TORTURE IN SCHOOLS: FROM THE PERSPECTIVE OF THE CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA

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***Abstract**: According to the Criminal Code of the Republic of Moldova, the following persons may commit the crime of torture, inhuman or degrading treatment: (i) public person; (ii) the person who, de facto, exercises the powers of a public authority; (iii) any other person acting in an official capacity; (iv) any other person acting with the express or tacit consent of a person acting in an official capacity. These special qualities are alternative. Under this aspect, in judicial practice, the question arose as to whether teachers can be included in any category as subjects of the crime in question. Judicial practice does not provide a clear answer. Ill-treatments in schools/educational institutions are a pressing problem (and not only in the Republic of Moldova) and which calls for prompt and fair intervention by the state. In this sense, we have proposed solutions suitable for consideration by the courts and by the Parliament taking into consideration the practice of other states and international standards.*

***Keywords**: teachers, torture, inhuman or degrading treatment, jurisprudence, Criminal Code of the Republic of Moldova.*

1. Introduction

In line with the international treaties to which it is a party of, the Republic of Moldova is obliged to create effective mechanisms to prevent and eradicate torture, inhuman and/or degrading treatments. The application of any form of torture or ill-treatment is absolutely[1] prohibited

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[1] For example, see in this regard: Steven Greer, *Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gäfgen Case*, in: Human Rights Law Review, 2011, Volume. 11, Issue 1, pp. 67-89,

in all circumstances,[2] including in the context of the fight against terrorism and other serious crimes. This principle has always been supported by the European Court of Human Rights (ECtHR).[3]

Thus, article 166[1] of the Criminal Code of the Republic of Moldova (hereinafter – CC RM) establishes liability for torture, inhuman or degrading treatment. This article provides the following:

"(1) The intentional infliction of physical or mental pain or suffering, which represents inhuman or degrading treatment, by a public figure or by a person who, de facto, exercises the powers of a public authority, or by any other person acting in the capacity officially or with the express or tacit consent of such a person, shall be punished with imprisonment from 2 to 6 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 3 to 5 years.

(2) The actions provided for in para. (1):

a) knowingly committed against a minor or a pregnant woman or taking advantage of the known or obvious state of helplessness of the victim, which is due to advanced age, illness, disability or another factor;

b) committed against 2 or more people;

c) committed by 2 or more people;

d) committed by using a weapon, special tools or other objects adapted for this purpose;

e) committed by a person in a position of responsibility or by a person in a position of public dignity;

f) who recklessly caused a serious or moderate injury to bodily integrity or health;

g) who due to imprudence caused the person's death or suicide;

h) committed on bias motivation,

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https://doi.org/10.1093/hrlr/ngr001; Stijn Smet, *The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR. Truly a question of scope only?* In: Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*. Cambridge: Cambridge University Press, 2013, pp. 273-293; Natasa Mavronicola and Francesco Messineo, *Relatively Absolute? The Undermining of Article 3 in Ahmad v UK*, in The Modern Law Review, 2013, Volume 76, Issue 3, pp. 589-603; Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR. Absolute Rights and Absolute Wrongs*, Oxford: Hart, 2021, pp. 27-56 etc.

[2] Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances,* Cambridge: Cambridge University Press 2013, pp. 175-202; Corina Heri, *Responsive Human Rights. Vulnerability, Ill-treatment and the ECtHR*, Oxford: Hart, 2021, pp. 5-16.

[3] Daniel Goinic, *Trial and punishment of torture and ill-treatment – case law analysis*. Chisinau, 2022. Available at: https://crjm.org/wp-content/uploads/2022/12/Judecarea-si-sanctionarea-torturii-ENG_final.pdf [accessed: 01.11.2024].

shall be punished with imprisonment from 3 to 8 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 5 to 10 years.

(3) Torture, i.e. any intentional act by which a person is inflicted with severe physical or mental pain or suffering with the aim of obtaining information or confessions from this person or a third person, to punish him or her for an act that he or she third person has committed it or is suspected of having committed it, to intimidate her or to exert pressure on 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 powers 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,

shall be punished with imprisonment from 6 to 10 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 8 to 12 years.

(4) The actions provided for in para. (3):

a) knowingly committed against a minor or a pregnant woman or taking advantage of the known or obvious state of helplessness of the victim, which is due to advanced age, illness, disability or another factor;

b) committed against 2 or more people;

c) committed by 2 or more people;

d) committed by using a weapon, special tools or other objects adapted for this purpose;

e) committed by a person in a position of responsibility or by a person in a position of public dignity;

f) who recklessly caused a serious or moderate injury to bodily integrity or health;

g) who due to imprudence caused the person's death or suicide,

shall be punished with imprisonment from 8 to 15 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 10 to 15 years."

In this context, the following question arises: can teachers be held liable based on the said article? We wonder, because the statistical data show that in the period 2013-2022, 8% of the crimes aimed at ill-treatment of students were committed by teachers and, respectively, directors of educational institutions.[4]

2. The position of the General Prosecutor

In 2021, the Prosecutor General of the Republic of Moldova submitted an appeal to the Supreme Court of Justice in the interest of the law. The

[4] *Ibidem*.

General Prosecutor requested the Supreme Court of Justice to answer the question formulated above, specifying that, in the practice of courts of all levels, including the jurisprudence of the Supreme Court of Justice of the Republic of Moldova, when applying article 166[1] CC RM, there is no unified point of view regarding the possibility of the development of teaching staff, who are employed in public educational institutions, as subjects of the crimes of torture, inhuman or degrading torture.

Thus, there are two divergent jurisprudential orientations. The first jurisprudential orientation presupposes the impossibility of the development of teaching staff, who are employed in public educational institutions, as subjects of the crimes provided for in article 166[1] CC RM.[5] The second jurisprudential orientation assumes that, on the contrary, such teaching staff can appear as subjects of the crimes provided for in article 166[1] CC RM.[6]

The General Prosecutor opted for the second jurisprudential orientation. He supported the idea, according to which the teacher, who is employed in a public educational institution, refers to the notion of "any other person acting in an official capacity", used in article 166[1] CC RM.

3. *Amicus Curiae* Opinion

We submitted an *amicus curiae* Opinion to the Supreme Court of Justice. In what follows, we will present the main points of reference

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[5] See, e.g.: Decision of the Supreme Court of Justice of the Republic of Moldova of 21.03.2017. File no. 1ra-333/2017. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=8404 [accessed: 01.01.2024]; Decision of the Supreme Court of Justice of the Republic of Moldova of 04.07.2017. File no. 1ra-938/2017. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=9088 [accessed: 01.01.2024]; Decision of the Supreme Court of Justice of the Republic of Moldova of 12.12.2017. File no. 1ra-1398/2017. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=10039 [accessed: 01.01.2024]; Decision of the Supreme Court of Justice of the Republic of Moldova of 18.11.2020. File no. 1ra-1378/2020. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=17477 [accessed: 01.01.2024].

[6] See, e.g.: Decision of the Supreme Court of Justice of the Republic of Moldova of 03.05.2017. File no. 1ra-849/2017. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=8747 [accessed: 01.01.2024]; Decision of the Supreme Court of Justice of the Republic of Moldova of 24.05.2017. File no. 1ra-333/2017. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=8994 [accessed: 01.01.2024]; Decision of the Supreme Court of Justice of the Republic of Moldova of 31.07.2018. File no. 1ra-1266/2018. Available at: http://jurisprudenta.csj.md/search_col_penal.php?id=11726 [accessed: 01.01.2024].

(which we will highlight in italics) of the reasoning stated by the General Prosecutor. At the same time, we will present our observations and/or reflections:

1) by "any other person acting in an official capacity", must be understood the person who cannot be considered a public person, but who does not exercise, de facto, the powers of a public authority, but who, due to the way of establishing the activity exercised and of the nature of the activity exercised, acquires an official character.

We cannot disagree with the statement that the notion of "public person"[7] does not intersect with the notion of "any other person acting in an official capacity". Such a statement results even from the provision of article 166[1] CC RM, in which the subject is described as follows: "public person or [...] person who, de facto, exercises the powers of a public authority, or [...] any other person who acts in an official capacity or with the express or tacit consent of such a person". From this wording it follows that the subject of the crimes, provided in article 166[1] CC RM, is characterized by four alternative special qualities: i) public person; ii) the person who, de facto, exercises the powers of a public authority; iii) any other person acting in an official capacity; iv) any other person acting with the express or tacit consent of a person acting in an official capacity.

It is not possible for a person to possess both the special quality of a public person and the special quality of any other person acting in an official capacity. This is due to the alternative character of the special qualities stated above, but especially the use in article 166[1] CC RM of the phrase "any other". This phrase excludes the possibility of the same person cumulating the special qualities specified in points i) and iii) presented above.

However, as will be seen below, the General Prosecutor did not take this aspect into account. More specifically, in the appeal filed by the Prosecutor General, any other person, who acts in an official capacity, is assigned the status of a person exercising the functions of the public authority. Through this assimilation of the public person with any other person acting in an official capacity, the will of the legislator is neglected, who resorts to the phrase "any other" in article 166[1] CC RM;

2) the use in article 166[1] CC RM of the word "official" means that the reference situation involves the exercise of state authority.

