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INHUMAN TREATMENTS APPLIED TO MINORS. CONCEPTUAL DELIMITATION

Diana GRUMEZA*[1]

Abstract:

The actuality of the topic derives from the existence of these dangerous phenomena at the level of society from ancient times up to the present, an aspect that determines us to speak, unfortunately, about the perenniality of the topic approached.

The key to defending human rights is the Universal Declaration of Human Rights, signed by the quasi-unanimity of the world's states. In addition, we have the Convention against Torture and Inhuman or Degrading Treatment or Punishment adopted by the United Nations, the European Convention on Human Rights (ECHR) and the Convention establishing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), to which the Republic of Moldova is a party and has assumed a series of commitments.

At European level, the abolition of the death penalty is a prerequisite for EU membership. In the same context, we add, torture, inhuman or degrading treatment, fall within the same range of aggressions directed against fundamental human rights.

Both at constitutional level and in the organic laws of the Republic of Moldova or in the special legislation, as the case may be, there are stipulated rights and obligations to combat the torture practices, as well as inhuman or degrading treatments.

Comparing the legislation of the Republic of Moldova with the legislation of Romania, as well as with the international legislation regarding the criminalization of torture and inhuman or degrading punishment, we notice sensible approaches.

Keywords:

inhuman, cruel treatments, minors, torture, human rights

Although at first glance, it seems that treating issues related to torture, inhuman or degrading treatment is out of date, being easier to place them in past periods of history, the jurisprudence of the contemporary ECHR abounds in conviction for violation of international law in this area: Case Taştan vs. Turkey (File No 63748/00, settled by judgment of March 4, 2008), Case Dedovski vs. Russia (7178/2003, settled on May 15, 2008), Case Bursuc vs. Romania (file No. 42066/1998 settled by decision of October 12, 2004).

The actuality of the topic derives from the existence of these dangerous phenomena at the level of society from ancient times up to the present, an aspect that determines us to speak, unfortunately, about the

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perenniality of the topic approached. International civil society organizations claim acts of torture and ill-treatment in 131 states of the world[2].

A brief look at the universal framework for the protection of minor rights requires a comprehensive overview of the existing international regulations in this area. An integral part of the applicable law in the Republic of Moldova, international regulations have the role of imposing certain obligations on our state by drawing guidelines or by expressing legal concepts.

1. The international legal framework for the protection of minor rights against inhuman treatment

The key to defending human rights is the Universal Declaration of Human Rights, signed by the quasi-unanimity of the world's states. In addition, we have the Convention against Torture and Inhuman or Degrading Treatment or Punishment adopted by the United Nations, the European Convention on Human Rights (ECHR) and the Convention establishing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), to which the Republic of Moldova is a party and has assumed a series of commitments.

i. The Universal Declaration of Human Rights, in Article 5 states expressly that "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment"[3]. The right of any person not to be subjected to torture or to inhuman or degrading punishment or treatment is a right inherent to the human being deriving from the right to life, liberty and security.

ii. The Convention against Torture and Inhuman or Degrading Treatment or Punishment, adopted by the United Nations (O.N.U.) in New York in 1984, defines in Article 1 the term "torture" in the sense: "any act by which intentional powerful pain or suffering is caused to a person, whether physical or mental, in particular for the purpose of obtaining from that person or from a third person information or confessions, to punish him/her for an act committed by him/her or by a third person or suspected to have committed it, to intimidate or exert pressure upon him/her or a third person or for any other reason based on a form of discrimination

[2] Special Report of the European Court of Auditors https://www.eca.europa.eu/Lists/ECADocuments/SR15_09/SR_TORTURE_RO.pdf (accessed on 07.12.2017).

[3] Universal Declaration of Human Rights, available at http://www.anr.gov.ro/docs/legislatie/internationala/Declaratia_Universala_a_Drepturilor_Omului.pdf (accessed on 04.12.2017).

