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**TORTURE, INHUMAN OR DEGRADING TREATMENT  
(art. 166<sup>1</sup> OF THE CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA) –  
ATTACKS ON HUMAN DIGNITY**

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*This scientific study was aimed at finding the reasons of the legislator of the Republic of Moldova to enshrine the acts of torture, inhuman or degrading treatment in Chapter III of the Special Part of the Criminal Code – ‘Crimes against freedom, honour and dignity of the person’. This concern is fuelled, by the differences that arise in terms of the location in a certain Chapter, between the current incriminating model in the field concerned and that one the was used until the adoption of the Law of the Republic of Moldova on the amendment and completion of certain legislative acts, no. 252 of 08.11.2012. The comparative analysis of the criminal regulations of the Republic of Moldova, other states regarding the liability for torture, inhuman or degrading treatment and the synthesis of the relevant ECtHR case law, allowed to present the legal and social aspects of these harming facts, due to which it was possible to detach the necessary explanations that substantiate the legislative reshuffles introduced by the Law of the Republic of Moldova on the amendment and completion of certain legislative acts, no. 252 of 08.11.2012.*

**Keywords:** torture, inhuman treatment, degrading treatment, human dignity, law of the European Court of Human Rights.

**TORTURA, TRATAMENTUL INUMAN SAU DEGRADANT  
(art. 166<sup>1</sup> CP RM) – ATENTATE ASUPRA DEMNITĂȚII UMANE**

*Demersul științific este destinat identificării rașunilor legiuitorului Republicii Moldova de a disloca faptele de tortură, tratament inuman sau degradant în Capitolul III al Părții Speciale a Codului penal – „Infracțiuni contra libertății, cinstei și demnității persoanei”. Această preocupare este dictată de diferențele care se impun, în latura amplasării într-un anumit Capitol, între actualul model incriminator în materie și cel care a operat până la intervenția Legii Republicii Moldova pentru modificarea și completarea unor acte legislative, nr. 252 din 08.11.2012. Analiza comparativă a reglementărilor penale ale Republicii Moldova, ale altor state referitoare la răspunderea pentru tortură, tratament inuman sau degradant și sintetizarea jurisprudenței CtEDO în materie, a permis ilustrarea naturii juridice și sociale a acestor fapte prejudiciabile, grație căreia s-a putut desprinde explicațiile de rigoare care au stat la baza remaniierilor legislative intervenite prin Legea Republicii Moldova pentru modificarea și completarea unor acte legislative, nr. 252 din 08.11.2012.*

**Cuvinte-cheie:** tortură, tratament inuman, tratament degradant, demnitate umană, jurisprudența Curții Europene a Drepturilor Omului.

**LA TORTURE, LES TRAITEMENTS INHUMAINS OU DÉGRADANTS  
(art. 166<sup>1</sup> CP RM) - ATTEINTES À LA DIGNITÉ HUMAINE**

*Cet article vise à identifier les raisons pour lesquelles le législateur de la République de Moldova a invoqué les actes de torture et les traitements inhumains ou dégradants au chapitre III de la partie spéciale du Code pénal – “crimes contre la liberté, l’honneur et la dignité de la personne”. Cette préoccupation est dictée par les différences qui sont imposées, en termes de localisation dans un certain chapitre, entre le modèle incriminant actuel en la matière et celui qui a fonctionné jusqu’à l’intervention de la loi de la République de Moldova pour la modification et l’achèvement de certains actes législatifs, n° 252 du 08.11.2012. Une analyse comparative des règlements du droit pénal de la République de Moldova, des autres États membres concernant la responsabilité pour usage de la torture, des traitements inhumains ou dégradants, et la synthèse de la jurisprudence de la Cour Européenne des droits de l’homme dans ce domaine, ont permis d’illustrer la nature de la sécurité juridique et sociale de cette activité criminelle, grâce à laquelle il a été possible de tirer des explications, qui ont été à la*

*base des modifications des modifications législatives qui ont eu lieu par la Loi de la République de Moldova pour la modification et l'achèvement de certains actes législatifs, n° 252 du 08.11.2012.*