[7] This notion is defined in para. (2) article 123 CC RM: "[a] public person means: a public servant, including a public servant with a special status (collaborator of the diplomatic service, customs service, defence, national security and public order bodies, other person holding special or military ranks); the employee of autonomous or regulatory public authorities, of state or municipal enterprises, of other legal entities under public law; the employee from the cabinet of persons with positions of public dignity; the person authorized or vested by the state to provide public services on its behalf or to perform activities of public interest."

The notion of "exercise of state authority" is contained, for example, in the Criminal Code of Romania. Specifically, in para. (1) article 282 "Torture" in this code refers to "the act of a public official who performs a function involving the exercise of state authority or of another person who acts at the instigation or with his express or tacit consent [...]".[8] As can be seen, in the opinion of the Romanian legislator, the function, which involves the exercise of state authority, is performed by a civil servant. A person who does not have the status of a civil servant cannot perform a function involving the exercise of state authority.

It is mentioned in the Romanian literature that, "by public official, who performs a function that involves the exercise of state authority, [...] is meant only that official who is part of the bodies through which state power is achieved or who according to the law or other normative acts assimilated to the law, is empowered to take mandatory measures and impose their compliance or ensure compliance with such provisions or measures taken by the competent bodies. They belong to the category of such officials: senators, deputies, members of the Constitutional Court, members of the Government, advisers of the Court of Accounts, prosecutors, judges, policemen or gendarmes".[9] As is natural, teaching staff, who are employed in public educational institutions, are not mentioned in this list.

The exercise of state authority, evoked by the Prosecutor General, represents, in fact, the exercise of public authority functions within the meaning of para. (1) article 123 CC RM. According to this rule, "a person with a position of responsibility means the person who, in an enterprise, institution, organization of the state or of the local public administration or in a subdivision thereof, is granted, permanently or temporarily, by the stipulation of the law, by appointment, election or by virtue of an assignment, certain rights and obligations in order to exercise the functions of the public authority (our emphasis) or of the administrative disposition or organizational-economic actions".

From the Judgement of the Constitutional Court of the Republic of Moldova no. 1 of January 11, 2001 regarding the control of the constitutionality of the provisions of article 183 of the Criminal Code[10] we

[8] The Criminal Code of Romania. Available at: https://codexpenal.just.ro/laws/Cod-Penal-Romania-RO.html [accessed: 01.01.2024].

[9] Versavia Brutaru et al. *Explanations of the new Criminal Code,* Vol. 4. Bucureşti: Universul Juridic, 2016, p. 23.

[10] Article 183 of the Criminal Code of the Republic of Moldova from 1961 is considered. According to para. (1) of this article, "a responsible person, according to this code, is considered the person who, in the public authorities, in an enterprise, institution, organization, regardless of the type of ownership and the legal form of organization, is granted permanently or provisionally – by virtue of the law, by appointment, election or by entrusting a task - certain rights and obligations in order to exercise the functions of

find that the person, who exercises the functions of the public authority, is the person vested, on behalf of the state, with legal powers to carry out actions that carry legal consequences for all or for the majority of citizens, and his actions in the line of duty are not limited by the framework of a certain department, system etc.[11] From this interpretation it emerges that "to exercise the functions of public authority" means to exercise attributions and responsibilities, established under the law, in order to realize the prerogatives of the legislative, executive or judicial power. Thus, the person who exercises the functions of the public authority is the person who: holds a legislative, executive, or judicial mandate; exercise state power on behalf of the Republic of Moldova; has attributions and responsibilities that are opposable in relation to persons who are not subordinate to him.

By assigning the quality of a person, who exercises the functions of public authority, to a teaching staff, who is an employee of a public educational institution, the General Prosecutor reports such a teaching staff to the category of public persons. In R. Popov's opinion, to which we mostly agree, "the notion of 'person with responsibility', defined in para. (1) article 123 CC RM, and the notion of 'public person', defined in para. (2) article 123 CC RM, is in a 'part-whole' relationship."[12] On this occasion, we specify that only the following persons with a position of responsibility are not public persons: councillors from the village (communal), city (municipal), district councils; deputies of the People's Assembly of the Gagauzia autonomous territorial unit.[13]

Developing the idea regarding the relationship between the notions of "person with responsibility" and "public person", Ruslan Popov claims: "[T]hose from the staff of medical-sanitary institutions and from the staff of educational institutions – who exercise administrative dispositional or organizational-economic actions or *functions of the public authority* (our emphasis) – fall under the scope of either the notion of 'person with a position of responsibility' (and, implicitly, of the broader notion of 'public person'), or of the notion of 'person who manages a commercial, public or

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the public authority or the enterprise of dispositional or organizational-economic administrative actions."

[11] Judgment of the Constitutional Court no. 1 of 11.01.2001 regarding the control of the constitutionality of the provisions of article 183 of the Criminal Code. In: *Official Gazette of the Republic of Moldova*, 2001, no. 8-10.

[12] Ruslan Popov, *The subject of the crimes provided for in Chapters XV and XVI of the special part of the Criminal Cod,* Chisinau: CEP USM, 2012, p. 176.

[13] For more details, see: Stati Vitalie. *Does any person with a position of responsibility have the status of a public person?* In: Integration through Research and Innovation. National Scientific Conference with International Participation: Legal and Economic Sciences: Abstracts of Communications. Chisinau: CEP USM, 2019, pp. 135-139.

other non-state organization' (but not of the notion of 'person who works for a commercial, public organization or another non-state organization')".[14]

Continuing the idea, it is necessary to reproduce the following explanation from point 6.1 of the Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 11 of 22.12.2014 regarding the application of the legislation on criminal liability for corruption offenses:

"[P]ersons who perform purely professional duties (for example, doctors, teachers, cashiers, etc.) are not public persons, since the fulfilment of these duties do not produce legal effects (that is, it cannot give rise to modify or extinguish legal relationships). Carrying out the obligations of a professional nature, such persons have no way to appear in the position of a public figure. Only if, in the presence of certain circumstances, these persons end up exercising functions producing legal effects (for example, granting rights or releasing from obligations), the 'sub-administrative' activity of doctors, teachers, cashiers, etc. it can turn into an administrative activity. For example, in the case of issuing the medical leave certificate by the doctor or in the case of the evaluation by the teaching staff of students, master's students, they exercise functions producing legal effects [...]".[15]

Respecting the logical line, Vitalie Stati and Ruslan Popov state:

"[T]he competence of a public person, in the sense of para. (2) article 123 CC RM includes, among other things, its prerogative to carry out relevant legal actions. Such actions produce legal effects. It is considered that the public person has the right or the obligation to create, modify or extinguish legal relations through his actions. In other words, the public person has the prerogative to grant rights and obligations to other persons, to modify the volume of these rights and obligations or to terminate them. This is precisely the criterion that allows the delimitation of the notion of 'public person' (in the sense of para. (2) article 123 CC RM) from the notions of 'administrative-technical staff' and 'person exercising purely professional functions'."[16]

Therefore, the teaching staff, who is employed in a public educational institution, is a public person not when they exercise their professional

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[14] Ruslan Popov, *The application of articles 256 and 324 of the Criminal Code for crimes committed by the staff of medical and sanitary institutions or the staff of educational institutions*, in: National Law Review, 2015, no. 4, pp. 12-22.

[15] Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova no. 11 of 22.12.2014 regarding the application of the legislation on criminal liability for corruption offences. Available at:

http://jurisprudenta.csj.md/search_hot_expl.php?id=248 [accessed: 01.01.2024].

[16] Vitalie Stati and Ruslan Popov, *Some clarifications regarding the meaning of the notion "public person" (para. (2) article 123 of the CC RM)*, in: National Law Review, 2015, no. 10, pp. 19-28.

obligations, but only when they carry out administrative activity. In his appeal, the General Prosecutor did not make any differentiation between these two qualitatively different positions that the teaching staff employed in a public educational institution can have;

3) between the notions of "public educational institution" and "private educational institution", on the one hand, and the notion of "exercise of state authority", on the other hand, there is a "part-whole" relationship.

Unlike the public authority, neither the public institution nor the private institution exercises the authority of the state. No law and no statute provide such a prerogative for the public institution and the private institution. As we stated above, the exercise of state authority, evoked by the Prosecutor General, represents the exercise of public authority functions within the meaning of para. (1) article 123 CC RM.

Popov rightly states: "[p]ublic institution and public authority are different public entities, which cannot be confused. The public authority is the one that constitutes the public institution on the basis of an act it issues, and which fully or partially finances the public institution from its budget".[17] A public institution cannot have the prerogatives of its founder, i.e., the public authority. Thus, for example, according to para. (1) article 32 of Law no. 98 of 04.05.2012 regarding the specialized central public administration, "for the performance of administrative, social, cultural, *educational functions* (our emphasis) and other functions of public interest, for which the ministry or other central administrative authority is responsible, *with the exception of those of normative-legal regulation, state supervision and control, as well as other functions that involve the exercise of the prerogatives of public power* (our emphasis), public institutions may be established within their sphere of competence."[18]

Therefore, a public institution cannot exercise prerogatives of public power or, in other words, cannot exercise state authority.

