Scandinavian Stud.*, vol. 60, 2015, p.408.

<sup>7</sup> For an overall account of current crime policy, see J. Pratt, *Penal populism*, Routledge, 2007. For an analysis of transformations of criminal law in the main English-speaking countries, see: J. Pratt, M. Miao, *Risk, populism, and criminal law*, in *New Crim. L. Rev.*, vol. 22(4), 2019, pp. 391 ss. For a critical analysis of the scholarly debate on punitiveness and penal populism, see: R. Matthews, *The myth of punitiveness*, in *Theoretical Criminology*, vol. 9, 2005, pp. 175 ss.. Proposing a restricted definition of penal populism, R. Cornelli, *Contro il panpopulismo. Una proposta di definizione del populismo penale*, in *Diritto penale contemporaneo*, vol. 4, 2019, pp. 128 ss.

<sup>8</sup> R. Bianchetti, *Sentimenti, risentimenti e politica criminale*, cit., p. 10. More on this theme: F. Palazzo, *Mezzi di comunicazione e giustizia penale*, in *Politica del Diritto*, vol. 2, 2009; R. Bianchetti, *La paura del crimine. Un'indagine criminologica in tema di mass media e politica criminale ai tempi dell'insicurezza*, Giuffrè, 2018; F. Palazzo, *Paura del crimine. rappresentazione mediatica della criminalità e politica penale (a proposito di un recente volume)*, in *MediaLaws. Rivista di diritto dei media*, vol. 3, 2018, pp. 14 ss.

<sup>9</sup> M. Papa, *Decreti e norme vaghe tradotti sui media: la comunicazione che inquina il diritto*, in *Il Dubbio*, 21 April 2020.

<sup>10</sup> Respectively Danish for “corona criminals” and “corona rules”.

<sup>11</sup> Dutch for “corona crimes”.

<sup>12</sup> Literally translatable into “corona-spitting” and “corona-coughing”.

<sup>13</sup> For a categorization of “corona-crimes”, see the [decision of the Rotterdam District Court \(Case number 10 /077803-20\)](#), 30 march 2020 (in Dutch).

Likewise, it can be observed how often these criminal tools and, in general, governmental responses to the virus have been associated with war-like metaphors. «*Vi er i krig*» stated the Danish Justice Minister Nick Hækkerup<sup>14</sup>. As brilliantly expressed by a journalist, «The Covid-19 emergency is almost everywhere addressed with a war language: there is talk of a trench in hospitals, of the virus' front line, of war economy [...] according to the consolidated tradition of populists who thrive only when there is an external enemy to repel, possibly by force»<sup>15</sup>. As a consequence, citizens are led to blindly comply with norms posing as saviors of the society. Similarly, the combination of the new "Corona-vocabulary" with war metaphors leads us to isolate different enemies: first and foremost Covid-19, but also corona-criminals such as plague-spreaders and thieves of facemasks. This depiction of those who do not follow through with restrictions (or who take advantage of the emergency situation) as enemies of the state who should be punished with a criminal sanction could be nothing less than another example of "criminal law of the enemy"<sup>16</sup>. In the following paragraph, these reflections will be used to analyze Denmark's criminal response to corona-crimes.

## 2. The legal framework for management of epidemics in Denmark.

Before addressing the core of this analysis, it is relevant to briefly introduce the Danish legal framework<sup>17</sup> with regards to health-related emergency situations. The management of epidemics in Denmark is disciplined by the *epidemiloven* (Act on Measures against Infectious and Other Communicable Diseases, in short Epidemic Act)<sup>18</sup>,

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<sup>14</sup> «We are at war» (Author's translation). R. F. Isaken, *Skal Danmark forandres på grund af coronavirus?* Ekstra Bladet, 28 March 2020.

<sup>15</sup> D. Cassandro, *Siamo in guerra! Il coronavirus e le sue metafore*, in *Internazionale*, 22 March 2020.

<sup>16</sup> The basis of this doctrine will not be analyzed in this paper, due to editorial restrictions. For a reconstruction of the international debate on criminal law of the enemy, see *ex multis*: M. Donini, M. Papa (Eds), *Diritto penale del nemico. Un dibattito internazionale*, Giuffrè, 2007.

<sup>17</sup> According to the Danish Constitutional Act, a Bill must be read three times in the Chamber before it can be passed. The following procedure is typical. First reading: At this stage, the main principles of the Bill are discussed, and spokespersons of the various political parties present their party's position on the Bill. Most Bills are sent on to one of the Parliament's committees, where Members of Parliament (MPs) debate the Bill in detail and produce a report on the basis of their deliberations. Second reading: The Bill is debated in full and in detail. The contents of the committee report form part of the debate and, if amendments have been proposed, these will be discussed as well. Following the debate, MPs vote on any amendments proposed. After the second reading, a Bill can be referred back to a committee, but in most cases it goes straight to the third reading. Third reading: Initially, MPs debate and vote on proposed amendments. If an MP wishes to take the floor, the Bill will be debated in its entirety. If no amendments have been proposed, MPs debate and vote on the Bill immediately. For the vote to be valid, half of the MPs (i.e. at least 90) must be present and take part in the voting. Bills are passed by a simple majority, i.e. more MPs must vote for the Bill than against it. When a Bill has been passed, it must be signed by the Queen and a Minister and then published on the website [www.lovtidende.dk](http://www.lovtidende.dk). Once this has been done, the Bill becomes law. Folketinget, *The Tasks and Responsibilities of the Danish Parliament*, s.d.

<sup>18</sup> *Lov om foranstaltninger mod smitsomme og andre overførbare sygdomme* nr. 814 af 27. august 2009, med de ændringer, der følger af § 5 i lov nr. 656 af 8. juni 2016, jf. lovbekendtgørelse nr. 1026 af 1. oktober 2019, som ændret ved bekendtgørelse nr. 156 af 27. februar 2020, bekendtgørelse nr. 157 af 27. februar 2020, lov nr. 208 af 17. mars 2020 og lov nr. 359 af 4. April 2020.

which was modified by the Danish Parliament (*Folketinget*) first in March<sup>19</sup> and then again in April<sup>20</sup>.

