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THE OFFENSE OF TORTURE IN TERMS OF THE STANDARDS AND PRECEDENTS OF THE ECHR

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In the given article it is analyzed the offense of torture incriminated in the art. 166¹ of the Criminal Code of the Republic of Moldova in terms of the normative standards established by the ECHR and the jurisprudence of the European Court. As a result, there were evaluated the essential features of the national normative framework of the incrimination of torture in relation to the existing European standards and practices in this domain. The pertinent conclusions made by the authors offer the possibility of the understanding of the premises of the definition and incrimination of the torture and inhuman or degrading treatment in the criminal legislation of the Republic of Moldova.

Keywords: *torture, inhuman treatment, degrading treatment, offense, punishment.*

INFRAȚIUNEA DE TORTURĂ PRIN PRISMA STANDARDELOR ȘI PRECEDENTELOR CEDO

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În prezentul articol este analizată infracțiunea de tortură incriminată la art. 166¹ C.pen. al R. Moldova prin prisma standardelor normative instituite prin CEDO și jurisprudența Curții europene. Drept rezultat, au evaluate trăsăturile esențiale ale cadrului normativ național de incriminare a torturii în raport cu standardele și practicile europene existente în acest domeniu. Concluziile pertinente făcute de către autori oferă posibilitatea înțelegerii premiselor de definire și incriminare a torturii și a tratamentelor inumane sau degradante în legislația penală a R. Moldova.

Cuvinte cheie: *tortură, tratament inuman, tratament degradant, infracțiune, pedeapsă.*

Introduction. In the art. 3 of the European Convention on Human Rights (hereinafter referred to as ECHR) it is stipulated: “No one shall be subjected to torture or to inhuman or degrading punishments of treatment”. This provision is of a very general nature and is the shortest norm of the Convention, the content of which should be traced and interpreted in terms of the jurisprudence of the European Court. The prohibition stipulated in the art. (3) of the ECHR is of absolute nature, since no exception to this provision is allowed.

The first obligation imposed by the art. 3 of the European Convention is of a nega-

tive nature and is expressed by the abstinence of the state agents from the application of the acts of torture, inhuman or degrading treatment of the persons under their authority. An obligation of the positive nature presented to the signatory states is to take all necessary measures for the prevention of the exposure of people to torture or inhuman or degrading treatment. These measures include also the creation of an effective national incriminating framework of the prevention of torture and inhuman treatment that would ensure the punishment of the persons responsible for the application of such treatment.

Used methods. For the critical analysis and examination of the problematics that forms the object of the concern of the given article were used the specific research methods, such as: method of comparative analysis, method of logical interpretation and case study of the decisions of the European Court pronounced on the concrete cases of the violation of the art. 3 of the ECHR.

Obtained results and discussions. In order to ensure the positive obligation of the incrimination and punishment of the acts of torture, in the art. 166¹ of the Criminal Code of the Republic of Moldova it is stipulated the criminal liability for the act of *torture, inhuman or degrading treatment*. From the point of view of the legislative technique this article is structured in four paragraphs, in which it is stipulated the criminal liability for two distinct offenses:

- Inhuman or degrading treatment (art. 166¹ par. (1) of the Criminal Code);
- Torture (art. 166¹ par. (1) of the Criminal Code).

Inhuman or degrading treatment (art. 166¹ par. (1) of the Criminal Code) is the intentional causing of physical or mental pain or suffering that represents the inhuman or degrading treatment, by a public person or by a person that de facto exercises the powers of a public authority or by any other person acting in the official capacity or with the express or tacit consent of such a person. In the par. (2) of the art. 166¹ of the Criminal Code the following aggravating forms of the offense are provided: (a) consciously to a minor or to a pregnant woman or taking advantage of the known or obvious helpless state of the victim because of advanced age, illness, disability or other factor; b) to two or more persons; c) by two or more persons; d) using the weapons, special instruments or other objects adapted to this purpose; e) by a public functionary or by a person with the position of public dignity; (f) that by inadvertence caused serious or average harm to the corporal integrity or health; (g) that by inadvertence caused the death of person or his/her suicide.

Torture (art. 166¹ par. (3) of the Crim-

inal Code) is any intentional act by which a person is subjected to the strong physical or mental pain or suffering for the purpose of the obtainment from this person or from a third person the information or confessions, to punish him/her for an act that he/she or a third person committed or is suspected of having committed, to intimidate or to exercise the pressure on him/her or on a third person, or for any other reason based on a form of discrimination, whatever would be, when such pain or suffering is caused by a public person or by a person that de facto exercises the functions of a public authority or by any other person acting in the official capacity or with the express or tacit consent of such a person. In the par. (4) of the art. 166¹ of the Criminal Code are provided the following aggravating forms of the offense: (a) consciously to a minor or to a pregnant woman or taking advantage of the known or obvious helpless state of the victim because of advanced age, illness, disability or other factor; b) to two or more persons; c) by two or more persons; d) using the weapons, special instruments or other objects adapted to this purpose; e) by a public functionary or by a person with the position of public dignity; (f) that by inadvertence caused serious or average harm to the corporal integrity or health; (g) that by inadvertence caused the death of person or his/her suicide.