Moreover, a private institution cannot exercise state authority. From para. (3) article 1 of Law no. 86 of 11.06.2020 regarding non-commercial organizations[19] (Law no. 86/2020), we learn that the private institution is a non-commercial organization. In accordance with para. (3) article 11 of the same law, "public [...] authorities [...] cannot constitute non-commercial organizations". Likewise, from article 6 "The activity of the non-commercial organization" and article 7 "The rights and obligations of

[17] Ruslan Popov, *The subject of the crimes provided for in Chapters XV and XVI of the special part of the Criminal Code*. Chisinau: CEP USM, 2012, p. 116.

[18] Law no. 98 of 04.05.2012 regarding the specialized central public administration. In: *Official Gazette of the Republic of Moldova*, 2012, no. 160-164.

[19] Law no. 86 of 11.06.2020 regarding non-commercial organizations. In: *Official Gazette of the Republic of Moldova*, 2020, no. 193.

the non-commercial organization" do not in any way imply that a private institution can exercise state authority;

4) the teaching staff acquires official duties and acts in an official capacity in order to fulfill the state policy in the field of education.

We believe that this point of reference must be corroborated with point of reference 1) from the reasoning stated in the appeal of the Prosecutor General, according to the fact that by "any other person acting in an official capacity", he must understand the person who cannot be considered a public person, but no person. does not, de facto, exercise the powers of a public authority, but which, due to the way of establishing the activity exercised and the nature of the activity exercised, acquires an official character.

In our opinion, teaching staff, who are employed in a public educational institution, cannot acquire official duties, and cannot act in an official capacity. The manner of establishing the activity exercised by this staff, as well as the nature of the activity exercised by the teaching staff, who are employed in a public educational institution, do not allow us to support the opposite.

First of all, no one denies that public educational institutions are established by public authorities or with the approval of public authorities. Of course, state policies in the field of education are carried out within educational institutions. However, it cannot be argued that teaching staff, who are employed in a public educational institution, exercise state authority.

Educational activity is regulated by the state. But, at the present time, there are no activities (except those against the law and those related to private life) that are not, in one way or another, subject to state regulation. Accreditation of institutions, issuance of entrepreneurial patents or permissive documents (license, authorization, or certificate), registration of political parties, public associations, religious cults, or their component parts, etc. - all these are examples of state regulation of activities that do not involve the exercise of state authority. The fact that the state regulates such activities does not mean that the state delegates the prerogatives of exercising state authority to those whose activity is subject to state regulation.

Secondly, teaching staff, who are employed in a public educational institution, do not have official duties, as they are not official persons.

We believe that only official persons can have official duties. The notion of official person has the meaning resulting from the systemic interpretation of the following provisions of the Administrative Code[20]:

– "By petition, in the sense of this code, is meant any request, notification or proposal *addressed to a public authority* (our emphasis) by a natural or legal person" (para. (1) article 9);

[20] Administrative Code. In: *Official Gazette of the Republic of Moldova*, 2018, no. 309-320.

– "The public authority or the official person (our emphasis) has the right not to examine in substance the petitions that contain uncensored or offensive language, threats to national security, public order, the life and health of the official person, as well as his family members" (para. (3) article 76).

So, the petition is addressed to a public authority. At the same time, the public authority or official has the right to examine the petitions. In conclusion, in the sense of the Administrative Code, official person is the person who represents a public authority. Only one person, representing a public authority, can have official duties;

5) the notion of "compulsory schooling" is close to the notion of "public custody", as formulated in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[21] *(hereinafter – Optional Protocol): „any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".*

First, the Optional Protocol does not contain the notion of "public custody" or its definition. According to para. 2 article 4 of this Protocol, "[f]or the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".[22] From this perspective, it is not clear how the notion of "compulsory schooling" could be close to the notion of "deprivation of liberty". The situation was different, for example, in the case of *D.L. v. Bulgaria*. In this case, the ECtHR decided that the detention of a minor in a closed educational institution because of her antisocial behaviour and the danger that she would become a prostitute constituted a deprivation of liberty, considering especially the regime of permanent supervision and authorization of exits, as well as the duration of the placement (i.e., the duration of the measure had not been specified, but it could extend, according to the law, up to three years).[23]

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[21] This protocol was signed in New York on 18.12.2002, being ratified by the Republic of Moldova through Law no. 66 of 30.03.2006. In: *Official Gazette of the Republic of Moldova*, 2006, no. 66-69.

[22] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Available at:

https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx [accessed: 01.01.2024].

[23] Case of *D.L. v. Bulgaria*, Application no. 7472/14, Judgment of 19 May 2016. Available at: https://hudoc.echr.coe.int/?i=001-163222 [accessed: 01.01.2024].

Secondly, the following provisions from the Education Code of the Republic of Moldova are relevant[24]:

– "Compulsory education begins with the preparatory group of preschool education and ends with secondary education" (para. (1) article 13);

– "The obligation to attend compulsory education ends at the age of 16" (para. (2) article 13);

– "Schooling becomes compulsory after the age of 7" (para. (4) article 27).

The obligations, provided by para. (1) and (2) article 13 and para. (4) article 27 of the Education Code, does not demonstrate in any way that the teaching staff, who are employed in a public or private educational institution, are represented by persons acting in an official capacity.

These obligations are imposed by the state, not by educational institutions, not by teachers who are employed in public or private educational institutions. From lit. a) para. (1) article 141 and letter a) article 142 of the Education Code, we find that the authorities of the local public administration of the first and second level, as well as of the UTA Gagauzia, within the limits of the competences established by the legislation, have powers to ensure compliance with the legislation in the field of education in the administered territory. Teaching staff, who are employed in public or private educational institutions, do not and cannot have such an attribution;

6) must be considered subjects of the crimes, provided for in article 166[1] CC RM, only the persons who are part of the management staff of the educational institution, the teaching staff, the scientific staff, and the scientific-didactic staff within the meaning of article 131, in conjunction with articles 53, 70 and 117 of the Education Code.

We agree that the persons, who are part of the management staff of the educational institution (for example, director, deputy director, head of department, rector, vice-rector, dean, head of department, head of department, etc.), being public persons, may be subjects of the offenses provided for in article 166[1] CC RM. As for the teaching staff, as we mentioned above, those who represent them can be considered public persons only when they carry out administrative activities (for example, in the case of the evaluation by the teaching staff of students, students, master's students, doctoral students, audience etc.), not when exercising their professional obligations (for example, during a lesson that does not involve an assessment of learning outcomes). Such a finding is valid in the case of scientific and scientific-didactic personnel.

The management staff of the educational institution, the teaching staff, the scientific staff and the scientific-teaching staff do not fall under

[24] The Education Code. In: *Official Gazette of the Republic of Moldova*, 2014, no. 319-324.

the scope of the notion of "any other person acting in an official capacity", which is used in article 166[1] CC RM. Such a conclusion will emerge from the analysis of the notion of "any other person acting in an official capacity", which we will carry out below;

7) the quality of subjects of crimes, provided for in article 166[1] CC RM, possess those from the management staff, teaching staff, scientific staff and scientific-didactic staff from all types of educational institutions, provided by article 15 of the Education Code.

According to para. (3) article 15 of the Education Code, "depending on the type of ownership, educational institutions are classified as follows: a) public educational institution; b) private educational institution".

The management staff of the private educational institution, the teaching staff, the scientific staff, and the scientific-didactic staff within such an institution do not possess the quality of subjects of the offenses provided for in article 166[1] CC RM. From the analysis I carried out above, it can be deduced without any doubt that the persons employed in a private educational institution cannot have the status of public persons. Also, this conclusion results from comparing articles 123 and 124 CC RM, as well as from the comparison between the provisions of Chapters XV and XVI of the special part of the Criminal Code.

The management staff of the private educational institution, the teaching staff, the scientific staff, and the scientific-teaching staff within such an institution do not fall under the notion of "any other person acting in an official capacity", which is used in article 166[1] CC RM. Such a conclusion will emerge from the analysis of the notion of "any other person acting in an official capacity", which we will carry out below.

3.1. "Any other person acting in an official capacity"

In what follows, we propose to establish the meaning of the notion "any other person acting in an official capacity", which is referred to in article 166[1] CC RM.

To this end, we note that an almost identical notion – "person acting in an official capacity" – is used in Section 134 (1) "Torture" in the Criminal Justice Act of the United Kingdom of Great Britain and Northern Ireland (hereinafter – the United Kingdom) of 29 July 1988 (hereinafter – CJA): "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."[25] We note that, in this norm, the notion of "person acting in an official capacity" is

[25] See in this regard: Criminal Justice Act 1988. Part XI. Torture. Section 134. Available at: https://www.legislation.gov.uk/ukpga/1988/33/section/134 [accessed: 01.01.2024].

used in opposition to the notion of "public official". Similarly, in article 166[1] CC RM, the notion of "any other person acting in an official capacity" is used in opposition to the notion of "public person", as well as to the notion of "person who, *de facto*, exercises the powers of a public authority".

As article 166[1] CC RM, Section 134 CJA transposes into domestic legislation certain obligations of the United Kingdom, assumed in accordance with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[26] Article 1 of this Convention provides: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or *other person acting in an official capacity*" (our emphasis).[27]

Starting from this premise, it should be noted that, in the case of *R v. Reeves Taylor*, the Supreme Court of the United Kingdom provided the answer to the following questions raised in the appeal: "What is the correct interpretation of the term 'person acting in an official capacity' in section 134(1) CJA; in particular does it include someone who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs?"[28]

In the Judgement *R v. Reeves Taylor* (which has been analyzed by several authors[29]), the greatest interest is the following fragments that

[26] The Republic of Moldova acceded to this convention in 1995.