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whatever it may be, when such pain or such suffering is enforced by an officer of the public authority or by any other person acting in an official capacity or at the instigation or with the express or tacit consent of such persons. This term does not refer to pain or suffering resulting solely from legal sanctions, inherent to or caused by such sanctions. [4]"

iii. The same above-mentioned Convention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regulates from a institutional point of view the legal framework for the establishment of a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in order to examine the treatment of persons deprived of their liberty with a view to strengthening, where appropriate, their protection against torture and inhuman or degrading treatment or punishment.

iv. The European Convention on Human Rights (ECHR) provides in Article 3 with the marginal note "banning torture" that "no one can be subjected to torture or to inhuman or degrading punishment or treatment."

v. UN Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989, ratified by the Republic of Moldova by the Decision of the Parliament No.408-XII of 12.12.1990. The Convention is a synthesis of the rights of the minor, which regulates - among the many natural rights of the child - no child being subjected to torture, punishment or cruel, inhuman or degrading treatment. The capital punishment or life imprisonment without the possibility of being released shall not be ruled for offenses committed by persons under the age of 18. (Article 37 (a)). In addition to the principle of the minor's best interest (Article 3), the UN Convention on children's rights also regulates other incidental principles that affect the child. We have in mind: the right of the child to express his or her opinion on any matter that concerns him/her (Article 12); the right of the child to freedom of expression (Article 13); the right of the child to freedom of thought, conscience and religion (Article 14); the right of the child to have access to information (Article 17); the right of the child to education (Article 28).

vi. The United Nations Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) of December 17, 2015 also provide for an urgent investigation by an independent national authority of the situations of

[4] Convention Against Torture and Inhuman or Degrading Treatment or Punishment, available at http://www.hotararicedo.ro/files/files/CONVENTIA%20IMPOTRIVA%20TORTURII%20SI%20ALTOR%20PEDEPSE%20ORI%20TRATAMENTE%20CU%20CRUZIME,%20INUMANE%20SAU%20DEGRADANTE.pdf (accessed on 04.12.2017).

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torture, inhuman or degrading treatment or cruel punishment applied to detainees, the complaints of people deprived of liberty related to such extreme abuses must be confidential.

vii. The World Medical Association, in the 1975 Tokyo Declaration on Torture and Degrading Treatment, highlights key elements included in the definition of torture, which we mention:

a) intentional character: torture causes physical or mental suffering to the victim intentionally;

b) systematic and wild nature: the causing of suffering may be systematic and planned in advance, or it may be wild and at random;

c) purpose: there should be a purpose of torture. It could be obtaining information, forcing a confession of a crime, signing a written statement or any other reason. For example, it could be to spread terror into the community in a dictatorial regime. It could be an attempt to destroy the personality of someone who might be able to mobilize people against the regime;

d) mental and physical suffering: this definition mentions that physical and mental suffering is one aspect according to which it can be seen if a person has been tortured or not. The absence of any physical sign does not exclude the possibility of torture. Even small physical or mental sufferings are enough to be considered torture[5].

2. European legal framework for the protection of minor rights against inhuman treatment

At European level, the abolition of the death penalty is a prerequisite for EU membership. In the same context, we add, torture, inhuman or degrading treatment, fall within the same range of aggressions directed against fundamental human rights.

i. In the criminal field, however, at EU level, efforts are timid. However, given the importance of the field in question, EU adopted in 2005, the EC Regulation no. 1236 on the trade in certain goods susceptible of being used for the purpose of imposing capital punishment, torture and

[5] Osipov Vladimir, Cojocaru Radion, "Notiunea de tortura, tratament inuman si degradant, pedeapsa inumana sau degradanta in jurisprudenta C.E.D.O." ("The notion of torture, inhuman or degrading treatment, inhuman or degrading punishment in ECHR jurisprudence") in Revista Nationala de Drept no.6-7/2011, p. 43, available at https://ibn.idsi.md/sites/default/files/imag_file/Notiunea%20de%20tortura%20161_163.pdf (accesata la 04.12.2017).

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other cruel, inhuman or degrading treatment or punishment[6], as amended by Implementing Regulation No. 775/2014.

ii. In 2012, through "Guidelines on Torture and Other Cruel Treatments", EU reconfirms its firm stance on torture and inhuman or degrading treatment.

These "Guidelines" fall under the category of "other EU normative acts", but are not binding on Member States, being rather an expression of an official position of the Union in an area where its competence is not full.

Therefore, "The Guidelines on Torture and Other Cruel Treatments"[7] are meant to highlight the commitment of the EU in the fight against torture, inhuman or degrading treatment, through clear support for international regulations, and by taking concrete measures within the framework of the Common Foreign and Security Policy.