**Mots-clés:** *torture, traitements inhumains, traitements dégradants, dignité humaine, jurisprudence de la Cour Européenne des Droits de l'Homme*

### **ПЫТКИ, БЕСЧЕЛОВЕЧНОЕ ИЛИ УНИЖАЮЩЕЕ ОБРАЩЕНИЕ (ст. 166<sup>1</sup> УК РМ) - ПОСЯГАТЕЛЬСТВА НА ЧЕЛОВЕЧЕСКОЕ ДОСТОИНСТВО**

*Данная статья призвана выявить причины, по которым законодатель Республики Молдова включил акты пыток, бесчеловечного или унижающего достоинство обращения в Главу III Особенной части Уголовного кодекса - «Преступления против свободы, чести и достоинства человека». Обеспокоенность продиктовано различиями, которые необходимы, с точки зрения места в определенной главе, между нынешней инкриминирующей моделью в данном вопросе и той, которая действовала до принятия Закона Республики Молдова № 252 от 08.11.2012 О внесении поправок и дополнений в некоторые законодательные акты. Сравнительный анализ уголовного законодательства Республики Молдова и других государств в отношении ответственности за пытки, бесчеловечное или унижающее достоинство обращение и обобщение судебной практики ЕСПЧ по данному вопросу позволили проиллюстрировать правовую и социальную природу этих наносящих ущерб фактов, которые и послужили основанием для законодательных изменений после принятия Закона Республики Молдова № 252 от 08.11.2012 о внесении поправок и дополнений в некоторые законодательные акты.*

**Ключевые слова:** *пытка, бесчеловечное обращение, унижающее обращение, человеческое достоинство, юриспруденция Европейского суда по правам человека.*

#### **Incriminating context**

By law, in the Republic of Moldova, torture, inhuman or degrading treatment are harmful acts incriminated in Art. 166/1 of the Criminal Code [1] and are enshrined in Chapter III of the Special Part 'Crimes against freedom, honour and dignity of the person'. Before the intervention of the Law on the amendment and completion of certain legislative acts, no. 252 of 08.11.2012 [2], torture was incriminated in Art. 309/1, being included in Chapter XIV of the Special Part, entitled 'Crimes against justice'.<sup>1</sup> Relating the social value protected through this Chapter to the content of Art. 309/1 of the Criminal Code, we deduce that the incriminating framework in the field of torture was related to a wider scope of social relationships. This is because, given the provisions of Art.114 of the Constitution of the Republic of Moldova [3], justice is administered in the name of the law only by courts. However, analyzing the content of Art. 309/1 of the Criminal Code of the Republic of Moldova, we note that by committing harmful

<sup>1</sup> It should be noted that prior to the operation of the Law on amendment and completion of certain legislative acts n.252 from 08.11.2002, the inhuman and degrading treatment wasn't considered incriminating, such as *nomen iuris*. Thus, for example, such types of treatment was partially covered by certain provisions, such as: letter c) par.(2) art.328 Criminal Code, meaning the excess of power or abuse of job duties accompanied by actions that humiliate the dignity of the damaged party.

acts described in the law, the act of torture may impede not only the activity of courts, but also the activity before and after the trial. Thus, the social relationships regarding the enforcement of justice and contribution to the enforcement of justice are impaired. That is why it was proposed in the literature to rename Chapter XIV of the Special Part of the Criminal Code of the Republic of Moldova from 'Crimes against justice' to 'Crimes related to the enforcement of justice or related to the enforcement of justice' [4], so as to include the pre- and post-trial activity. However, the Moldovan legislator chose another option to adjust this dissent, and namely moved torture to another chapter. The reason for such a legislative reshuffle is given in the Informative Note to the Draft Law on the amendment and completion of certain legislative acts. [5] According to it, 'inclusion of the crime of torture in Chapter III of the Special Part of the Criminal Code is due to the fact that, similarly to other crimes such as slavery or trafficking in human beings, which are directly aimed at degrading the human being to a mere object, torture is the most direct attack on human dignity (our emphasis). The current classification of Art.309(1) in Chapter XIV of the Special Part of the Criminal Code as a crime against justice seems to suggest that the main subject of protection to be achieved through the criminalization of torture is the proper enforcement and administration of justice. While it cannot be denied that acts of torture are most of-

ten committed in order to obtain testimonies in the early stages of the criminal investigation, its protecting purpose would be reduced to ensuring the proper act of justice, which would be an absolutely wrong interpretation and contrary to the spirit and nature of the complete prohibition of torture in accordance with international law’.