[27] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available at: https://www.ohchr.org/sites/default/files/cat.pdf [accessed: 01.01.2024].

[28] Judgement *R v. Reeves Taylor (Appellant)* given on 13 November 2019, heard on 24 and 25 June 2019. Available at: https://www.supremecourt.uk/cases/docs/uksc-2019-0028-judgment.pdf [accessed: 01.01.2024].

[29] Lord Lloyd-Jones, *International Law before United Kingdom Courts: A Quiet Revolution*, in: International & Comparative Law Quarterly, 2022, Volume 71, Issue 3, pp. 503-529; Manfred Nowak, *Can Private Actors Torture?*, in Journal of International Criminal Justice, 2021, Volume 19, Issue 2, pp. 415-423; Hannah Woolaver, *R. v. Reeves Taylor (Appellant). [2019] UKSC 51*, in: American Journal of International Law, 2020, Volume 114, Issue 4, pp. 749-756.

contain the reasoned and consistent answer to the question reproduced above:

> "23. Section 134 CJA was intended to give effect to UNCAT in domestic law. As a result, the words 'person acting in an official capacity' *must bear the same meaning in section 134 as in Article 1, UNCAT* (our emphasis) [...] The principles of international law governing the interpretation of treaties are to be found in Articles 31[30] and 32[31], Vienna Convention on the Law of Treaties, 23 May 1969 [...].
>
> [...]
>
> 30. [...] The UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 [...] defined 'torture' in article 1 in terms which required that it be inflicted by or at the instigation of a public official. By Resolution 32/62 of 8 December 1977, the UN General Assembly requested the Commission on Human Rights to draw up a draft convention against torture. The Commission examined the matter at its 34th session and invited comments on the draft articles from the governments of member states of the United Nations and its specialized agencies in advance of its 35th session. The comments received are summarised in three documents published by the Commission on Human Rights (E/CN.4/1314, 19 December 1978; E/CN.4/1314/Add 1, 18 January 1979; E/CN.4/1314/Add 2, 31 January 1979). At that stage, the

[30] This article provides: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

[31] This article provides: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

definition of torture in draft article 1 required that it be inflicted 'by or at the instigation of a public official'. In its response the Austrian Government proposed that the concept of 'public official' be expanded, for example by using the words 'persons, acting in an official capacity'[32] (E/CN.4/1314, para 43). [...]

31. [...] The term 'other person acting in an official capacity' goes, however, clearly beyond State officials. It was inserted on the proposal of Austria in order to meet the concerns of the Federal Republic of Germany that certain non-State actors whose authority is comparable to governmental authority should also be held accountable. These de facto authorities seem to be similar to those 'political organizations' which, according to article 7(2)(i) of the International Criminal Court Statute (ICC)[33], can be held accountable for the crime of enforced disappearance before the ICC. One might think of rebel, guerrilla or insurgent groups who exercise de facto authority in certain regions or of warring factions in so-called 'failing States'.[34]

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[32] Most likely, this proposal was the basis of the provision from para. (3) § 312a "Torture" from the Criminal Code of the Republic of Austria: "public officials within the meaning of this provision shall also be those who, in the event of the absence or default of the public authorities, are effectively acting as officials". See: Criminal Code of the Republic of Austria. Available at: codexpenal.just.ro/laws/Cod-Penal-Austria-RO.html [accessed: 01.01.2024].

[33] Article 7(2)(i), ICC Statute provides: "'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts so those persons, with the intention of removing them from the protection of the law for a prolonged period of time." See: Rome Statute of the International Criminal Court. https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [accessed: 01.01.2024].

[34] In this context, it should be noted that, in a commentary to the UNCAT, in Section 3.1.6.2 – Meaning of the phrase 'another person acting in an official capacity', in point 126, it is explained: "In the case of *Elmi v Australia*, the Committee had to decide whether the forced return of a Somali national belonging to the Shikal clan to Somalia, where he was at a [...] substantial risk of being subjected to torture by the ruling Hawiye clan, constituted a violation of the prohibition of refoulement pursuant to Article 3 UNCAT. The Committee found a violation of Article 3 and explicitly rejected the argument of the Australian Government that the acts of torture the applicant feared he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 UNCAT. The Committee has noted that since Somalia has been without a central Government for years and a number of warring factions de facto exercise prerogatives that would normally be practised by legitimate Governments, the members of these factions could fall within the phrase 'public officials or other persons acting in an official capacity' contained in article 1 UCAT". See: Manfred Nowak, Moritz Birk, and Giuliana Monina, *The United Nations Convention Against Torture and its Optional Protocol: A Commentary, 2nd ed.* Oxford: Oxford University Press, 2020. Available at:

[...]

36. [...] The words 'a public official or other person acting in an official capacity' in Article 1 UNCAT were intended to achieve that result, they should not exclude conduct by rebels, outside the authority of the State, exercising governmental functions over the civilian population of territory under its control. On the contrary, such conduct is properly the concern of the international community and requires international regulation, albeit implemented at national level.

[...]

54. Before the Court of Appeal the prosecution sought to rely on principles concerning the responsibility of an insurrectional movement which ultimately succeeds in replacing the government of a State, as the NPFL[35] did in Liberia. The General Commentary to the International Law Commission Draft Articles on State Responsibility explains that whereas the conduct of an unsuccessful insurrectional movement is not in general attributable to the State, where the movement achieves its aims and installs itself as the new government of the State it would be anomalous if the new regime could avoid responsibility for conduct earlier committed by it. *The continuity which exists between the new organisation of the State and that of the insurrectional movement leads to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle* (our emphasis). [...]

[...]

76. [...] 'A person acting in an official capacity' in section 134(1) CJA includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.

[...]

78. [...] [I]nsurrectional forces engaged in fighting the forces of the central government of a State may nevertheless exercise sufficient governmental authority over territory and persons under their

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https://opil.ouplaw.com/view/10.1093/law/9780198846178.001.0001/law-9780198846178-chapter-3#law-9780198846178-chapter-3-div7-125[accessed: 01.01.2024].

[35] Refers to the National Patriotic Front of Liberia, a Liberian rebel group that initiated and participated in the First Liberian Civil War from 1989 to 1996.

control for acts done on their behalf to be official acts for this purpose. [...]." [36]

The conclusions, which are required, are the following: in states characterized by socio-political stability, official behaviour is carried out by public agents. In case of cataclysms (for example, war, foreign military intervention, local military conflict, military coup, etc.) certain entities may assume governmental or administrative functions. In article 1 UNCAT, the phrase "any other person acting in an official capacity" refers to representatives of such entities. Such an interpretation is intended to prevent impunity by extending the prohibition of torture and other cruel, inhuman or degrading punishment or treatment to de facto authorities who should not admit such treatment when they arrogate to themselves the powers that the de jure authorities of a state.

On a portion of the territory of the Republic of Moldova, which is controlled by the so-called "Transnistrian authorities", we attest to the existence of a "de facto government". Other examples of "authorities" are those of: "Republic of Abkhazia"; "Republic of South Ossetia"; "Donetsk People's Republic"; "Luhansk People's Republic"; "Turkish Republic of Northern Cyprus"; "Sahrawi Arab Democratic Republic"; "Somaliland", etc. In other cases, insurgency movements (e.g.: PCP (SL) (Republic of Peru); ELN (Republic of Colombia); EZLN (United Mexican States); IFPG, KŞZK, PJAK, MEK (Islamic Republic of Iran), etc.) do not and proclaim statehood, but have effective control over a portion of the territory. Regardless of these nuances, the important thing is that the de facto authorities assume powers that should have been exercised by the de jure authorities.

Therefore, in the sense of article 166[1] CC RM, by "any other person acting in an official capacity" is meant the person who represents the de facto authorities (i.e., the authorities acting outside the field of constitutionality) who assume duties that should have been exercised by the de jure authorities.

Obviously, this interpretation of the notion of "any other person acting in an official capacity" is not compatible with the interpretation promoted in the Prosecutor General's appeal.

In the Prosecutor General's appeal, the interpretation of the notion any other person acting in an official capacity" from article 166[1] CC RM is so broad that it reduces the notion of special subject to zero. As we mentioned above, there is no activity (except illegal and private) that is not

[36] Judgement *R v. Reeves Taylor (Appellant)* given on 13 November 2019, heard on 24 and 25 June 2019. Available at: https://www.supremecourt.uk/cases/docs/uksc-2019-0028-judgment.pdf [accessed: 01.01.2024].

regulated, in one way or another, by the state. From the interpretation, proposed by the General Prosecutor, it follows that practically any natural person, who represents a certain entity and who meets the requirements of age and responsibility, can be the subject of the crimes provided for in article 166[1] CC RM. Such an approach does not take into account that the notion of torture in article 166[1] CC RM reproduces the notion of torture from article 1 UNCAT. In this way, article 166[1] CC RM received not only the characteristic terminology of article 1 UNCAT, but also the legal content of the respective terms used in the UNCAT, as well as the legal effects implied by the application of the rules containing such terms.