The law, before the amendments, provided for a system based on five regional commissions (*epidemikommission*) which would come into being in case of the occurrence of an epidemic. These commissions comprise of police representatives (specifically, a police director appointed by the National Chief Police acting as chairman of the commission), health authorities and three local politicians elected by the regional council (§ 3). The *epidemiloven* granted a number of far-reaching powers (*Kapitel 3*) to the commission such as the possibility of ordering mandatory isolation, hospital observations and even forced hospitalization of individuals, or the banning of public events and of gathering of groups. The act also regulates crimes connected to the violation of its provisions in chapter 6. Article 29 provides for a punishment with a fine or up to six months of imprisonment – unless the act constitutes a more serious crime – for a series of actions including: violation of the duty to report to the police or to the doctor that a person suffers from a generally dangerous illness (§ 21); violation of the order of the Epidemic Commission to be examined by a doctor and/or admitted for observation at a hospital (§ 5, stk. 1); violation of the order of compulsory isolation and hospitalization by the Epidemic Commission (§ 6, stk. 1 and 3) and violation of the of the Epidemic Commission's order of lockdown of an area (§ 7)<sup>21</sup>. On this matter, it should also be noted that the Criminal Code of Denmark already incriminates the conduct of transmitting dangerous contagious diseases:

§ 192. Anyone who, in violation of the regulations given by law or pursuant to law to prevent or counteract a contagious disease, causes the danger that such a disease will gain entry or spread among humans, shall be punished by imprisonment for up to 3 years.

Stk. 2. If the illness is such that according to the law it must be subjected to, or at the time when the act is committed, is subject to public treatment, or if special measures against its introduction have been taken in the kingdom, the punishment shall be imprisonment for up to 6 years.

Stk. 3. Anyone who, in the manner specified, causes danger of a contagious disease finding its way into or spreading among livestock or cultivated plants, shall be punished by a fine or imprisonment for up to 2 years.

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<sup>19</sup> Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme nr 208 af 13. mars 2020.

<sup>20</sup> Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare nr 359 af 4. april 2020.

<sup>21</sup> «Kapitel 6 Straffebestemmelser m.v.

§ 29. Medmindre højere straf er forskyldt efter anden lovgivning, straffes med bøde eller fængsel indtil 6 måneder den, der

1) overtræder § 21,

2) overtræder forbud eller unnlader at efterkomme påbud meddelt efter § 5, stk. 1, § 6, stk. 1 og 3, § 7, § 11, stk. 2 og 3, § 12, stk. 1, og § 16, stk. 1.

Stk. 2. I forskrifter, der udfærdiges i henhold til loven, kan der fastsættes straf af bøde eller fængsel indtil 6 måneder for overtrædelse af bestemmelserne i forskrifterne».

Lov om foranstaltninger mod smitsomme og andre overførbare sygdomme nr. 814 af 27. august 2009, med de ændringer, der følger af § 5 i lov nr. 656 af 8. juni 2016, jf. lovbekendtgørelse nr. 1026 af 1. oktober 2019, som ændret ved bekendtgørelse nr. 156 af 27. februar 2020, bekendtgørelse nr. 157 af 27. februar 2020, lov nr. 208 af 17. marts 2020 og lov nr. 359 af 4. April 2020.

Stk. 4 If the crime is committed with negligence, punishment shall be a fine or imprisonment of up to 6 months<sup>22</sup>.

As the numbers of the spread of the infection started to rise, and as the criticism towards the more “liberal” approach adopted by its neighbor Sweden began to attract the eyes of international media<sup>23</sup>, the Minister of Health (*Sundheds- og Ældreministeren*) proposed a bill to amend the Epidemic act. The “fast-tracked” amendments, which were approved unanimously<sup>24</sup>, shifted a consistent number of powers (*rectius*: all) from the regional Epidemic Commissions to the Government and is characterized by a Sunset Clause, setting its expiration date on March 1<sup>st</sup>, 2021<sup>25</sup>. The bill also repealed the economic compensation measures directed at individuals hurt by the restrictions to their individual rights as a consequence of the Epidemic Commissions’ decisions. As a remedy, the Government provided for a series of aid packages (*hjælpepakker*) directed at compensating both employers and employees which suffered economic damages from the sanitary emergence<sup>26</sup>.

Lastly, on December 22, 2020 the Minister of Health (Magnus Heunicke) presented a proposal for a new Epidemic Act, which is currently undergoing consultation<sup>27</sup>. The new law will replace the current epidemic law and the attached emergency laws (which, as mentioned above, will stop being applicable after the 1<sup>st</sup> of March 2021) and is meant to

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<sup>22</sup> «§ 192. Den, som ved overtrædelse af de forskrifter, der ved lov eller i medfør af lov er givet til forebyggelse eller modarbejdelse af smitsom sygdom, forvolder fare for, at sådan sygdom vinder indgang eller udbredes blandt mennesker, straffes med fængsel indtil 3 år.

Stk. 2. Er sygdommen en sådan, der ifølge lovgivningen skal undergives eller på den tid, da handlingen begås, er undergivet offentlig behandling, eller mod hvis indførelse i riget der er truffet særlige forholdsregler, er straffen fængsel indtil 6 år.

Stk. 3. Den, som på den angivne måde forvolder fare for, at smitsom sygdom finder indgang eller udbredes blandt husdyr eller nytte- eller kulturplanter, straffes med bøde eller fængsel indtil 2 år.

Stk. 4. Begås forbrydelsen uagtsomt, er straffen bøde eller fængsel indtil 6 måneder».

[Straffeloven](#), lovbekendtgørelse nr. 976 af 17. september 2019, som ændret ved lov nr. 1425 af 17. december 2019, lov nr. 1426 af 17. december 2019 og § 31 lov nr. 1563 af 27. december 2019. For a comparative analysis of Criminal reaction to Covid-19 in Europe, see: Turanjanin V., Radulović D., *Coronavirus (COVID-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, in *Iran J Public Health*, Vol. 49, Suppl. 1, 2020, pp. 4-11.

