

## Achieving the Material Element of the Crime of Submission to Ill Treatment from the Perspective of the ECHR Jurisprudence

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**Abstract:** The Criminal Code in force regulates the submission to ill treatment in the chapter dedicated to offenses against the act of justice. The harmonization of the national legislation with the EU legislation, especially with the European Convention on Human Rights (Article 3) and its Protocols is being sought, without forgetting, however the concrete situations that must be decided in Romania. For this reason, in order to establish the material element of this crime, the point at which the suffering caused to a person cannot be considered mere brutality, but serious enough to be regarded as inhuman or degrading treatment or even torture was determined. Moreover, it should be considered that the concept of minimum level of gravity disappears in the case of prisoners, because the obligation of protection is greater in their case. Any act of gratuitous violence, no matter how insignificant, against a prisoner determines the application of Article 3 of the Convention without taking into account the minimum level of severity.

**Keywords:** inhuman or degrading treatment; fundamental human rights; detention

Art. 281 paragraph (1) states that “*Subjecting to person to serving a sentence, to security or educational measures, in a different manner than that provided by law, shall be punished with imprisonment from 6 months to 3 years and with prohibition of the right to hold public office*” and in paragraph (2) “*The submission to degrading or inhuman treatment of a person in state of arrest, detention or in execution of a security or educational measure, with deprivation of liberty, shall be punished with imprisonment from 1 to 5 years and with prohibition of the right to hold public office*”<sup>2</sup>.

The offense of submission to ill treatment has a dual **legal object**. On the one hand, there is the main legal object consisting of the social relations concerning the act of justice, the execution of sentences and the custodial educational measures, and on the other hand, there is a secondary legal object consisting of social relations regarding the respect for the fundamental human attributes of a person: honour, dignity, health and freedom.

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<sup>2</sup>Criminal Code approved by Law no. 286/2009.

In the type form, **the material element of the objective side** is achieved by subjecting a person to enforcing a punishment, to security or educational measures, in a different way than as required by law. That means imposing a person another manner of enforcing the sentence, the security measure or the educational measure than that established by law. The enforcement manner, the safety and the educational measures are governed by the Criminal Procedure Code and by Law no. 254/2013 on the execution of sentences and custodial measures ordered by the Court during the trial.

The offense of submission to ill treatment, as provided in paragraph 1 does not absorb the offense of deprivation of freedom<sup>1</sup> because it is not possible that a more severe offense is absorbed by a lighter offense. In such a situation, the rules of the set of offenses are applicable.

As far as the aggravated form of the offense of the submission to ill treatment is concerned, **the material element** is achieved by the submission to inhuman or degrading treatment of a person in state of arrest, detention or in execution of a security or educational measure, with deprivation of liberty. Inhuman treatment is that attitude that may constitute an attempt upon the life of the person or which may produce only distress and/or physical suffering of a high intensity. The suffering must be caused voluntarily by agents of the state or even by private individuals tolerated by the state bodies and must be situated at a very high level of severity. Degrading treatment can be defined (Udroiu, 2014, p. 302) as a treatment that humiliates the person in front of herself or of other persons or that determines her to act against her will or conscience.

The crime of submission to ill treatment absorbs the crime of hitting or other violence offenses provided by the Article 193 of the Criminal Code. In exchange, it does not absorb the offenses of bodily injury or injuries causing death; in such a situation, the rules from the set of offenses will be applied.

In any case, these ill treatments should not have the form of torture. In other words, inhuman and degrading treatment should not exceed a certain degree of intensity, otherwise the offense of torture provided and sanctioned by art. 282 of the Criminal Code will be applied.

The restrictions inherent to the custodial measures to which a person is submitted (e.g., withholding the mobile phone or the jewellery made of precious metals at the

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<sup>1</sup> The Article 205 of the Criminal Code. The unlawful deprivation of liberty (1) the deprivation of liberty of a person, unlawfully, is punishable by imprisonment from one to seven years. (2) The abduction of a person unable to express her will or to defend herself is considered deprivation of liberty. (3) If the offense is committed: a) by an armed person; b) against a minor; c) endangering the health or life of the victim, the penalty is imprisonment from 3 to 10 years. (4) If the act resulted in the death of the victim, the penalty is imprisonment from 7 to 15 years and the prohibition of certain rights”.

time of imprisonment) do not fall within the scope of inhuman or degrading treatment.

In order to retain the offense of submission to ill treatment, it is necessary that acts falling within the constitutive content of the offense have a repetitive character; in the case of committing a single act of submission to ill treatment, the offense of abusive behaviour will be retained<sup>1</sup>. The same offense of abusive behaviour will be withheld in the case where ill treatment is committed in the enforcement of a warrant for preventive arrest or for the enforcement of a penalty.

The revised Constitution of Romania states, according to European reference documents that no one must be submitted to any torture or inhuman or degrading treatment or punishment<sup>2</sup>.

Article 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

By capitalizing the principle of humanism and legality of sanctions, the Article 3 of the Convention has generated an ample case law of the European Court of Human Rights. Thus, the Court in Strasbourg has developed a series of criteria according to which violence exercised by state agents can be classified into one of these categories: the context in which the acts of violence occurred, the length of those acts of violence, the physical or mental effects of harm on the person who went through them, the sex, age and state of health of the victim and the reasons for those violent acts. The European Court examines these criteria together or separately, depending on the circumstances of the case.

The provisions of the Article 3 are intended to protect the physical and moral integrity of the person and her dignity. Since it regulates everyone's right to dignity and physical integrity, the prohibition imposed by article 3 is absolute. It follows that European states cannot, under any circumstances, derogate from this provision, which makes this right to appear as intangible. The prohibition of torture or inhuman or degrading treatment or punishment is absolute also in relation to the behaviour of the person to whom they are applied. Also, the nature of the offense which would be imputed to the applicant is deprived of any significance in the meaning of the Article 3 of the ECHR.