3.2. A confusion?

In our opinion, the extremely broad interpretation of the notion "any other person acting in an official capacity" in article 166[1] CC RM, which is promoted by the Prosecutor General, is based on the conceptual confusion between torture and inhuman or degrading treatment within the meaning of article 166[1] CC RM, on the one hand, and baiting and torturing within the meaning of Ministry of Health Regulation no. 199 of 27.06.2003 on medico-legal assessment of the seriousness of the bodily injury (hereinafter – Regulation of the Ministry of Health no. 199/2003).[37] This regulation provides, *inter alia*: "[...] 77. Baiting represents actions that cause suffering to the victim by depriving them of food, drink or heat, or by placing or abandoning the victim in conditions harmful to life. 78. Torturing is manifested by actions that produce persistent, repeated or prolonged pain (by whipping, whipping, by stabbing with sharp objects, by cauterization with thermal or chemical agents, etc.). [...]".[38]

The Criminal Code of the Republic of Moldova in the version up to the entry into force of Law no. 252 of 08.11.2012 for the amendment and completion of some legislative acts (hereinafter – Law no. 252/2012) contained the phrases:

– "by mutilation or torture" [letter e) para. (2) article 151 (Intentional severe bodily injury or damage to health) and letter f) para. (2) article 152 (Intentional less severe bodily injury or damage to health) CC RM];

– "accompanied by torturing the victim" [letter f) para. (2) article 171 (Rape) CC RM];

– "accompanied by the torture of the victim" [letter g) para. (2) article 172 (Violent actions of a sexual character) CC RM];

[37] Regulation of the Ministry of Health no. 199 of 27.06.2003 on medico-legal assessment of the seriousness of the bodily injury. In: *Official Gazette of the Republic of Moldova*, 2003, no. 170-172.

[38] *Ibidem*.

– "by mutilation, torture, inhuman or degrading treatment" [letter d) para. (3) article 188 (Burglary) CC RM];

– "accompanied by mutilation, torture, inhuman or degrading treatment" [para. (3) article 189 (Blackmail) CC RM].

Such a concept was abandoned as a result of the entry into force of Law no. 252/2012. So, instead of the phrases specified above, others appeared: "with particular cruelty, as well as for sadistic reasons" (letter e) para. (2) article 151 and letter f) para. (2) article 152 CC RM); "committed with particular cruelty, as well as for sadistic reasons" (letter f) para. (2) article 171 CC RM); "committed with particular cruelty, as well as for sadistic reasons" (letter g) para. (2) article 172 CC RM); "with particular cruelty" (letter d) para. (3) article 188 CC RM); "committed with particular cruelty" (para. (3) article 189 CC RM).

One of the characteristics of "particular cruelty" is highlighted by S.N. Drujkov: special cruelty is inconceivable without torture, maltreatment, molestation.[39] In the same sense, other authors claim that the concepts of "torturing", "mistreatment", "molestation", "mutilation", "mockery", etc. they are part of the same notional register, representing cases of manifestation of cruelty.[40]

Thus, in the Criminal Code in force of the Republic of Moldova, the notion of "particular cruelty" has the same semantic load that the notions of "mutilation" and "torturing" had before the entry into force of Law no. 252/2012. In the provisions in force of letter d) para. (3) article 188 and para. (3) article 189 CC RM, the notion of special cruelty has the semantic load that the notions of "torture" and "inhuman or degrading treatment" had before the entry into force of Law no. 252/2012.

Any natural person, who meets the requirements of age and responsibility, can be the subject of the offenses provided for in articles 188 and 189 CC RM. Appealing to the analogy, some practitioners deduced that, in the case of the crimes provided for in article 166^1 CC RM, the subject can also be any natural person, who represents a certain entity and who meets the requirements of age and responsibility. Probably, this would be the cause of the confusion we were talking about above.

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[39] S.N. Druzhkov, *Criminal-legal functions of special cruelty in the composition of murder: questions of theory and practice: Abstract of the dissertation for the degree of candidate of legal sciences,* Izhevsk, 2002, p. 16.

[40] A.N. Popov, *Aggravated murders*, St. Petersburg: Legal Center Press, 2003, p.471; Bagun E.A., *Responsibility for beatings and torture under the Criminal Code of the Russian Federation: dissertation abstract for the degree of candidate of legal sciences*. Moscow, 2007, p. 19; Babiy N., *Theoretical foundations of criminalization and qualification of compound violent crimes,* in: Court Gazette, 2005, p. 50.

It should also be mentioned that, in the initial version of the Criminal Code of the Republic of Moldova, there was article 154 "Intentional ill-treatment or other acts of violence":

"(1) Intentional ill-treatment or other acts of violence, if they did not cause the consequences provided for in articles 151-153, are punished with a fine ranging from 200 to 500 conventional units or with imprisonment of up to 3 years.

(2) The same actions committed: a) on the husband (wife) or a close relative; b) knowingly on a pregnant woman; c) on a minor; d) on a person in connection with his performance of service or public obligations; e) by two or more people; f) taking advantage of the victim's powerlessness; g) with the use of special instruments of torture; h) to order, are punished with a fine of 500 to 1000 conventional units or with imprisonment of 3 to 6 years."

When characterizing the *actus reus* provided for in article 154 CP RM, Serghei Brînza makes an interesting finding: "[T]aking into account the interpenetration of the notions of 'ill-treatment or other acts of violence' and 'torture', we must recognize that not only physical suffering, but also mental suffering can constitute the prejudicial consequences of the offense provided for in article 154 CC RM".[41] This "interpenetration" of the two notions increases the confusion between the crime, which was provided for in article 154 CC RM, and the crimes provided for in article 166[1] CC RM. However, as will be seen below, the subject of the crime, which was provided for in article 154 CC RM, cannot have the special quality of the subject of the crimes provided for in article 166[1] CC RM.

In this sense, we draw attention to the fact that article 154 was excluded from the Criminal Code by Law no. 292 of 21.12.2007 regarding the amendment and completion of some legislative acts, which entered into force on 08.02.2008.[42]

At the same time, by Law no. 139 of 30.06.2005 for the amendment and completion of the Criminal Code of the Republic of Moldova[43], the Criminal Code was supplemented with article 309[1] "Torture". We emphasize that this law entered into force on 22.07.2005. In para. (1) article 309[1] CC RM, torture was defined as follows: "The intentional infliction of severe, physical or mental pain or suffering on a person,

[41] Serghei Brînza et al., *Criminal law. The special part*. Chisinau: Cartier, 2005, p. 116.

[42] Law no. 292 of 21.12.2007 regarding the amendment and completion of some legislative acts. In: *Official Gazette of the Republic of Moldova*, 2008, no. 28-29.

[43] Law no. 139 of 30.06.2005 for the amendment and completion of the Criminal Code of the Republic of Moldova. In: *Official Gazette of the Republic of Moldova*, 2005, no. 98-100.

especially with the aim of obtaining information or confessions from this person or from a third party, to punish her for an act that she or a third person has committed or is suspected of having committed, to intimidate or put pressure on her or on a third person, or for any other reason based on a form of discrimination, whatever it may be, if such pain or suffering is caused *by a person with a responsible position or by any other person acting in an official capacity* (emphasis added), or at the instigation or with the express or tacit consent of some such persons, with the exception of pain or suffering resulting exclusively from legal sanctions, inherent in these sanctions or caused by them [...]".

Therefore, during the period 22.07.2005 – 08.02.2008, in the Criminal Code co-existed article 154 "Intentional ill-treatment or other acts of violence" and article 309[1] "Torture". The scopes of these two articles were different. So, they could not overlap. In the case of the crimes provided by these two articles, the subject could not have the same quality.

In continuation of this idea, we reproduce some passages from the Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova regarding the application of Law no. 252 of 08.11.2012:

> "The Plenum of the Supreme Court of Justice of the Republic of Moldova supports the scholars' position, presented by the Department of Criminal Law and Criminology of the Faculty of Law of the State University of Moldova, which interpreted the provisions of article 309[1] CC RM [...] in correlation with the provisions of article 166[1] CC RM (introduced by Law no. 252 of 08.11.2012), under the aspect that there was no decriminalization of the acts incriminated in article 309[1] CC RM [...] by repealing [this] rule from the Criminal Code. [...] [It] has been ascertained with certainty that the act of torture, once repealed by Law no. 252 of 08.11.2012 of article 309[1] CC RM [...], was not decriminalized, the qualification of torture being found in para. (3) and (4) of article 166[1] CC RM. [...] Comparing the components provided for in article 309[1] CC RM (Torture) in the version up to the entry into force of Law no. 252 of 08.11.2012 and article 166[1] CC RM (Torture, inhuman and degrading treatment), we conclude that the *corpus delicti* provided for in article 309[1] para. (1) CC RM is equivalent to the *corpus delicti* from para. (3) of article 166[1] CC RM, and the *corpus delicti* from para. (3) of article 309[1] CC RM (torture in aggravating circumstances) is relatively equivalent to the *corpus delicti* from para. (4) article 166[1] CC RM".[44]

[44] The decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova from 06.30.2014 regarding the application of Law no. 252 of November 8, 2012. File no. 4-1ril-3/2014. Available at:
http://jurisprudenta.csj.md/search_interes_lege.php?id=4 [accessed: 01.01.2024].