<sup>23</sup> For an overall analysis of the legal foundations of the Swedish “Pragmatic Approach” to COVID-19 and its interaction with Swedish legal culture, see A. Simoni, *L’emergenza Covid-19 in Svezia: le basi giuridiche di un approccio pragmatico*, in *DPCE Online*, v. 43 n. 2, 2020.

<sup>24</sup> The expression “fast track” was used by the Danish Institute for Human Rights in the European Union Agency for Fundamental Rights (FRA) Report, *Coronavirus COVID-19 outbreak in the EU. Fundamental Rights Implications*, 20<sup>th</sup> March 2020. As reported by K. Cedervall: «The Parliament adopted the amendments unanimously in just 12 hours. This is highly unusual. Both because unanimous decisions are rare in a parliament with 14 parties and a strong tradition for minority governments (we had only one very short-lived majority government since 1973), and because 12 hours to debate a step of this magnitude is far from normal (normal lawmaking procedure dictates 30 days)», K. Cedervall, *Something is forgotten in the State of Denmark: Denmark’s Response to the COVID-19 Pandemic*, in *Verfassungsblog: On Matters Constitutional*, 4 May 2020.

<sup>25</sup> [Lov om ændring af lov om foranstaltninger mod smitsomme og andre overførbare](#) nr 359 af 4. april 2020. ([Udvidelse af foranstaltninger til at forebygge og inddæmme smitte samt sikring af kapacitetsmæssige ressourcer m.v.](#)) nr 133 af 13. marts 2020.

<sup>26</sup> For an overall overview of the economic measures adopted by the Danish Government see *inter alia*: M. Soested, N. Videbaek Munkholm, *COVID-19 and Labour Law: Denmark*, in *Italian Labour Law e-Journal*, v. 13 n. 1S, 2020.

<sup>27</sup> Sundheds- og Ældreministeriet, [Forslag til lov om epidemier m.v. \(epidemiloven\)](#) nr 134 af 22. december 2020.

change Denmark's general overall approach to handling of epidemics. Remarkably, in an early draft the Government had introduced an amendment imposing compulsory vaccination but the provision was quickly expunged after heated protests<sup>28</sup>.

Amongst the most significant amendments in the version of the draft that is currently being discussed, it is worth mentioning the reinstatement of an Epidemic Commission (with an "advisory" role) and the establishment of mandatory parliamentary scrutiny before the government can implement a number of restrictions (§ 9). The latter will be carried out by a specific committee appointed in the Folketinget which will have to approve the most intrusive measures proposed by the Minister of Health (unless there is an imminent and acute danger or threat to public health, § 9 stk. 2). Notably, one of the newly introduced powers contained in the bill regards the possibility for the Minister to forcibly isolate and test groups of people who have participated to a specific event or assembly in case an infection is discovered (currently this is possible only with regards to individuals) (§ 28)<sup>29</sup>. Positively so, the draft provides for the right to judicial review of injunctions measures resulting in deprivation of liberty of individuals (§64, stk. 1) and the establishment of a Board of Appeal competent for judging decisions taken under the Epidemic Act (§61).

Thus, this analysis will not focus on the constitutional and human rights aspects raised by the modifications of the Epidemic Act, or on the adoption of the following lockdown measures by the Danish Prime Minister, Mette Frederiksen<sup>30</sup>. Rather, the emphasis will be placed on a connected piece of urgent legislation which did not attract the spotlight – yet – of the academic scene adopted on April 2, 2020. The law is titled "Increased punishment for offenses based on or committed in the context of Covid-19" and amended the Danish Criminal Code, the Danish Code of Criminal Procedure and the

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<sup>28</sup> Sundheds- og Ældreministeriet, Udkast til Forslag til Lov om epidemier m.v. (epidemiloven), §5. See also O. Batchelor, A. F. Scheel, Tvangsvaccination slettet i aftale om ny epidemilov, der giver mere magt til Folketinget, DR, 18 December 2020.

<sup>29</sup> For an efficient summary of the main concerns raised regarding the new draft raised by the civil society, M. Borre, Høringssvar viser strubevis af indsigelser mod ny epidemilov: »Der er tale om vidtgående indgreb i den enkelte borgers privatliv og frihed«, Berlingske, 19 January 2021. For criticism on the introduction of the power to isolate and test groups of people, J. Schneider, Ét smittetilfælde vil kunne tvinge en hel forsamling i isolation: »Jeg vil opfordre til, at man ikke vedtager den her lov«, Berlingske, 18 January 2021. For a more in-depth analysis of the relevant legal questions, see Justitia-Danmarks uafhængige juridiske tænketank, Høringssvar til forslag til lov om epidemier m.v. (epidemiloven), 15 January 2021; Institut for Menneskerettigheder, Høringssvar til ny Epidemilov, 15 January 2021; Institut for Menneskerettigheder, Høringssvar vedr. udkast til Forslag til lov om epidemier m.v. (epidemiloven), 12 November 2020.

<sup>30</sup> For a general overview of COVID-19 Constitutional challenges in Denmark see; K. Cedervall, *Something is forgotten*, cit.; M. Mazza, Alcune osservazioni su diritto costituzionale, fonti primarie e contrasto al Coronavirus nell'esperienza danese, in *DPCE Online*, [S.I.], v. 43, n. 2, Luglio 2020. For a global analysis of key legal certainty and human rights challenges in connection with the Danish Government initiatives' to prevent the spread of COVID-19 in Denmark see: Advokatsamfundet-Institut for Menneskerettigheder, COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser, 5 June 2020. For an overview of global legal responses to the pandemic in a comparative perspective, *inter alia*: Comparative Covid Law – Osservatorio Covid Diritto Comparato; *DPCE Online*, [S.I.], v. 43, n. 2, Luglio 2020. ISSN 2037-6677.