The formulation of the norm of the incrimination of torture and inhuman or degrading treatment in the art. 166¹ of the Criminal Code of the Republic of Moldova was influenced largely by the interpretations of the jurisprudence of ECHR existing in the content of the art. 3 of the European Convention. Proceeding from this premise, we come to the idea that the correct interpretation and application of the norm to which we refer should be made in accordance with the principles and decisions pronounced by the European Court.

The starting point is the objective of the art. 3 of the ECHR that is the defence of the physical and moral integrity of person as well as of his/her dignity. This interpretation was the basis for the description of the act of tor-

ture in the Chapter III of the special part of the Criminal Code, entitled *Offenses against the freedom, honour and dignity of person*. Through the incrimination of torture, inhuman or degrading treatment should be pursued primarily the protection of the social relationships regarding the human personality and not of the social relationships of another nature, such as those relating to the performance of the act of justice. Thus, the first finding that it is imposed is that the positioning of the act of *torture, inhuman or degrading treatment* in the Chapter III of the special part of the Criminal Code is in accord with the meaning of the art. 3 of the European Convention, i.e. the protection of human dignity.

By virtue of the statements we can conclude that the purpose of the art. 3 of the Convention underlies the explanation of the content of the main legal object of torture, inhuman or degrading treatment (art. 166¹ of the Criminal Code) that proceeding from these grounds forms the social relationships regarding the protection of the dignity of the person.

Another premise to be considered in the evaluation of the extent to which the Republic of Moldova understood to honour its obligation of the incrimination and punishment of torture relates to the delimitation of various forms of maltreatment prohibited by the art. 3 of the Convention. The norm makes a gradual distinction between the torture that represents a *cruel treatment, with particular physical and mental suffering for the victim*, and other treatment or punishments that without causing the sufferings of such intensity are considered as being *inhuman and degrading* being subject to prohibition.

Proceeding from this distinction that is made by the text itself of the art. 3 of the Convention and the Court in its jurisdiction activity (Decision of ECHR of September 26th, 1997 *Aydin v. Turkey*, Decision of ECHR of July 28th, 1999 *Selmouni v. France*, Decision of ECHR of July 11th, 2000 *Dikme v. Turkey*, Decision of ECHR of March 06th, 2006 *Menesheva v. Russia*), the lawmaker incriminated the act of the inhuman or degrading treatment (art. 166¹ par. (1) of the

Criminal Code) distinctly from that of torture (art. 166¹ par. (3) of the Criminal Code).

From the sanctioning regime itself applied for the commission of the above-mentioned acts results that torture is considered to be a more serious offense than the inhuman or degrading treatment. The punishment for the inhuman or degrading treatment performed in the typical variant is the imprisonment from 2 to 6 years with the deprivation of the right to occupy certain positions or to exercise a certain activity for a period from 3 to 5 years (art. 166¹, par. (1) of the Criminal Code), and for torture – the imprisonment from 6 to 10 years with the deprivation of the right to occupy the certain positions or to exercise a certain activity for a period from 8 to 12 years (art. 166¹, par. (1) of the Criminal Code). For the inhuman or degrading treatment committed in the aggravating circumstances it is instituted the punishment by the imprisonment from 3 to 8 years with the deprivation of the right to occupy certain positions or to exercise a certain activity for a period from 5 to 10 years (art. 166¹, par. (2) of the Criminal Code) and for torture in the aggravating circumstances – the imprisonment from 8 to 15 years with the deprivation of the right to occupy certain positions or to exercise a certain activity for a period from 10 to 15 years (art. 166¹, par. (4) of the Criminal Code).

In its jurisdictional activity, the Court established the obligatoriness of the determination of the form of maltreatment applied to the applicant: “In order to determine whether a particular form of maltreatment can be qualified as **torture**, it should be taken into account the distinction stipulated in the article 3 between this term and that of the **inhuman or degrading treatment**. As it was found previously, it seems that the intention was that the Convention should stigmatize through such a distinction the deliberate inhuman treatment that causes very serious and cruel sufferings” [1] (under No.).

Neither the art. 3 of the Convention, nor the European Court during its jurisdictional activity provided a notion of torture.