Through this decision, the Plenum of the Supreme Court of Justice of the Republic of Moldova ruled that the scope of para. (3) and para. (4) article 166[1] CC RM is relatively equivalent to the scope of article 309[1] CC RM, which was repealed. Regarding the phrase "any other person acting in an official capacity", it can be argued that the scope of para. (3) and (4) article 166[1] CC RM is absolutely equivalent to the scope of article 309[1] CC RM. The legislator uses this phrase in para. (3) and (4) article 166[1] CC RM, as well as in article 309[1] CC RM.

As we noted above, the scope of article 309[1] CC RM could not coincide with the scope of article 154 CC RM. Keeping consistency, we must recognize that the scope of para. (3) and (4) article 166[1] CC RM cannot be extended to the scope of article 154 CC RM. After the repeal of article 154 CC RM, a gap was formed that for the time being could not be filled by another norm. In para. (1) and (2) article 166[1] CC RM, the subject of the offense is described in the same terms as the subject of the offenses provided for in para. (3) and (4) article 166[1] CC RM. The phrase "any other person acting in an official capacity" is used in this description. As a result, it is logical to state that neither the scope of para. (1) and (2) article 166[1] CC RM cannot be extended to the scope of article 154 CC RM.

The emerging conclusion is the following: the criminal law in force does not provide for liability for an act like the one provided by article 154 CC RM. Article 166[1] CC RM provides liability for torture, inhuman or degrading treatment. This article does not provide liability for the act of intentional ill-tratament or other acts of violence, which was criminalized in article 154 CC RM. The gap, formed after the repeal of article 154 CC RM, could not be replaced by article 166[1] CC RM, nor by any other norm. Any attempt to apply article 166[1] CC RM in the hypothesis, which was provided by article 154 CC RM, would mean the application by analogy of the criminal law. Such an application of the criminal law beyond its content would imply that the court exceeds its powers, trying to fix what only the legislator can fix.

3.3. The example of other states

We mentioned above that the subject of crimes, provided for in article 166[1] CC RM, it is special, not general. Article 166[1] CC RM does not use general formulations regarding the subject of the crime, such as those used, for example, in the Criminal Code of the Kingdom of Belgium:

– "Whoever who torture a person shall be punished with imprisonment from ten to fifteen years"[45] (article 417ter);

[45] The Criminal Code of the Kingdom of Belgium. Available at: codexpenal.just.ro/laws/Cod-Penal-Belgia-RO.html [accessed: 01.01.2024].

– "Whoever who subjects a person to inhuman treatment shall be punished with imprisonment from five to ten years"[46] (article 417quater);

– "Whoever e who subjects a person to degrading treatment will be punished with imprisonment from fifteen days to two years and a fine from fifty euros to three hundred euros, or only one of these two punishments"[47] (article 417quinquies).

It is pertinent that the formulations regarding the subject of crimes, provided in article 166[1] CC RM, to be compared with the wording of the criminal laws in which the subject of torture (and of inhuman or degrading treatment) is a special one. Moreover, in these criminal laws phrases are used that are similar to the phrase "any other person acting in an official capacity", used in article 166[1] CC RM.

Thus, for example, para. (1) § 312a "Torture" of the Criminal Code of the Republic of Austria provides: "[t]he act of the person who, as a public agent (our emphasis) within the meaning of § 74 para. (1) point 4a letter b) or c)[48], at the instigation of such a public agent or with the express or tacit approval of such a public agent causes another person great physical or mental pain or suffering, in particular in order to obtain from him or a third party a statement or a recognition, in order to punish her for an act committed or alleged to have been committed by her or by a third party, in order to intimidate or coerce her or for a reason of discrimination, is punishable by imprisonment from 1 year to 10 years".[49] Of greater interest, however, is para. (3) § 312a Criminal Code of the Republic of Austria. According to the rule in question, "[a] public agent within the meaning of this provision is also the person who, in the absence or lack of state institutions (our emphasis), acts as a public agent".[50] It is obvious that the provision of para. (3) § 312a of the Criminal Code of the Republic of Austria refers to any other person acting in an official capacity within the meaning of article 1 UNCAT.

[46] Ibidem.

[47] Ibidem.

[48] At para. (1) § 74 "Other definitions" of the Criminal Code of the Republic of Austria states: "For the purposes of this law: [...] public agent is the person who [...] b. exercises for the Federation, a land, a commune , another person under public law, with the exception of the church or religious community, for another state or for an international organization, legislative, administrative or judicial prerogatives as a body or employee thereof, c. is authorized to exercise other functions official on behalf of the bodies mentioned in letter b and in law enforcement, [...]".

[49] Criminal Code of the Republic of Austria. Available at: codexpenal.just.ro/laws/Cod-Penal-Austria-RO.html [accessed: 01.01.2024].

[50] Ibidem.

Article 104 "Torture and other cruel, inhuman or degrading treatment or punishment" of the Criminal Code of the Republic of Croatia provides: "[a] public official or other person who at the instigation of or with the consent or acquiescence of a public official *or other person acting in an official capacity* (our emphasis) inflicts on another severe pain or suffering, whether physical or mental, for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, shall be punished by imprisonment from one to ten years."[51]

Article 243(1) "Torture and other cruel, degrading or inhuman treatments" of the Criminal Code of the Portuguese Republic provides: "[w]hoever, having as duty the prevention, pursuit, investigation or knowledge of criminal, administrative or disciplinary infringements, the enforcement of penalties of the same nature or the protection, custody or surveillance of detained or arrested person, tortures or treats such person in a cruel, degrading or inhuman way in order to: a) obtain from such person of from another confession, testimony, statement or information; b) punish such person for an act committed or supposedly committed by such person or by another; or c) intimidate such person or to intimidate another; is punished with sentence of imprisonment from one to five years, if a more serious sentence is not applicable to him by virtue of another legal provision."[52] Of greater interest, however, is paragraph 2 of this article: "In the same sentence incurs whoever, by own initiate or by a superior order, *usurps the duty mentioned in the previous number* (our emphasis) to commit any of the acts described therein".[53]

In other states, the legislators went the other way, namely – as the subject of torture (and inhuman or degrading treatment) they specified only the public agent (and the person who acts at the instigation or with his express or tacit consent), not any other person acting in an official capacity. Perhaps, this was done for reasons of avoiding divergent interpretations of the notion "any other person acting in an official capacity". Although such an approach simplifies the process of criminal law enforcement, its disadvantage is that it only partially respects the commitment assumed when ratifying the UNCAT.

[51] Criminal Code of the Republic of Croatia. Available at: codexpenal.just.ro/laws/Cod-Penal-Croatia-RO.html [accessed: 01.01.2024].
[52] Criminal Code of the Portuguese Republic. Available at: codexpenal.just.ro/laws/Cod-Penal-Portugalia-RO.html [accessed: 01.01.2024].
[53] *Ibidem.*

For example, section 149 (1) "Torture and other cruel and inhumane treatment" of the Criminal Code of the Czech Republic provides: "[w]hoever causes bodily or mental suffering by means of torture or some other inhuman or cruel treatment to another person *in connection to exercise of powers of a public authority, a local authority, a court, or another public authority* (our emphasis), shall be sentenced to imprisonment for from six months to five years".[54]

Pursuant to article 157a (2) of the Criminal Code of the Kingdom of Denmark: "The infringement is considered committed by torture, if committed in the *exercise of Danish, foreign or international public officials* (our emphasis) by adding another person injury to body or health, or severe physical or mental pain or suffering 1) to obtain information or a confession from someone 2) to punish, intimidate or coerce anyone to do, tolerate or refrain from doing something or 3) because of his political beliefs, gender, race, colour, national or ethnic origin, religion or sexual orientation."[55]

Pursuant to § 290[1] (1) "Torture" of the Criminal Code of the Republic of Estonia: "[c]ausing of great or consistent physical or mental pain *by an official* (our emphasis) without legal grounds to a person with the intention of receiving statements from him or her or third persons, punishment, frightening, coercion or discrimination, as well as instigation by an official to such act or consent to such acts punishable by one to seven years' imprisonment."[56]

Pursuant to section 9(a) "Torture" from Chapter 11 of the Criminal Code of the Republic of Finland:

> "(1) If a public official causes another strong physical or mental suffering 1) in order to get him or her or another person to confess or to provide information, 2) in order to punish him or her for something that he or she or some other person has done or is suspected of having done, 3) in order to frighten or coerce him or her or another person, or 4) on the basis of race, national or ethnic origin, skin colour, language, gender, age, family relations, sexual orientation, inheritance, incapacity, state of health, religion, political opinion, political or vocational activity or other corresponding grounds, he or she shall be sentenced for torture to imprisonment for at least two and at most twelve years and in addition to removal from office.

[54] Criminal Code of the Czech Republic. Available at: codexpenal.just.ro/codex.html [accessed: 01.01.2024].

[55] Criminal Code of the Kingdom of Denmark. Available at: codexpenal.just.ro/laws/Cod-Penal-Danemarca-RO.html [accessed: 01.01.2024].

[56] Criminal Code of the Republic of Estonia. Available at: codexpenal.just.ro/laws/Cod-Penal-Estonia-RO.html [accessed: 01.01.2024].

(2) Likewise, a public official who explicitly or implicitly approves an act referred to in subsection 1 committed by a subordinate or by a person who otherwise is factually under his or her authority and supervision shall also be sentenced for torture.

[...]