At EU level the financial instrument providing funds for the fight against torture, and the death penalty is called the European Instrument for Democracy and Human Rights, through which, for example, the European Commission has granted at the level of prior EU budget not less than 100.9 million Euro to finance and / or support rehabilitation projects for the victims of torture, and for the abolition of the death penalty. EU recognizes, however, that despite all its efforts, the effectiveness of these projects remains limited.

3. National legal framework for the protection of juvenile rights against inhuman treatment

Both at constitutional level and in the organic laws of the Republic of Moldova or in the special legislation, as the case may be, there are stipulated rights and obligations to combat the torture practices, as well as inhuman or degrading treatments.

3.1. The Constitution of the Republic of Moldova guarantees the right of every person to physical and mental integrity, prohibiting torture, as well as cruel, inhuman or degrading punishments or treatments. The absolute nature of these rights stems also from the non-admission of

[6] EC Regulation no. 1236/2005 on trade in certain goods susceptible to be used in order to impose capital punishment, torture and other cruel, inhuman or degrading treatment or punishment, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:r12535&from=RO (accessed on 05.12.2017).

[7] Guidelines on torture and other cruel treatments, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:r10109&from=RO (accessed on 05.12.2017).

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limitations of these rights (Article 24, corroborated with Article 54 paragraph 3).

3.2. The Criminal Code of the Republic of Moldova regulates the principle of humanism (Article 4). Principally, "the criminal law does not pursue the purpose of causing physical suffering or harming the dignity of man. No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment "(Article 4 paragraph 2),

Naturally, as with other laws of the rule of law, the crime of torture is imprescriptible from the point of view of criminal responsibility (Article 60 paragraph 8).

The Criminal Code condemns torture, both as an offense against humanity (Article 135¹ letter d): "the torturing of a person under the care of the perpetrator or over which he/she exercises control in any other way, causing serious bodily or health injuries, psychological pain or suffering, overcoming the consequences of sanctions allowed by international law ", as well as a distinct crime, in two forms Article 166¹ paragraph 1: "The intentional causing of physical or mental pain or suffering, which represents inhuman or degrading treatment, by a public person or by a person who de facto exercises the powers of a public authority or by any other person who acts in an official capacity or with the express or tacit consent of such person", namely Article 166¹ paragraph 3 "Any intentional act by which a person is subjected to powerful physical or mental pain or suffering in order to obtain information or confessions from that person or from a third person, to punish him/her for an act which he/she or a third party has committed or is suspected of having committed, to intimidate him/her or exert pressure on him/her or on a third person, or for any other reason based on a form of discrimination, whatever it may be, when such pain or suffering is caused by a public person or by a person who de facto exercises the duties of a public authority, or by any other person acting in an official capacity or with the express or tacit consent of such a person", as well as in aggravated forms in Article 166¹ paragraphs 2 and 4.

3.3. The Code of Criminal Procedure of the Republic of Moldova regulates the prohibition of torture, cruel, inhuman or degrading treatment in criminal proceedings, provided that the criminal trial is governed by the imperative of respecting the rights, freedoms and dignity of the person.

Thus, Article 10 paragraph 3 states that "In the conduct of criminal proceedings, no one can be subjected to torture or to cruel, inhuman or degrading treatment, no one can be detained in humiliating conditions, cannot be forced to participate in procedural actions damaging human dignity", the duty of evidence, belonging according to Article 10 paragraph 3¹ "to the authority in the custody of which the person deprived of his

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liberty is placed at the disposal of a state body or at its indication or with its tacit consent or agreement."

The rights of the victim of a crime of torture during criminal proceedings are governed by Article 58 paragraphs 4 and 5[1], corroborated with Article 147 the victim of such an offense being entitled to be assisted by a lawyer throughout the criminal proceedings like the other parties to the proceedings; being assisted by a lawyer who provides state-guaranteed legal assistance if he/she does not have money to pay the lawyer; to be accompanied by a trusted person, alongside his/her lawyer, in all inquiries, including closed hearings; to receive a court order on material compensation for the damage caused by means of the offense; to be subject to complex expertise on mental or physical condition.