The prohibition of inhuman or degrading treatment has become a general principle of international law, with value of rule - peremptory rule.

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<sup>1</sup> The Article 296: Abusive behaviour "(1) The use of offensive language against a person by the one in the line of duty is punishable by imprisonment from one month to six months or by fine. (2) Threatening or hitting or other violence committed under par. (1) shall be punished with the punishment provided by law for the offense, whose special limits shall be increased by one third".

<sup>2</sup> The Constitution of Romania provides in Article 22 para. (2): No one shall be subjected to torture, inhuman or degrading treatment or punishment.

This right meets the following features (Gutan, 2004, p. 74 ff):

- it is intangible: limitations on its exercise are not allowed, not even in circumstances which may jeopardize national sovereignty, which distinguishes it from other rights protected by the Convention;
- it cannot stand derogations, under the Article 15 concerning the emergency derogations;
- it is an absolute right, which subsists, regardless of the victim's conduct and regardless of the crime of which the victim is accused.

The European Court has stated in several occasions that when a person in good health falls under the authority of the state, the state must provide a plausible explanation as to the origin and nature of any traces of violence. The European Court has stated that states do not have only the negative obligation of not subjecting persons within their jurisdiction to ill treatment, but also a number of positive obligations of taking concrete and effective measures to protect the physical and bodily integrity of the person.

Such a positive obligation is that of taking all necessary measures to prevent the submission of a person to ill treatment, for example by adopting an effective criminal legislation to incriminate the harm brought to the integrity of the physical, mental or bodily health of the detainee. State authorities will be held accountable also in the situation when they did not take effective measures in order to prevent a risk of maltreatment, risk that potential victims had brought to the attention of authorities (by filing a criminal complaint, for example). The European Court did not make, in that context, a distinction if the ill treatment came from state agents or private individuals.

As for the imprisonment regime, ensuring minimum conditions to the prisoners is a jurisprudential creation. The Court held that Article 3 imposed states an obligation to provide for every detainee, detention conditions that would ensure respect for human dignity and the obligation to take concrete measures for the execution of a sentence or the remand in custody not to involve mental and/or physical suffering at a higher level than the one normally involved by such a penalty or measure.

The abusive behaviour of state agents during controls or raids carried on by them was also deemed contrary to the Article 3. There were not deemed contrary to art. 3: the application of medical treatment to a prisoner against his will, to the extent where the treatment corresponded to the principles of treatment generally accepted and applied to preserve the physical/mental health of the prisoner, the forced feeding of a prisoner if he had declared he was on hunger strike.

Regarding the assessment of the gravity of maltreatment, it is relative by nature; it depends, as we have pointed out earlier, by a set of specific circumstances of each case, such as the duration of the ill treatment or the psychological or mental effects and, in some cases, the sex, age and state of health of the victim. When a person is

deprived of liberty, the use of physical force, when it is not determined by the behaviour of the person, injures the human dignity and constitutes, in principle, an infringement of the right guaranteed by the Article 3 of the Convention.

Regarding the condition of minimum level of gravity, it should be noted that the mere unjustified treatments applied to a person and which might cause her some minor inconvenience, do not fall within the scope of protection of the Article 3. In order to assess in each case, the minimum level of severity implied by a certain treatment, the ECHR jurisprudence has created certain criteria, outlining clearly the existence or non-existence of the minimum level of severity (Barsan, 2010, p. 138).

Article 3 of the ECHR prohibits torture and other inhuman or degrading treatment or punishment. The European Court has stated the principle under which the prohibition of torture and inhuman or degrading treatment or punishment constitutes “one of the fundamental values of democratic societies that make up the Council of Europe”. Therefore, the protection of physical and psychological integrity of the person against torture and other ill treatment is absolute. Under Article 3 of the Convention, “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. This guarantee is therefore, as stated previously, an untouchable right: the right of not being submitted to a treatment contrary to the human integrity and dignity is an inalienable attribute of the human person, based on common values of the cultural heritage and social modern systems and cannot suffer any restriction or derogation<sup>1</sup>.

Regarding the degrading treatment, in compliance with the practice of the European Court, we conclude that the concept envisages serious prejudice to human dignity, lowering the social status of a person, her situation or her reputation. For example, the Court held in the case of *Ireland v. United Kingdom* (1978) that a treatment applied to a person has to be qualified as degrading when it causes her feelings of fear, anxiety, inferiority capable to humiliate, degrade and eventually defeat her physical and moral resistance. In the case *Kurt v. Turkey* (1998), the uncertainty and fears lived by the applicant, mother of a missing boy during the Turkish military operations in a region inhabited mostly by Kurds, feelings that caused her serious mental suffering and deep unrest, were considered as inhuman and degrading treatment.

With respect to the detainees, the contracting states have the obligation to make sure that any detainee is provided with conditions which are compatible with the respect for human dignity and with the adjustment of some ways of execution of the custodial sentence so that he/she is not subjected to humiliating treatment or situations that would exceed the unavoidable level of suffering inherent to detention.

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<sup>1</sup> [http://drept.uvt.ro/documents/Anale\\_UVT\\_Drept\\_1-2.2008\\_final-Romania-si-articolul-3-al-C.E.D.O.pdf](http://drept.uvt.ro/documents/Anale_UVT_Drept_1-2.2008_final-Romania-si-articolul-3-al-C.E.D.O.pdf) accessed 4/27/2016.

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