(4) The provisions in this section regarding public officials apply also to persons performing a public fiduciary function and to a *person exercising public power and, except for the sanction of removal from office, also to the employee of a public corporation and to a foreign public official* (our emphasis)."[57]

Pursuant to article 137A (1) "Torture and other violations of human dignity" of the Criminal Code of Greece: "[t]he act of the *official or the military cadre of the [Greek] army, whose duties involve the questioning or examination of crimes or disciplinary violations, the execution of punishments or the detention or supervision of detainees* (our emphasis) is punishable by detention if, in the course of the exercise of these duties, he subjects the person in his power to torture for the purpose: a) to obtain from him or from a third party a confession, deposition, information or declaration, in particular of denial or acceptance of a political or other type of ideology; b) to punish [the respective person]; c) to intimidate the person and third parties. The same punishment is also applied for the act of the civil servant or the military cadre who, on the order of his superiors or on his own initiative, improperly takes on such duties and commits the acts provided for in the previous sentence."[58]

Pursuant to article 282 (1) "Torture" of the Criminal Code of Romania: "The act of a public servant holding an office that involves the exercise of state authority or of other person acting upon the instigation of or with the specific or tacit consent thereof to cause an individual pain or intense suffering, either physically or mentally: a) to obtain information or statements from that person or from a third-party; b) to punish them for an act committed by them or by a third party or that they or a third party is suspected to have committed; c) to intimidate or pressure them or a third-party; d) for a reason based on any form of discrimination, shall be punishable by no less than 2 and no more than 7 years of imprisonment and a ban on the exercise of certain rights."[59]

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[57] Criminal Code of the Republic of Finland. Available at: codexpenal.just.ro/laws/Cod-Penal-Finlanda-RO.html [accessed: 01.01.2024].

[58] Criminal Code of Greece. Available at: codexpenal.just.ro/laws/Cod-Penal-Grecia-RO.html [accessed: 01.01.2024].

[59] Criminal Code of Romania. Available at: codexpenal.just.ro/laws/Cod-Penal-Romania-RO.html [accessed: 01.01.2024].

Pursuant to § 420 (1) "Torture and other inhuman or cruel treatment" of the Criminal Code of the Slovak Republic: "[*a]ny person who, in connection with the exercise of his powers of the public authority official* (our emphasis), from his motion or with his explicit or implicit approval, causes another person physical or mental suffering by ill-treatment, torture or other inhuman and cruel treatment shall be liable to a term of imprisonment of two to six years."[60]

Pursuant to article 174 (1) of the Criminal Code of the Kingdom of Spain: "Torture is committed by the public authority or officer who, abusing his office, and in order to obtain a confession or information from any person, or to punish him for any deed he may have committed, or is suspected to have committed, or for any reason based on any kind of discrimination, subjects that person to conditions or procedures that, due to the nature, duration or other circumstances thereof, cause him physical or mental suffering, suppression or decrease in his powers of cognizance, discernment or decision, or that in any other way attack his moral integrity. Those found guilty of torture shall be punished with a sentence of imprisonment from two to six years if the criminal offence is serious, and of imprisonment from one to three years if it is not. In addition to the penalties stated, in all cases, the punishment of absolute barring shall be imposed, from eight to twelve years."[61] Paragraph 2 of this article provides: "[t]he same penalties shall be incurred, respectively, by the authority or officer of prison institutions or correctional or protection centres for minors who may commit the deeds referred to in the preceding paragraph in relation to the detainees, interns or prisoners."[62]

In relation to the concept, promoted by the legislators of the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, Greece, Romania, the Slovak Republic and the Kingdom of Spain, it is useful to reproduce the following observation from the Opinion of the Legal Department of the Secretariat of the Parliament of the Republic of Moldova on the Draft Law which was the basis for the pass of article 166[1] CC RM: "[...] [w]e consider that the expression from para. (1) and (3) [article 166[1] CC RM] – "by a public person or by a person acting in an official capacity" – is wrong, ambiguous and needs to be revised".[63]

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[60] Criminal Code of the Slovak Republic. Available at: codexpenal.just.ro/laws/Cod-Penal-Slovacia-RO.html codexpenal.just.ro/laws/Cod-Penal-Slovacia-RO.html [accessed: 01.01.2024].

[61] Criminal Code of the Kingdom of Spain. Available at: codexpenal.just.ro/laws/Cod-Penal-Spania-RO.html [accessed: 01.01.2024].

[62] *Ibidem.*

[63] Opinion of the Legal Department of the Secretariat of the Parliament of the Republic of Moldova on the Draft Law for the amendment and completion of some legislative acts (no. 1945 of 05.09.2012). Available at:

In our view, this expression does not require revision. Otherwise, it would deviate from the concept in article 1 UNCAT. We believe that the solution must be different.

3.4. Our solution

Before presenting our solution, we will review the evolution of the description of the subject of torture and inhuman or degrading treatment in the Criminal law of the Republic of Moldova: "an agent of the public authority or any other person acting in an official capacity" (article 101^1 CC RM from 1961); "a person with a position of responsibility or any other person acting in an official capacity" (article 309^1 CC RM); "a public person or a person who, de facto, exercises the powers of a public authority, or any other person who acts in an official capacity" (article 166^1 CC RM).

For comparison, in article 1 UNCAT, the following phrase "an agent of the public authority or any other person acting in an official capacity" is used.

We note that the description of the subject of torture and inhuman or degrading treatment in article 166^1 CC RM constitutes an improvisation that deviates from the provision of article 1 UNCAT. The disjunction of the notion of "another person acting in an official capacity" (which was used in article 101^1 CC RM from 1961 and in article 309^1 CC RM) into two notions – "a person who, de facto, exercises the powers of a public authority" and "any other person acting in an official capacity" – generated confusion and complicated the interpretation of article 166^1 CC RM. We emphasize that such a disjunction is attested only in the Criminal Code of the Republic of Moldova. No similar assumptions can be identified in the criminal laws of other states.

It is necessary for the legislator to abandon this disjunction and adjust the provision of article 166^1 CC RM at the disposal of article 1 UNCAT. *In concreto*, in article 166^1 CC RM, the phrase "by a person who, de facto, exercises the powers of a public authority, or by any other person acting in an official capacity" must be replaced by the phrase "by any other person acting in an official capacity". The notion "person who, de facto, exercises the powers of a public authority" exhausts the content of the notion "any other person acting in an official capacity".

Apart from this, the Criminal Code must be completed with article 134^{21} "Any other person acting in an official capacity": "By any other person acting in an official capacity, within the meaning of article 166^1 of this code, it means the person who, in conditions of political instability or

https://www.parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/1344/language/ro-RO/Default.aspx [accessed: 01.01.2024].

the impossibility of the exercise by a state recognized by the international community of sovereignty over its territory or over a part of its territory, usurps and exercises de facto the powers of a public authority of a state recognized by the international community."

We are firmly convinced that pupils/students must be protected by the criminal law against ill-treatment committed by those who do not have the special quality required by article 166[1] CC RM. Now, the Criminal Code of the Republic of Moldova does not offer such protection. Application by analogy of article 166[1] CC RM in cases of ill-treatment of minors, committed by those who do not have the special capacity required by this article (application by analogy which is admitted in cases related to the second jurisprudential orientation, revealed in the appeal of the General Prosecutor), reveals a loophole in the criminal law. However, it is not the competence of the General Prosecutor's Office or the Supreme Court of Justice to fill this gap. This competence rests with the Parliament.

Therefore, we suggest the legislator to intervene and identify the optimal solution to criminalize the ill-treatment of minors and persons in difficult situations, committed by those who do not have the special quality required by article 166[1] CC RM. In this plan, it is useful to analyse the experience of other states.

For example, § 92 "Ill-treatment of minors, young or defenceless persons" of the Criminal Code of the Republic of Austria provides:

> "(1) The act of the person who causes physical or moral torment to a person under his authority or protection and who has not reached the age of 18 or who due to an infirmity, illness or mental disability is defenceless is punishable by imprisonment of up to 3 years.
>
> [...]
>
> (3) If the act results in lasting bodily harm (§ 85), the perpetrator is punished with imprisonment from 6 months to 5 years, and if it results in the death of the victim, with imprisonment from 1 to 10 years."[64]

Pursuant to article 187 of the Criminal Code of Bulgaria: "A person who tortures a minor or underage person, who is under his care or with whose education he has been entrusted, shall be punished by imprisonment for up to three years or by probation, as well as by public censure, provided the act does not constitute a graver crime."[65]

[64] Criminal Code of the Republic of Austria. Available at: codexpenal.just.ro/laws/Cod-Penal-Austria-RO.html [accessed: 01.01.2024].

[65] Criminal Code of the Republic of Bulgaria. Available at: codexpenal.just.ro/laws/Cod-Penal-Bulgaria-RO.html [accessed: 01.01.2024].