Aliens Act in a pursuit to contrast the so-called *corona-kriminelle*<sup>31</sup> (corona criminals)<sup>32</sup>. The following paragraph will focus on the provisions of law n. 349/2020 as well as with the process leading to its adoption in a criminal policy perspective. Specifically, special attention will be paid to the question of whether there was in fact the need of new criminal legislation to contrast a threat of public interest, or whether we can characterize this event as a prong of the general *panpenalismo* phenomenon as untangled earlier.

### 3. "Dropping the hammer": law n. 349/2020 - Increased punishment for offenses based on or committed in the context of Covid-19 (*Lov om ændring af straffeloven, retsplejeloven og udlændingeloven - Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19*).

Just as the news about the Epidemic act started being the object of vast media coverage, Danish national newspapers started picking up local news on thefts of hand sanitizer and other protection equipment from hospitals. Words like "corona-criminality", "corona-crimes" started surfacing in the media discourse. Consequently, on the 26<sup>th</sup> of March Danish Justice Minister Nick Hækkerup proposed an urgent bill to increase existing punishments in the criminal code for offenses based on or committed in the context of COVID-19. The urgent law was adopted by the Folketinget on 2 April 2020 and it consists of 4 articles which introduce modifications to the Criminal Code<sup>33</sup>, the Code of Criminal Procedure<sup>34</sup> and the Aliens Act<sup>35</sup>. The law was not adopted through the normal legislative process (which mandates three readings and a minimum processing time of 30 days in the Folketinget) but through the emergency procedure (*hastelovgivningsproces*). This procedure entails that the bill is subject to a shorter processing time and interested stakeholders (such as organizations) are not consulted<sup>36</sup>. As with the law amending the Epidemic Act, law n. 349/2020 is subject to a sunset clause (providing that it will be repealed on the 1<sup>st</sup> March 2021) and it provided that the Minister of Justice had submit by the 30<sup>th</sup> November 2020 a proposal for its revision (§4, stk. 3). For these reasons, on the 25<sup>th</sup> of November the Danish Minister of Justice proposed a draft bill to repeal the

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<sup>31</sup> The words "corona-kriminelle" and "corona-kriminalitet" were coined by the press after the minister of Justice, Nick Hækkerup, announced the proposal of the bill. See, *inter alia*: L. Dalsgaard, N. S. Nielsen, *OVERBLIK: Sådan har corona-kriminelle udnyttet krisen i Danmark*, DR, 25 March 2020. L. K. Skov, *Minister advarer coronakriminelle: Højere straffe på vej*, TV 2, 25 March 2020; A. S. Allarp, *Folketinget sviner straffeloven til med dets coronastraffe*, Information, 8 April 2020.

<sup>32</sup> *Lov om ændring af straffeloven, retsplejeloven og udlændingeloven ((Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19)* nr 349 af 02. april 2020.

<sup>33</sup> *Straffeloven*, lovbekendtgørelse nr. 976 af 17. september 2019, som ændret ved lov nr. 1425 af 17. december 2019, lov nr. 1426 af 17. december 2019 og § 3 i lov nr. 1563 af 27. december 2019.

<sup>34</sup> *Retsplejeloven*, LKB nr 938 af 10/09/2019 med de ændringer, der følger af § 1 i lov nr. 1540 af 18. december 2018, § 2 i lov nr. 1541 af 18. december 2018, lov nr. 1544 af 18. december 2018, § 15 i lov nr. 1711 af 27. december 2018, § 2 i lov nr. 1719 af 27. december 2018, § 2 i lov nr. 329 af 30. marts 2019, lov nr. 370 af 9. april 2019, § 1 i lov nr. 463 af 29. april 2019, lov nr. 485 af 30. april 2019, § 5 i lov nr. 497 af 1. maj 2019 og § 2 i lov nr. 505 af 1. maj 2019.

<sup>35</sup> *Udlændingeloven*, jf. lovbekendtgørelse nr. 1022 af 2. oktober 2019, som ændret senest ved lov nr. 1591 af 27. december 2019.

<sup>36</sup> For an in depth analysis of concerns raised by the adoption of the bill through the emergency procedure, see: Advokatsamfundet-Institut for Menneskerettigheder, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit., pp. 23-24.

aforementioned art. 4 paragraph 3<sup>37</sup>, and subsequently, on the 13<sup>th</sup> of January 2021, it presented a second draft bill to extend the validity of the sunset clause until the 1<sup>st</sup> of January 1, 2022<sup>38</sup>.

The core of law n. 349/2020 is contained in § 1. Art. 1 creates a new article § 81-d made of 4 paragraphs in the 10<sup>th</sup> chapter of the Danish Criminal Code, which is dedicated to the determination of the penalty (*straffens fastsættelse*). The first comma of the newly born § 81-d provides that punishment for a considerable number of crimes (theft and robbery, of course, but also falsification of official documents, unauthorized access to computer or data, extortion, violence and threats against public officials, to name a few) may be increased up to double if the crime was based on or committed in connection to the Covid-19 epidemic in Denmark. In the general remarks delivered when presenting the proposal, Justice Minister Nick Hækkerup provided the following practical example of application of the law: the theft of hand sanitizer from a pharmacy or a hospital for a total worth of 200 DKK (roughly 27 €) before the adoption of the bill would have been sanctioned with a fine of minimum 500 DKK (roughly 86€) ex § 276 of the Criminal Code. After law n. 349/2020, the same conduct could be punished with a prison sentence, which as a starting point, should be unconditional<sup>39</sup>.

The second paragraph of §81-d provides for a further aggravation of the aforementioned circumstance, establishing that when one of the crimes listed in the first paragraph takes place in such circumstances that it results in an unjustifiable seeking or obtainment of one of the governmental *hjælpepakker*<sup>40</sup> (loan, credit, aid, subsidy or similar compensation from aid packages to counteract the harmful effects of the Covid-19 epidemic), punishment may be increased up to four times.

The third paragraph of § 81-d dictates that the judge, when deciding whether to impose a fine as an additional punishment to another type of punishment ex § 50 co.2 of the Criminal Code to the conducts prescribed for in § 1 para 2 of law n. 349/2020, must place emphasis on the obtained or intended financial gain of the accused. Lastly, the fourth paragraph of § 81-d establishes that the judge must always include as an aggravating circumstance for **any** offense (i.e. not just the one mentioned in art. 1 para 1 l. n. 349/2020) the fact that the conduct took place with a background or in connection to the Covid-19 epidemic in Denmark.