Such a legislative approach naturally raises the question: Are there enough grounds to enshrine torture, inhuman or degrading treatment as a crime against human dignity? This question arises mainly against the background of incriminating models of torture, inhuman or degrading treatment under the laws of other states. For example, according to the Criminal Code of Romania in force [6], subjection to degrading or inhuman treatment is criminalized in Art. 281 (2), and torture is provided for in Art. 282, which in turn refers to Title IV of the Part Special, entitled ‘Crimes against the enforcement of justice’. On the contrary, in the Spanish Criminal Code torture and degrading treatment are provided for in Title VII entitled ‘Torture and other crimes against moral integrity’ [7], and their analysis makes us concluding that both by committing the material element of degrading treatment (Art. 173) and by the act of torture committed by an authority or a civil servant (Art. 174 (1)), including by an official from penitentiaries or juvenile re-education centres (Art.174 (2)), the perpetrator limits or attacks the moral integrity of the victim. Based on these examples, we summarize that in terms of horizontal comparison, there is no unitary conception of the legal nature of the act of torture, inhuman or degrading treatment. We consider this issue fundamental, since the social value and, implicitly, the social relationships related to it, which make up the content of the special legal object of the crime, are involved in a connection of organic derivation with the value and social relationships that represent the generic legal object of the crime. So, the content of one of the elements of the crime composition, i.e. the object of the crime, also depends on the correct systematization of a crime. This is why, in the Romanian specialized literature it is argued that the main legal object of the crime of torture (Art. 282 of the CC of Romania) consists in social relationships regarding the enforcement of justice, which are incompatible with causing to a person strong physical or mental sufferings in any of the purposes mentioned in the norm of incrimination [8], rather than in the social relationships related to the dignity of the person.

In other words, we recall that the categorization of torture as a crime against the dignity of the person was also conducive to the Criminal Code of the Republic of Moldova in the version of 1961 (repealed). Thus, torture (Art. 101/1) was enshrined in Chapter II of the Special Part of the Criminal Law in the version from 1961 – ‘Crimes against life, health, freedom and dignity of the person’. [9] Synthesizing the evolution of the incriminating frame in the field of torture, we reiterate that on the current territory of the Republic of Moldova, initially this act was conceived as a crime against the dignity of the person, then as a crime against justice and finally return to the primary conception. However, we consider that the legislative conceptual revision of the categorization of torture, which we have described, is not based on this historical precondition. There are other serious reasons that the legislator has taken into account for doing so. That is why we still aim to find the answer to the question by exploring international and European instruments and mechanisms.

#### **International, European and national context**

Art. 5 of the Universal Declaration of Human Rights [10], Art. 7 of the International Covenant on Civil and Political Rights [11], Art. 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [12], Art. 3 of the European Convention on Human Rights [13], the preamble to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [14], etc. enshrine one of the most fundamental values of a democratic society, and namely: the right not to be subjected to torture and to cruel, inhuman or degrading treatment or punishment. Despite the brief wording in the above instruments, the depth of the established right is, beyond any doubt, as it is a general right from which no derogations are allowed, not even in the context of an imminent danger that threatens the life of the person or even the life of the nation. A proof of this is the ECtHR case law. For example, in *Gäfgen v. Germany*, the European Court held that ‘Torture, inhuman or degrading treatment cannot be applied even if a person’s life is at risk. [...] The philosophical basis underlying the absolute nature of the right guaranteed by Art. 3 does not allow any exception or justifying factors or balancing of interests, regardless of the person’s conduct or the nature of the crime concerned’. [15] Also, in the case *Chahal v.*

the United Kingdom, the European Court held that ‘the Court is well aware of the difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Art. 3 makes no provision for exceptions and no derogation from it is permissible under Art. 15 even in the event of a public emergency threatening the life of the nation.’ [16]