Pursuant to § 225 (1) "Ill-treatment of persons in one's charge" of the German Criminal Code: "[w]hoever tortures or roughly ill-treats or by maliciously neglecting their duty of care for a person damages the health of a person under 18 years of age or a person who is defenceless due to frailty or illness and who: 1. is in their care or custody, 2. belongs to their household, 3. has been left under their control by the person who has the duty of care or 4. is subordinate to them within a service or employment relationship incurs a penalty of imprisonment for a term of between six months and 10 years."[66]

Pursuant to article 571 "Abuse of correctional or disciplinary means" of the Criminal Code of the Republic of Italy: "[t]he one who abuses the means of correction or discipline to the detriment of a person subject to his authority or entrusted to him for reasons of education, instruction, care, supervision or guard, or for the practice of a profession or an occupation, is punished, if as a result of the act results in the danger of physical or mental illness, with imprisonment up to 6 months. If a bodily injury results from the act, the penalties established in articles 582 and 583, reduced by one third; if death results, imprisonment from 3 to 8 years applies".[67]

Pursuant to section 174 "Cruelty towards and violence against a minor" of the Criminal Law of Latvia:

> "(1) For a person who commits cruel or violent treatment of a minor, if physical or mental suffering has been inflicted upon the minor and if such has been inflicted by persons upon whom the victim is financially or otherwise dependent and if the consequences provided for in Section 125 or 126 of this Law are not caused by these acts, the applicable punishment is the deprivation of liberty for a period of up to three years or temporary deprivation of liberty, or probationary supervision, or community service, or fine.
>
> (2) For a person who commits the criminal offence provided for in Paragraph one of this Section, if it has been committed against an underaged person, the applicable punishment is the deprivation of liberty for a period of up to five years or temporary deprivation of liberty, or probationary supervision, or community service, or fine."[68]

[66] See in this regard: German Criminal Code. Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [accessed: 01.01.2024].

[67] Criminal Code of the Republic of Italy. Available at: codexpenal.just.ro/laws/Cod-Penal-Italia-RO.html [accessed: 01.01.2024].

[68] Criminal Law of the Republic of Latvia. Available at: https://likumi.lv/ta/en/en/id/88966-criminal-law [accessed: 01.01.2024].

Pursuant to article 152-A "Ill-treatments" of the Criminal Code of the Portuguese Republic:

> "1. The one who has the care, custody or service of, or is in charge of guiding or educating the minor or the defenceless person, by virtue of age, deficiency, illness or pregnancy, and: a) repeatedly applies ill physical treatment to him or psychological, including corporal punishment, deprivation of liberty and sexual abuse or treats her with cruelty; b) uses it in dangerous, inhuman or prohibited activities; or c) burdens her with excessive work; shall be punished with imprisonment from one to five years, unless, under another legal provision, a greater penalty falls upon him.
>
> 2. If the facts provided for in the previous paragraphs result in: a) the crime of serious bodily injury, the perpetrator is punished with imprisonment from two to eight years; b) death, the perpetrator is punished with imprisonment from three to ten years."[69]

Last but not least, pursuant to article 197 "Ill-treatments applied to minors" of the Criminal Code of Romania: "[s]erious jeopardy, through measures or treatments of any kind, of the physical, intellectual or moral development of an underage person, by parents or by any person under whose care the underage person is, shall be punishable by no less than 3 and no more than 7 years of imprisonment and a ban on the exercise of certain rights."[70]

We note that, in the criminal laws of the Republic of Austria and the Portuguese Republic, the criminal norm regarding the ill-treatment of minors and persons in difficult situations coexists with the norm regarding torture (and inhuman or degrading treatment), in which the subject of the crime is specified, among others, any other person acting in an official capacity. Which proves that, in the context of the Criminal Code of the Republic of Moldova, such coexistence is also possible.

By the way, in 2009, an attempt was made to incriminate in article 153 CC RM of the act of hitting and causing slight bodily injuries to children. According to paragraph (1) of this draft article, "[p]remeditated infliction of light bodily injuries, mistreatment, hitting and other acts of violence committed on a child who has not reached the age of 14, which caused physical pain, or a short-term disturbance of the child's health, is punishable by a fine from 200 to 300 conventional units or with unpaid work for the benefit of the community from 140 to 240 hours, or with

[69] Criminal Code of the Portuguese Republic. Available at: codexpenal.just.ro/laws/Cod-Penal-Portugalia-RO.html [accessed: 01.01.2024].

[70] Criminal Code of Romania. Available at: codexpenal.just.ro/laws/Cod-Penal-Romania-RO.html [accessed: 01.01.2024].

imprisonment of up to 6 months".[71] Paragraph (2) of this article stated: "[t]he same acts committed by the parents, by the guardian or guardian, attending physician, teacher, educator, person in employment with child care institutions, or by any other person to whom the child was entrusted, shall be punished with a fine of to 300 to 500 of the conventional unit or with imprisonment of up to 1 year."[72]

However, now, there is no need to supplement the Criminal Code of the Republic of Moldova with a rule that would protect children's health. This objective is achieved in the provisions of article 151 (2) (b) and article 152 (2) (c^1) CC RM. According to these rules, liability for serious or moderate intentional injury to bodily integrity or health is aggravated if the act is committed, inter alia, knowingly against a minor. In article 78 "Injury to bodily integrity" of the Contravention Code[73],[74] the minor is not explicitly mentioned as a victim. However, the minor's bodily integrity and health are implicitly protected against the acts provided for in article 78 of the Contravention Code.

It is necessary to protect the dignity of the minor and the person in a difficult situation, as well as their physical or mental integrity, against ill-treatment committed by those who do not have the special quality required by article 166^1 CC RM. On this occasion, it should be noted that the notions of "physical or mental integrity" and "bodily integrity" should not be confused. Bodily integrity is damaged because of bodily injuries (without causing damage to health), specified in Part V of the Regulation of the Ministry of Health no. 199/2003. In contrast, physical or mental integrity is damaged because of causing physical or mental pain or suffering.

Consequently, we recommend the legislator to supplement the Criminal Code of the Republic of Moldova with article 166^2 "Ill-treatments" which would have the following content:

> "The intentional infliction of pain or physical or mental suffering on a minor, a pregnant woman or a helpless person by the staff of educational institutions, medical institutions, or residential social

[71] The draft law for the amendment and completion of some legislative acts. Available at: http://www.parlament.md/download/drafts/ro/173.2009.doc [accessed: 01.01.2024].

[72] *Ibidem*.

[73] Contravention Code. In: *Official Gazette of the Republic of Moldova*, 2014, no. 319-324.

[74] This article provides: "(1) Maltreatment or other violent actions that have caused insignificant bodily harm are sanctioned with a fine from 15 to 30 conventional units or with unpaid work for the benefit of the community from 20 to 40 hours, or with contravention arrest from 5 to 10 days. (2) Intentional slight injury to bodily integrity that caused a short-term disturbance of health or an insignificant but stable loss of work capacity is sanctioned with a fine of 30 to 45 conventional units or with unpaid work for the benefit of the community from 40 to 60 hours, or with contravention arrest from 10 to 15 days."

institutions, if there are no signs of torture, inhuman or degrading treatment, shall be punished with imprisonment from 3 to 7 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 5 to 10 years."

This provision will ensure a fair balance between the principle of the legality of criminalization and the imperative of effectively combating inhumane treatment of minors.

Finally, considering the above, we recommended the Supreme Court of Justice of the Republic of Moldova to establish that teachers, who are employed in public or private educational institutions, cannot be the subjects of the crimes provided in article 166[1] CC RM.

4. Decision of The Supreme Court of Justice

In a 2022 decision, the Supreme Court of Justice rejected the appeal of the Prosecutor General. According to the Supreme Court, the General Prosecutor would not have presented decisions certifying that there is a divergent judicial practice.[75]

The decision of the Supreme Court was not supported by all judges. Thus, two judges formulated a separate opinion, in which they showed that, indeed, there is a non-unitary judicial practice, and that the intervention of the Supreme Court was indispensable to make it clear. In the separate opinion, it is emphasized that it was necessary to admit the appeal of the Prosecutor General and to establish that the acts of violence that reach the threshold of gravity specific to inhuman or degrading treatment, or that of torture committed by persons who are part of the teaching staff, scientific staff and staff scientific-didactic within all types of educational institutions, will be able to be included under article 166[1] CC RM, because such persons have the status of special subjects, i.e., "persons acting in an official capacity".[76]

5. In the end

Ill-treatments in schools/educational institutions are a pressing problem (and not only in the Republic of Moldova[77]) and which calls for

[75] Decision of the Supreme Court of Justice of February 3, 2022. File no. 4-1ril-3/2021. Available at: http://jurisprudenta.csj.md/search_interes_lege.php?id=19 [accessed: 01.01.2024].

[76] See: Separate opinion of the judges Timofti Vladimir and Cobzac Elena at the Decision of the Supreme Court of Justice of February 3, 2022. File no. 4-1ril-3/2021. Available at: http://jurisprudenta.csj.md/search_interes_lege.php?id=19 [accessed: 01.01.2024].

[77] See, e.g.: Leila Nadya Sadat, *Torture in Our Schools?*, in: Harvard Law Review Forum, 2022, Volume, 135(8), pp. 512-524.

prompt and fair intervention by the state. However, in this field, the courts of the Republic of Moldova do not "speak with single voice". While in some court judgements it was decided that teachers can be held liable based on article 166[1] (Torture, inhuman or degrading treatment) of the CC RM, in others – the opposite was stated. The Supreme Court of Justice of the Republic of Moldova itself issued diametrically opposed judgements, becoming a source of legal uncertainty.

Unfortunately, the Supreme Court of Justice of the Republic of Moldova missed the opportunity to clarify and exercise its role as guardian of fundamental rights, rights that must be practical and effective, but not theoretical and illusory. She left the courts and litigants in the dark. We hope that things will change, and that the solution proposed by us will be implemented. The test of time will show.

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