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<sup>37</sup> Justitsministeren, *Forslag til Lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven-Ophævelse af revisionsbestemmelse nr. 110*, 25 november 2020. The proposed bill n. 110 has undergone its first reading. For an overview on the Danish legislative process, see n. 17.

<sup>38</sup> Justitsministeren, *Forslag til lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven nr. 136*, 13 January 2021.

<sup>39</sup> «Som et eksempel kan fremhæves den situation, hvor en person stjæler håndsprit fra f.eks. en lægepraksis eller et hospital til en værdi af i alt 200 kr. Et sådant tilfælde vil udgøre tyveri efter straffelovens § 276 og vil som udgangspunkt skulle sanktioneres med en bøde på 500 kr., som er mindstebøden efter straffelovens § 287. Med lovforslaget forudsættes det, at der fremover for en sådan overtrædelse som udgangspunkt vil skulle fastsættes en kortere fængselsstraf, der som udgangspunkt bør være ubetinget». Justitsminister Nick Hækkerup, *Almindelige bemærkninger- Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, 26 March 2020.

<sup>40</sup> V. *supra*, par. 2.

With regards to the code of criminal procedure, the law (§ 2) extends the scope of § 791-d, which regulates the blocking of websites through which certain criminal offenses are committed, to crimes based on or committed in connection to the Covid-19 epidemic in Denmark. Finally, the law (§ 3) modifies the rules regarding deportation of immigrants which have had a legal residence in Denmark for more than 8 years, providing that such individuals can be expelled from the country in case they are sentenced to an unconditional custodial punishment determined in application of the aggravated circumstance prescribed by § 81-d of the Criminal Code.

At the time the bill was proposed, the Danish police districts had received 45 reports of fraud committed in connection to the corona epidemic and 16 reports of burglary, theft or attempted theft of protective equipment<sup>41</sup>. Interestingly so, after the sensational news titles which created the figure of the “corona-criminal” character, calling for harsher punishments, not much was said after the bill was adopted. «One can safely say that the Folketing has found the **big hammer** and drops it on those who deceive and swindle» stated the Danish Justice Minister Nick Hækkerup<sup>42</sup>. When asked what were the reasons which justified the urgency behind the bill, the response of the Justice Minister was «[...] there are cases where exceptional situations entail that the general due process of a bill cannot be awaited. Recent weeks have brought several examples of criminals exploiting the serious and extraordinary situation, we as a country find ourselves in, for their own personal gain. Among other things, we have seen examples of criminals exploiting the citizens’ trust in the authorities. It is absolutely crucial that we put an end to these forms of crime, as citizens’ trust is essential in a time of crisis like this one [...]. If we do not act now and act quickly, there is a risk that we as a society will subsequently be able to state that we should have imposed and tightened the penalties. That is a situation in which the government does not want to be»<sup>43</sup>.

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<sup>41</sup> L. Dalsgaard, N. S. Nielsen, *OVERBLIK: Sådan har corona-kriminelle udnyttet krisen i Danmark*, DR, 25 March 2020.

<sup>42</sup> «Så man kan roligt sige, at Folketinget har fundet den store hammer frem og svunget den over for dem, som snyder og svindler», Nick Hækkerup, *Speech during the second reading of Bill No. 157*, 2 April 2020.

<sup>43</sup> «Der er dog tilfælde, hvor ekstraordinære situationer medfører, at den almindelige behandling af et lovforslag ikke kan afventes. De seneste uger har bragt flere eksempler på, at kriminelle udnytter den alvorlige og ekstraordinære situation, vi som land befinder os i, for deres egen vindings skyld. Der er bl.a. set eksempler på kriminalitet, som udnytter borgernes tillid til myndighederne. Det er helt centralt, at vi kommer disse for- 3 mer for kriminalitet til livs, da borgernes tillid er afgørende i en krisetid som den foreliggende [...]Hvis vi ikke handler nu og handler hurtigt, er der en risiko for, at vi som samfund efterfølgende vil kunne konstatere, at vi burde have sat ind og skærpet straffene». *Spørgsmål nr. 102 fra Folketingets Retsudvalg vedrørende forslag til lov om ændring af straffeloven (Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19) (L 157/2019)*, 1 April 2020. As observed by the Danish Bar Council and the Danish Institute for Human rights, «Denmark is undoubtedly in a health crisis situation, where it may have been necessary within reasonable limits to legislate in an urgent manner with the errors and shortcomings that this may entail. One can, however, raise the question of whether there has been an extraordinary situation in relation to the crime picture, which has been able to justify a urgent implementation of the changes. When the government and the Folketing later evaluate the process, one should therefore reflect on whether all the changes that § 81 d, para. 1, entailed, was so urgent that they should be dealt with immediately, or whether a larger proportion of the changes should have been subject to the ordinary legislative procedure; with associated deadlines and better legal quality - and thus more long-term sustainable legislation as a result [author’s translation]». Advokatsamfundet-Institut for Menneskerettigheder, *COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit., p. 24

Concerns were raised, especially by those who will be directly involved with the practical consequences of the application law: the Danish Bar Council (*Advokatsamfundet*)<sup>44</sup>, the Danish Institute for Human Rights<sup>45</sup> and the Association of Danish Judges (*Dommerforeningen*)<sup>46</sup>. In a letter sent by the Danish Bar Council to Parliamentary Legal Affairs Committee on March 31<sup>st</sup>, the council underlined how «the bill challenges some important principles for the **Danish rule of law**» since «there is a big difference in the necessity of adopting emergency legislation to prevent theft of alcohol and face masks from a hospital and to counteract the exploitation of NemID access information [common log-in internet credentials to all Danish banks and other governmental services] on the Internet, where the damage is not a matter of life and death»<sup>47</sup>.