Having due regard to this particularity, there was an opinion according to which the prohibition of torture acquired the status of absolute right as it was based on the moral thesis that there is no greater violation of human dignity. [17] The same idea is shared by other authors. According to them, the prohibition of torture and other forms of ill-treatment stems directly from the inherent and inalienable dignity of every human being that must be respected and protected in absolute terms, regardless of the conduct of the individual, and in any circumstances. [18]

In the same vein, international and European human rights provisions indirectly refer to human dignity when they prohibit torture, inhuman or degrading treatment or punishment. For example, in the Preamble to several universal documents, such as the International Covenant on Civil and Political Rights, it is stated that fundamental human rights derive from the inherent dignity of the human being. It should be noted that special international instruments also evoke the same idea. For example, the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: ‘Considering that ... the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ [19] The United Nations Declaration on the Elimination of All Forms of Racial Discrimination [20], also states that discrimination between people on the grounds of race, colour, or ethnic origin is an insult to human dignity and must be condemned as a violation of human rights and fundamental freedoms and as a matter likely to disturb the peace and security of peoples. Invoking the provisions of this latest international act is not coincidental. To exclude any confusion regarding

its relevance to the subject of our research, we reiterate that torture, according to Art. 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and according to Art.166<sup>1</sup> (3) of the CC of the RM, is committed *inter alia*, for any other reason, based on a form of discrimination, whatever it may be. Based on the provisions referred to above, we deduce that torture, punishment or cruel, inhuman or degrading treatment mainly harms the dignity of the person, a concept which is not defined by international and regional legal instruments.

The concept of human dignity is not defined in the domestic legal framework. However, some details on the nature of human dignity derive from the fundamental law of the Republic of Moldova, according to which human dignity is conceived as the core value, and its observance is a primary principle. A proof of this is Art. 1 (3) of the Constitution, according to which the Republic of Moldova is a democratic state governed by the rule of law, in which *human dignity* (our emphasis), human rights and freedoms, free development of human personality, justice and political pluralism are supreme values and are guaranteed. Therefore we conclude that human dignity is a constitutional principle, a supreme value of the rule of law, rather than a fundamental right, that is a constitutional position shared by other states, such as France. In this respect, it has been argued in the specialized French literature that the dignity of the person is not only a constitutional principle, but also a universal one which presupposes the protection of the person against any form of enslavement, degradation and even humiliation. [21] Since there is no any definition of human dignity, we will use its judicial interpretation given in point 5 of the Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova ‘On the application of legislation on the protection of honour, dignity and professional reputation of natural and legal person’, No. 8 of 09.10.2006 [22], according to which the dignity is the self-appreciation of the person based on the appreciation of the society.

### **The relevant ECHR case law**

In terms of both the European case law [23] and doctrines [24] it was revealed that the main purpose of Art. 3 of the European Convention is the protection of human dignity and physical integrity. At the same time, the protection of Art. 3 extends over several types of attacks on human dignity and

physical integrity. This is because the right not to be subjected to torture, inhuman or degrading treatment and punishment is a ground where the ECtHR has proceeded to successive interpretations and development of essential concepts starting from the degrees of impairment of the dignity of the person. For example, in the cases *Ribitsch v. Austria* [25], *Tekin v. Turkey* [26], *Assenov and others v. Bulgaria* [27], *Labita v. Italy* [28], *Pantea v. Romania* [29], *Rupa v. Romania (No. 1)* [30], *Savitschi v. the Republic of Moldova* [31], *Feodorov v. the Republic of Moldova* [32], *Buhaniuc v. the Republic of Moldova* [33], *Lolayev v. Russia* [34], etc., the European court raised to the rank of principle the fact that ‘in respect of a person deprived of liberty, any recourse to physical force, which his/her own conduct did not make strictly necessary, *affects human dignity* (our emphasis) and constitutes, in principle, a violation of the right guaranteed by Art. 3 of the Convention’. Moreover, the use of force harms human dignity whether or not the victim has suffered a severe or long-lasting physical effect. Specifically, in the case of *Tyrer v. the United Kingdom* [35], the ECtHR held that although the applicant had not suffered any severe or long-lasting physical effect, the punishment applied (three strokes of a birch twig over the backside, with pieces of the birch breaking), the applicant was made to take down his trousers and underpants and bend over a table, being held by two policemen, while the third one was administering the punishment; the birching raised the applicant’s skin and he was sore for about a week and a half afterwards) – whereby the person was treated as an object in the hands of the authorities – was a violation of his dignity and physical integrity, as the applicant suffered significant bodily injury and humiliation, which reached the level of serious degrading treatment and punishment within the meaning of Art. 3 of the Convention.