3.4. Naturally, all these rights, regarding the person in general, are also applicable to minors. In this respect, Law no. 338/2004 on the rights of the child, within the framework of Article 4, with the marginal note "The right to life" regulates in paragraph 2 expressly that "No child shall be subjected to torture, cruel, inhuman or degrading treatment or punishment."

3.5. Decision no. 583/2006 on the status of the execution of punishment by convicts stipulates in paragraph 80 that "Relations between detainees and prison staff are determined by the purposes of detention and are based on the principles of mutual respect, non-discrimination, prohibition of subjection to torture, inhuman or degrading treatment, or other ill-treatment, humanism, democracy and strict observance of the legislation", expressly stipulating the obligation of the doctor of the detention unit to notify the prosecutor in this respect, as well as to record the findings, the administration of the penitentiary being obliged to notify the family of the person under detention.

The proximity of the neighbouring state, Romania, integrated in the EU, the desideratum of the Republic of Moldova to the values and principles of the EU, determines us to also analyze the Romanian regulations in the same field: torture and ill-treatment.

4. The Romanian legal framework for the protection of minor rights against inhuman treatment

4.1. The Constitution of Romania, in Article 22 with the marginal note "the right to life and to physical and mental integrity" regulates in paragraph 2 the prohibition that "no one may be subjected to torture or to any kind of punishment or inhuman or degrading treatment."

4.2. The Romanian Criminal Code regulates the offense of torture as a distinct offense (Article 267[1] - The act by which a person is intentionally

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caused powerful or intense physical or psychological pain or suffering, especially for the purpose of finding from this person or from another person, information or confession, to punish him/her for an act committed by him/her or by a third person, or suspected of having committed it, to intimidate or exert pressure on him/her, or to intimidate or exert pressure on a third person or for any other reason based on a form of discrimination whatever it may be, when such pain or suffering is committed by an official of the public authority or by any other person acting in an official capacity or at the instigation or with the express or tacit consent of such persons, and Article 282 - The act of the civil officer having a role involving the exercise of the state authority or of other person acting at the instigation or with his/her express or tacit consent in order to cause to a person powerful physical or mental suffering: a) for the purpose of obtaining information or statements from that person or third person; b) For the purpose of punishing him/her for an act committed by him/her or a third person or is suspected to have committed it; c) in order to intimidate or exert pressure on him/her, or intimidate or exert pressure on a third person; d) on a ground based on any form of discrimination), but also as a means of committing other crimes, such as crimes against humanity (Article 439, letter e - Committing in a general or systematic attack launched against a civilian populations of one of the following acts: torture of a person under the care of the perpetrator or over which he/she exercises control in any other way, causing him/her physical or mental harm or serious physical or psychological suffering that exceeds the consequences of sanctions allowed by international law).

The offense of subjection to ill-treatment is regulated separately, respectively in Article 267 Criminal Code. Thus, it is defined as subjection to ill-treatment of a person in a state of restraint, detention, or execution of a punishment.

Both the offense of torture and that of subjection to ill-treatment are regulated in the Chapter on "crimes that impede justice".

In the chapter "Offenses against bodily integrity and health", in Article 197, the Romanian legislature regulated the offense of "ill-treatment applied to the minor" consisting in "seriously endangering, by measures or treatments of any kind, the physical, intellectual or moral development of the minor by parents or by any person which cares for the minor".

4.3. Romania's Code of Criminal Procedure is poorer in provisions on the prohibition of torture, inhuman or degrading treatment.

Article 102 paragraph1 establishes the prohibition of the use of torture evidence in criminal proceedings. It is absolutely natural for such intent, and such evidence shall be excluded even in the absence of an injury.

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Such a provision is inherent to the recognition of the principle of loyalty to the administration of evidence, the natural will of the legislator being that to ensure a balance between the public, collective interest of the society of criminal liability of the person guilty of committing a crime and the individual interest of the one to be held criminally responsible, consisting in the strict observance of its procedural rights, as well as the abolition of any form of abuse by the persons responsible for the prosecution.

Paradoxically, "the Roman legislator provided only for the exclusion of evidence obtained through torture, not of that obtained by inhuman or degrading treatment, in relation to which it is necessary to reconsider this position in accordance with the practice of the European Court of Human Rights." Novac (2016)

Also, according to Article 185 paragraph 2 the medical forensic autopsy is mandatory if the death of the person occurred during the period when the person is in police custody, of the National Penitentiary Administration, during the involuntary medical admission or in case of any death raising the suspicion of human rights violation, the application of torture or of inhuman treatment.