Similar concerns were raised by the Danish Judges Association, which labelled the law as an expression of an inappropriate form of criminal «detail-regulating» (*detailregulering*)<sup>48</sup> also referred to as «**criminal justice micromanagement**» (*strafferetlig micromanagement*) by Vestergaard<sup>49</sup>. Specifically, they pointed out how the Danish Criminal Code already offers the tools for judges to adjust penalties to the specific case through a system of mitigating and aggravating circumstances. In other words, courts could have imposed harsher penalties on corona-criminals even without an *ad hoc* aggravating circumstance. One must not forget that modern criminal codes are organized («fine meshed»<sup>50</sup>) systems where norms are intertwined and follow a logical scheme. As a consequence criminal norms, by nature, have a tendency of being closed towards external influences<sup>51</sup>.

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<sup>44</sup> The Danish Bar Association (*Advokatsamfundet*) submitted comments on the law proposal to the Committee on Legal Affairs of the Parliament. *Advokatsamfundet, Bemærkninger til forslag til lov om ændring af straffeloven (Skærpet straf for lovovertrædelser med baggrund i eller sammenhæng med covid-19)*, Retsudvalget 2019-20, L 157, bilag 11, 31 March 2020.

<sup>45</sup> *Advokatsamfundet-Institut for Menneskerettigheder, COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit.

<sup>46</sup> The Judges' Association had expressed its concerns on the content of the bill with a letter to the Justice Minister (*Dommerforeningen, Brev til Justitsministeren i forbindelse med coronarelateret hastelov*, 26 March 2020, and was then officially requested by Committee on Legal Affairs (*Retsudvalget*) of the Parliament to make comments to the draft (*Dommerforeningen, Dommerforeningens bemærkninger til hastelov om corona-smitte*, Retsudvalget 2019-20, L 157, bilag 3, 28 March 2020).

<sup>47</sup> «Lovforslaget udfordrer imidlertid nogle vigtige principper for den danske retsstat [...] er er dog efter Advokatrådets vurdering stor forskel på nødvendigheden i at vedtage hastelovgivning for at modvirke tyveri af håndsprit og mundbind fra et hospital og for at modvirke udnyttelse af ex NemID-oplysninger på internettet, hvor skaden alt andet lige ikke er et spørgsmål om liv og død». *Advokatsamfundet-Institut for Menneskerettigheder, COVID-19-tiltag i Danmark – retssikkerhedsmæssige og menneskeretlige konsekvenser*, cit.

<sup>48</sup> *Lovforslaget er efter Dommerforeningens opfattelse udtryk for en uhensigtsmæssig form for strafferetlig detailregulering, som i praksis risikerer at give anledning til besværlige fortolkningsproblemer*, *Dommerforeningen, Dommerforeningens bemærkninger til hastelov om corona-smitte*, Retsudvalget 2019-20, L 157, bilag 3.

<sup>49</sup> J. Vestergaard in U. Dahlin, *Jurister om Hækkerups hastelov: Overlad strafudmålingen til domstolene*, Information, 27 March 2020.

<sup>50</sup> «Her vil jeg blot pege på, at straffeloven og de deri indeholdte strafferammer udgør et finmasket system, hvor strafferammerne hænger indbyrdes sammen. Hæver man strafferammen meget i en bestemmelse for særlige forhold, skal man holde sig ikke mindst proportionaliteten for øje. Hvordan ser straffen ud for stort set lignende tilfælde bare i andre sammenhænge?» *Dommerforeningen, Dommerforeningens bemærkninger til hastelov om corona-smitte*, cit.

<sup>51</sup> For a reflection on criminal legal systems as “networks” of norms and the impact of decodification, see: M. Papa, *Fantastic Voyage. Attraverso la specialità del diritto penale*, Giuffrè, 2<sup>ed.</sup>, Torino, 2019, pp. 159 ss.

With regards to the content of the bill, the Bar Council noted how the wording crime «based on or in the context of» is too broad and vague, therefore threatening the principle of legality. This is enhanced by the fact that the remarks accompanying the bill state that such condition implies «that the offense in question must have been wholly or partly motivated by or aimed at exploiting the situation in the country», therefore calling for a difficult assessment of an offender's interior motives<sup>52</sup>.

Moreover, according to the Justice Minister, the violation of § 81-d, hence the realization of the aggravating circumstance of having committed a crime «based on or in the context of the Covid-19 Epidemic in Denmark», should be presumed when the violation regards aid packages to counteract the harmful effects of the Covid-19 epidemic or protective equipment such as hand sanitizer and bandages or other scarce resources in the current situation. Similarly, «[...] it should generally be assumed that the violation is based on or has been committed in the context of the covid-19 epidemic in Denmark if the defendant, under the pretext of the covid-19 epidemic, pretends to represent the health authorities or other similar subjects, in order to gain access to a citizen's home, social security number, NEM-ID and other similar information»<sup>53</sup>. On this matter, the President of the Danish Judges' association, Mikael Sjöberg, enucleates an interpretation problem: if, on the one hand, the expression «based on or in the context of the COVID-19 Epidemic in Denmark» entails that there must have been an element of exploitation of the situation by the defendant, then the newly introduced § 81-d would be punishing a specific deplorable conduct. On the other hand, whether it would only be necessary that crimes are motivated by the situation in Denmark as a consequence of Covid-19, then the application would be challenging. Think of the trivial case of a person stealing a small number of facemasks in order to be able to care for his or her infected mother without risking to infect his or her family<sup>54</sup>. Finally, the *Dommerforeningen* addressed the fact that the Ministry of Justice

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<sup>52</sup> «Betingelsen om, at overtrædelsen »har baggrund i eller sammenhæng med covid-19-epidemien i Danmark« indebærer, at den pågældende lovovertrædelse helt eller delvis skal have været motiveret af eller have til formål at udnytte den situation i landet, som covid-19-epidemien i Danmark har medført». Justitsminister Nick Hækkerup, *Almindelige bemærkninger- Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, 26 March 2020.