However, the Court approved partially the definition stipulated in the United Nations Convention against torture. This refers to: “any act by which it is provoked to a person, with intention, strong pain or sufferings, of physical or mental nature, in particular for the purpose of the obtainment from this person or from a third person the information or confessions, to punish him/her or a third person for an act that he/she committed or is suspected of having committed, to intimidate or to exert pressure on a third person, or for any other reason based on a form of discrimination, whatever it is, when such pain or suffering is caused by an official of the public authority or any other person acting in an official capacity, or at the instigation, or with the express or tacit consent of such persons”. [2]

Therefore, the acts of torture are characterized by the following distinctive features:

- means any particular pain or suffering, physical or mental;
- assumes the intention of the perpetrator to produce them;
- the subject that produces them is an official of the public authority or a person acting at the instigation or with his/her express or tacit consent;
- the purpose of the application of such acts consists in the obtainment of information or testimonies, application of a punishment for an act committed by a victim or another person, as well as for the exercise of the pressure on the victim or on another person.

Examining carefully the incriminating provision regarding the inhuman or degrading treatment (art. 166¹ par. (1) of the Criminal Code) and that regarding the torture (art. 166¹ par. (3) of the Criminal Code) it can be stated that both the intention, as well as the special capacity of the subject of the offense are the common signs, characteristic and related to both criminal actions. Therefore, for the correct delimitation of these two facts the priority will be given to the **severity of the physical or mental suffering caused by the official** (in case of torture it is strong) and to the **purpose** (obtainment of information or confessions, punishment for an act that he/

she or a third person committed or is suspected of having been committed), accordingly, the **reason of the commission of the act** (to intimidate or to exercise the pressure on he/she or a third person, or for any other reason, based on a form of discrimination) .

In one case, the European Court concluded: „... *the fact that pain or suffering was caused intentionally in order to obtain the recognition of guilt is a factor to be taken into account when it is decided whether the maltreatment was torture*” [3] .

This conclusion of the Court should be taken into account in the correct interpretation and application of the national law in the matter of the offense of torture, inhuman or degrading treatment. The intention of the causing of a strong physical or mental suffering, aligned with the objective to obtain the testimonies or statements from the victim represents a serious foundation to qualify the act according to the art. 166¹ par. (3) of the Criminal Code – torture. Therefore, in the assessment of the acts of torture by the courts will prevail both the objective element of the act represented by the causing of a **strong suffering**, and the subjective, i.e. **the intention and purpose or reason of its commission** (see above).

In another case the main criterion by which was guided the European Court at the determination of torture was of the objective nature, represented by the method of maltreatment and its susceptibility to cause a particular suffering to the victim. Thus, the Court notes, in particular, “... the intensity of the blows applied to the applicant as a result of which he suffered very serious bodily injuries. As a result of these injuries, the applicant was approximately 70 days in the hospital during different periods between July and November 1998. An important element that should be taken into consideration are the consequences that the maltreatment had on the health of the applicant. The Court also attributes great importance to the young age of the applicant (seventeen years old on the day of the events) the fact that made him particularly vulnerable before his aggressors. However, the decisive

element for the determination of the form of maltreatment is the practice called falaka (hitting of feet), which the applicant was subjected to. This is a form of the particularly condemnable maltreatment that involves the intention to obtain information, to intimidate or to punish. The Court reminds that in the case of *Salman v. Turkey* stated that the use of the falaka practice accompanied by the blows in the area of chest constituted the torture. In such circumstances, the Court considers that the violence applied against the applicant was of a particularly serious nature, capable to cause severe pains and cruel sufferings that can be considered as the acts of torture within the meaning of the article 3 of the Convention”. [4]

Other forms of treatment that the European Court determined as equivalent to the torture include: severe forms of falaka blows/phalange: blows on the feet [5]; severe blows, combined with the refusal of the provision of medical treatment [6]; electric shocks, treatment by hot and cold water, blows on the head and threats of the maltreatment of the children of the applicant [7], etc.

Conclusions. At the definition of the torture and inhuman or degrading treatment in the art. 166¹ of the Criminal Code, the Moldavian legislator was guided by three descriptive criteria:

– the notion of torture stipulated in the art. 1 of the UNO Convention against torture and other cruel, inhuman or degrad-

ing punishments and treatment of December 10th, 1984, adopted in New York and that was adopted by the European Court at the evaluation of the degree of interference of the art. 3 of the Convention;

– the text of the art. 3 of the European Convention in which are distinguished the forms of maltreatment: torture, inhuman or degrading treatment, inhuman or degrading punishment;

– ECHR jurisprudence, according to which, depending on the severity threshold it is differentiated the torture from other forms of maltreatment.

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3. Decision of ECHR of December 18th, 1996, *Aksoy v. Turkey*.
4. Decision of ECHR of April 4th, 2006, *Corsacov v. Moldova*.
5. Decision of ECHR of July 28th, 1999, *Selmouni v. France*.
6. Decision of ECHR of June 27th, 2000, *Ilhan v. Turkey*.
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