In practice, however, such autopsies are performed superficially. This is because the results could lead to blaming a whole system.

4.4. Law no. 272/2004 on the rights of the child regulates the child's protection against abuse, neglect, exploitation and any form of violence, in which sense it explicitly states that "the parents of the child or, as the case may be, another legal representative, the public authorities and the private bodies have the obligation to take all appropriate measures to facilitate the physical and psychological rehabilitation and social reintegration of any child who has been the victim of any form of neglect, exploitation or abuse, torture or punishment, cruel, inhuman or degrading treatment. (Article 90 paragraph 1)

In addition, the express regulation and the detailing of the principle of the minor's best interest (Article 2) is added. The child's best interest is circumscribed to the child's right to normal physical and moral development, to socio-affective balance and to family life. The principle of the best interests of the child is also enforced in relation to the rights and obligations of the child's parents, of other legal representatives, and of any person to whom he / she has been legally placed. The principle of the best interests of the child will prevail in all approaches and decisions concerning children, undertaken by public authorities and authorized private bodies, as well as in the cases solved by the judiciary courts. The determination of the best interests of the child shall include at least the following: a) the needs of physical, psychological, educational and health development, security and

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stability and belongingness to a family; b) the child's opinion, depending on the age and degree of maturity; c) the child's history, especially considering situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future; the ability of parents or carers that have to grow and care for the child to meet his/her specific needs; maintaining personal relationships with people to whom the child has developed attachment relationships.

4.5. Law no. 294/2004 regarding the execution of the punishments and the measures ordered by the judicial bodies during the criminal trial, which in Article 3 stipulates that "the punishments are executed under conditions that ensure the observance of human dignity" and in Article 4 "it is forbidden to subject any person who has to serve a sentence to torture, inhuman or degrading treatment or other ill-treatment."

The set of existing regulations at national (of the Republic of Moldova and Romania), European and international level, highlights the concrete efforts towards the abolition of all forms of torture and ill-treatment.

Conclusions

The international community has made constant efforts to eradicate torture and other forms of ill-treatment. However, surprisingly, every year we find out about cases of torture or other inhuman or degrading treatment. ECHR jurisprudence: it is the most obvious barometer for these situations, many times the cases brought before the European Court of Human Rights, finalized by convictions of states for torture or ill-treatment, result in onerous punishments for states that are guilty of violation of human rights under the above mentioned issues.

Cases of torture or ill-treatment are all the more dangerous, as the children are the victims. Unfortunately, many of the real torture cases cannot be proven, the lack of evidence being due to the "mastery" of the torturers, the lack of witnesses, the fear of victims giving statements, etc.

The ratification of international legal instruments, of existing conventions at international level for the protection of human and child rights means for the Republic of Moldova a clear entry on the trajectory of the democratic states. However, delays to recover still remain, at least in the area of interest of our research topic.

Comparing the legislation of the Republic of Moldova with the legislation of Romania, as well as with the international legislation regarding the criminalization of torture and inhuman or degrading punishment, we notice sensible approaches, both from the perspective of the regulation in

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the constitutions of both states, as well as from the provisions of criminal codes, in that in both of these organic laws mentioned, torture appears both as an offense against humanity and as distinct regulation. In one case and in the other, it is clear that the definition of torture is the same as that provided in the Convention against Torture and Inhuman or Degrading Treatment or Punishment.

In the case of subjection to ill-treatment, we note that in the law of the Republic of Moldova is one and the same offense "torture, inhuman or degrading treatment", while in Romania's legislation there is a clear dichotomy between the crime of torture and that of subjection to the treatments, regulated in the economy of the text of the Criminal Code in distinct articles. This differentiation clarifies the concepts and dissociates them with greater precision, which is why we consider that a distinction between the two forms of extreme abuse (torture, on the one hand, inhuman or degrading treatment, on the other hand) is also necessary in the legislation of the Republic Moldova.

At the same time, we consider that the express entry in the legislation of the Republic of Moldova of the prohibition of the use in trials of evidence obtained through cruel or inhuman treatment, as well as through torture, is imperative.

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