<sup>53</sup> «Det må dog i almindelighed antages, at en overtrædelse af de i den foreslåede § 81 d, stk. 1, nævnte bestemmelser har baggrund i eller sammenhæng med covid-19-epidemien i Danmark, hvis overtrædelsen vedrører hjælpepakker til imødegåelse af skadevirkninger ved covid-19-epidemien eller værnemidler såsom håndsprit og mundbind eller andre knappe ressourcer i den aktuelle situation. Ligeledes må det i almindelighed antages, at overtrædelsen har baggrund i eller sammenhæng med covid-19-epidemien i Danmark, hvis den tiltalte under påskud af covid-19-epidemien udgiver sig for at repræsentere sundhedsmyndighederne eller lignende med henblik på at få adgang til en borgers hjem, CPR-nummer, NemID eller lignende». Justitsminister Nick Hækkerup, *Almindelige bemærkninger- Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit..

<sup>54</sup> «Hvis bemærkningen derimod kan læses sådan, at den også går på forbrydelser, der er motiveret af, menso ikke har karakter af ud yttelse, " helt eller delvis skal have været otiveret af...den situation i landet, som covid-19-epidemien i Danmark har medført) kan man overveje, om den ikke kommer til at rammeskævt. For eksempel kunne man forestille sig, at en person, hvis 85-årige mor er Coronasyg, begår et tyveriaf (et mindre antal) værnemidler for at kunne pleje moderen uden risiko for at selv at blive smittet eller forat risikere at smitte sin egen familie. Tilsvarende kunne man forestille sig, at to personer i et supermarkedkom op at slås om at få fat i den sidste flaske håndsprit eller lignende. I sådanne situationer, hvor denstrafbare handling ikke begås for at udnytte Covid 19-situationen, men ikke desto mindre er motiveret afsituationen, nemlig den desperation, den forårsager, forekommer det umiddelbart mindre rimeligt at anvende de så stærkt forhøjede strafferammer. Omvendt kan man også i disse tilfælde sige, at der tale ombeskyttelse af knappe ressourcer i en særlig situation». *Dommerforeningen, Dommerforeningens bemærkninger til hastelov om corona-smitte*, cit.

accompanied the proposal of the bill with a list of very specific examples<sup>55</sup>, an action regarded «**pedagogically perhaps very good, but a somewhat inappropriate way of legislating**» since examples are not adequate to reflect daily life as they do not allow for reasonable exceptions<sup>56</sup>.

As of the 22<sup>nd</sup> of July 2020, the Danish Police communicated that out of 50 total reports of theft of hand sanitizer and protective masks filed since March, they charged 29 subjects, with the vast majority of cases taking place in March and April<sup>57</sup>. In the period from the 2<sup>nd</sup> of April 2020 to the 14<sup>th</sup> of November 2020, according to the statements of the Danish Attorney General (*Rigsadvokaten*), 30 judgments have been handed down where the penalty was determined according to the increased penalties provided in § 81-d, stk.2<sup>58</sup>. Likewise, the Special Prosecutor for Exceptional Economic and International Crime (*Statsadvokaten for Særlig Økonomisk og International Kriminalitet, SØIK*) stated that, as of the 8<sup>th</sup> December 2020, it had received 178 reports of fraud relating the Covid-19 relief packages. In the Ministry of Justice's view, «the Danish society is still looking at a crime picture that corresponds to what, in the spring of 2020, called for the adoption of law n. 349/2020»<sup>59</sup>. Interestingly so, the main argument in the bills' proposals of the Justice Minister justifying the request to extend the application of the sanctions contained in law n. 349/2020 is the continuation of the covid-19 epidemic in Denmark, rather than the furtherance of a worrisome criminal scenario (which, as some argued, never existed in the first place)<sup>60</sup>. As it was stated by Kristian Hegaard, spokesperson of Danish Social Liberal Party (*Radikal Venstre*): «It makes no sense. Denmark is in a health crisis – not a crime crisis. The infection rates are high – not the number of crimes. Hand alcohol has not been a scarce resource for months, so the basis on which the law was introduced no longer exist»<sup>61</sup>.

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<sup>55</sup> Nick Hækkerup, *Almindelige bemærkninger- Forslag til lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit.

<sup>56</sup> «Forslaget er så vidt jeg ved - for dommerne har ikke set det - fyldt med eksempler. Det er pædagogisk måske meget godt, men en noget uhensigtsmæssig måde at lovgive på. Eksempler kan aldrig dække dagligdagens virkelighed. Med eksempler risikerer man at snævre, hvor det er utilsigtet, og åbner ikke for rimelige undtagelser. Lad mig give et eksempel på det sidste: Hvordan stiller man sig til den sygeplejerske, der fra sin arbejdsplads – hospitalet – tager en flaske håndsprit med hjem for at beskytte sig og familien ? Skal hun for dette arbejdspladstyveri – for det er det – idømmes en fængselsstraf?». Dommerforeningen, *Brev til Justitsministeren i forbindelse med coronarelateret hastelov*, cit.

<sup>57</sup> A. Hecklen, E. Søndergård Ingvorsen, *Politiet har fået 50 anmeldelser om tyveri af håndsprit og værnemidler: 'Kan give straf som ved knivvold'*, DR, 22 July 2020.

<sup>58</sup> «Under covid-19-epidemien i Danmark er der desværre set en række eksempler på kriminalitet, som har baggrund i eller sammenhæng med epidemien. Det gælder ikke mindst svingagtig udnyttelse af hjælpepakkerne, hvor myndighederne modtager et stadigt stigende antal anmeldelser. Dette indebærer efter Justitsministeriets opfattelse, at det danske samfund grundlæggende stadig ser ind i et kriminalitetsbillede, som svarer til det, der i foråret 2020 nødvendiggjorde lov nr. 349 af 2. april 2020». Justitsministeren, *Forslag til Lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven- Bemærkninger til lovforslaget*, 13 January 2021,1.

<sup>59</sup> Justitsministeren, *Forslag til lov om ændring af lov om ændring af straffeloven, retsplejeloven og udlændingeloven*, cit., 2.1.2.

<sup>60</sup> «Vi har ikke en kriminalitetskrise, vi har en sundhedskrise, og lad os stå sammen om at løse den», Simon Emil Ammitzbøll-Bille (UFG), *Speech during the second reading of Bill no. 157*, 4 April 2020.