In addition to the use of physical force against a person in state custody, the dignity of the person is also harmed in the case of discrimination, whatever it may be. Thus, for example, in §113 of the Decision of 12 July 2005, in the case of *Moldovan and Others v. Romania (No.2)* [36], the European Court held that the ethnic discrimination to which the applicants had been publicly subjected by the manner in which the petitions were settled by the authorities, as well as the housing conditions of the applicants harm their human dignity, constituting, in the light of the circumstances of

the case, degrading treatment within the meaning of Art. 3 of the Convention. Moreover, the former Commission also held in the case of *Patel (Asiatiques d’Afrique Orientale) v. the United Kingdom* [37] that the racial discrimination to which the applicants had been subjected by the application of immigration legislation constituted an impairment of human dignity, which in the circumstances of the case (mass expulsion of Asians from East Africa, some of whom, even if they held a valid British passport, were denied residence in the United Kingdom) led to degrading treatment within the meaning of Art. 3 of the Convention. Even based on the interpretations of by the European Court of the degrading treatment, we can realize that, every time such a treatment is a special offense to human dignity, as it causes the human being a feeling of fear, suffering and inferiority, humiliating and debasing it. That is why, we share the opinion that degrading treatment takes into account those serious violations of human dignity that are likely to lower a person’s social status, his/her situation or reputation can be considered as such treatment, in the meaning of Art. 3 of the Convention, if it reaches a certain degree of seriousness. [38]

In the same vein, according to the case law of the ECtHR, human dignity is harmed when the person is subjected to forced medical treatment, unless it proves to be of therapeutic necessity. Although there is still a weakly ground exploited by the Court, we cannot disregard the finding made by the European court on this subject. We refer to the case of *Gorobet v. the Republic of Moldova* [39], according to which the applicant alleged that his detention and forced psychiatric treatment in the psychiatric hospital had caused him severe mental suffering, which constituted inhuman and degrading treatment. In the circumstances of this case, the Court saw no reason to disagree with the applicant and noted that it had not been proven that there was a need to subject the applicant to psychiatric treatment and, therefore, subjecting him to psychiatric treatment was illegal and arbitrary. Furthermore, the Court noticed that the medical treatment had lasted a considerable period of forty-one days and that during his detention the applicant had no contact with the outside world. In the opinion of the Court, such illegal and arbitrary treatment could have at least caused to the applicant the feelings of fear, agony and inferiority, which is why the Court ruled that the psychiatric treatment to which the

applicant had been subjected constituted, at least, degrading treatment, within the meaning of Art. 3 of the Convention.

### Conclusions

Given the international and European instruments and mechanisms, as well as the materiality of the act of torture, inhuman or degrading treatment that we derive from the legal framework of the Republic of Moldova, as well as their scope, we could notice that these conducts cover various ways, whereby human dignity is seriously harmed, consisting in: recourse to physical force of persons deprived of liberty; establishment or application of institutionalized corporal punishments; use of discriminatory treatment; application of forced medical treatment, etc. For these reasons, the incrimination of torture, inhuman or degrading treatment in Chapter III of the Special Part of the Criminal Code of the Republic of Moldova is the most appropriate legislative solution based on the systemic interpretation of criminal law. Consequently, by law, there is no impediment in supporting the fact that the social value protected mainly by the incrimination enshrined in Art.166/1 of the CC of the Republic of Moldova is represented by the dignity of the person.

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