<sup>61</sup> «Det giver ingen mening. Danmark står i en sundhedskrise - ikke en kriminalitetskrise. Smittedallene er høje - ikke antallet af forbrydelser. Håndsprit har ikke været en knap ressource i månedsvis, så grundlaget, loven blev indført på, er der ikke længere» in Ritzau, *Regeringen vil have hårde coronastraffe året ud*, Policy Watch,15 January 2021.

We are then left with the following question: was there really an emergency situation calling for such urgent criminal legislation?

#### 4. Conclusive remarks: placebo or panacea?

After having examined the contents of the most recent amendments to the Danish Criminal Code, it is now possible to formulate final observations of a wider scope. As it was cleverly claimed, the use of criminal law by national legal systems during the pandemic has been shifting between opposite poles: from a pathological (*panpenalistic*) or symbolic expansion of criminal punishment, on one hand, to an approach based on a modulation of the offenses<sup>62</sup> on the other. One could argue that it is reasonable for any legal system to introduce norms directed at ensuring that lifesaving equipment (such as respirators, hand sanitizer and face masks) is available to the community. Similarly, legislators could be justified in attaching a specific stigma, through the tightening of sanctions, to those who took advantage of the Covid-19 emergency situation. Nevertheless, such decisions can be justified only in situations of actual criminal crisis, especially when the tool used to affect the criminal legal system is a fast-track legislative process. When this factual factor is missing, the result is a maximalist use of criminal law.

Italy, as a matter of fact, bounced from one extreme to the other in a matter of twenty days: from expressly tying violations of the lockdown norms imposed by the Decrees of the President of the Council of Ministers<sup>63</sup> to article 650 of the Italian Criminal Code<sup>64</sup> (failure to comply with an authority's provision), to prescribing, unless the fact constitutes a criminal offence, an administrative fine<sup>65</sup>. In the Danish case, it could be claimed that prescribing a specific aggravating circumstance in relation to corona-crimes is an adequate tool to fulfill both general prevention and retribution as purposes of punishment. Nonetheless, it is possible to conclude that the criminal scenario in Denmark from the beginning of the Covid-19 emergency did not give rise in the first place to the need of fulfilling them. In other words, there was no criminal emergency, hence there was no need for emergency criminal law.

In conclusion, it is possible to formulate the following reflections. *Panpenalismo* is nothing new, it is just changing form. The diffusion of this phenomenon is indeed worldwide, as the pandemic, and the fact that the risk is a common one leaves a very

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The representatives of the Red-Green Alliance party (*De Rød-Grønne-Enhedslisten*) and of the Danish Social Liberal Party (*Radikal Venstre*) voted against the adoption of law n. 249/2020 and are against the extension of its validity. See also Kristian Hegaard, *Speech during the first reading of draft Bill no. 110*, 11 December 2020.

<sup>62</sup> «Il ricorso alla sanzione "punitiva" si mostra, inoltre, oscillante tra una risposta sanzionatoria panpenalistica o simbolico-espressiva e una più equilibrata valorizzazione della scalarità dell'offesa (da noi, questa seconda via è stata imboccata almeno dal d.l. n. 19 del 2020) ». D. Castronuovo, *Il diritto penale "al tempo della peste"*, in *Diritto Virale. Scenari ed interpretazioni delle norme per l'emergenza Covid-19*, p. 70.

<sup>63</sup> Decree Law no. 6 of 23 February 2020 (*Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*, d.l. 23 febbraio 2020, n. 6, convertito con modificazioni dalla l. 5 marzo 2020, n. 13 in G.U. 09/03/2020, n. 61); Decree of the President of the Council of Ministers of 8 March 2020 (*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19* in GU Serie Generale n.59 del 08-03-2020).

<sup>64</sup> Misdemeanor which can be punished with detention up to 3 months or with a fine up to € 206,00.

<sup>65</sup> For a more in depth analysis with regards to Italy, see *ex multis*: A. Bernardi, *Il diritto penale alla prova del Covid-19*, in *Diritto penale e processo* n. 4/2020, pp. 441-451.

fertile ground for legal comparisons. At the same time, politicians and consequently the media around the globe depict criminal law as the adequate and fast tool to ensure public safety in a criminal emergency: criminal law as the **panacea** for gaining the consensus from the worried citizens. Although there is no real criminal emergency, criminal punishment is portrayed as the way to eradicate the fear of corona crimes – without any attention to the tools provided by existing criminal legal frameworks, which are the result of a democratic process<sup>66</sup>. The result? A **placebo** effect.

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Decree law n. 125 of 7 October 2020 ([\*Misure urgenti connesse con la proroga della dichiarazione dello stato di emergenza epidemiologica da COVID-19 e per la continuita'\*](#)

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<sup>66</sup> «The tendency of criminal lawmakers to obtain social consensus by flattening themselves on media representation is at the origin of the well-known phenomenon of symbolic criminal legislation, i.e. lacking a real rationality of a safeguard purpose [...]. First of all, given the "instantaneousness" of the media representation and its "wave-like" progress, the legislator is always struggling to keep up with the solicitations coming from the media system: numerous legislative initiatives flock, rarely well pondered in their premises, in their development and in their consequences [...]. First of all, given the "instantaneousness" of the media representation and its "wave-like" progress, the legislator is always struggling to keep up with the demands of the media system: many legislative initiatives are crowded, rarely well considered in their premises, their development and their consequences [...]. But beyond that I would like to emphasize another consequence produced by the media system on criminal legislation. We are alluding to the phenomenon [...] of the so-called "photocopy laws": that is those laws that provide for new criminal cases built so to speak in the image and likeness of concrete criminal cases that have had a particular media resonance. These are cases that, far from filling in non-existent legislative gaps, have as their only intent to achieve the immediate conversion of the media representation in normative representation of crime, photographing normatively those particular criminal manifestations to which the media have given greater prominence [*Author's translation*] ». F. Palazzo, *Mezzi di comunicazione e giustizia penale*, cit. p. 208



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