

THE RIGHT TO PHYSICAL AND MENTAL INTEGRITY

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Abstract

Although the right to physical and mental integrity is regulated by the article 22 of Romanian Constitution beside the right to life, this two rights need a distinct approach due to the major importance which has each of them.

The constitutional regulations regarding the questioned right reflect the striving of the international organisms to defend and concede this right.

The concede of right to physical and mental integrity, proclaimed by the Constitution, gains efficiency in the internal law, first of all, by incriminating in Penal Code some facts directed against the corporeal integrity or against the health.

For reflecting again the importance of this right, The New Civil Code regulates too in article 58 the right to physical and mental integrity as an inherent right for human being, putting it in the personality rights category.

Key words: *rights, physical integrity, mental integrity, constitutional regulations, New Civil Code*

The right to physical and mental integrity is another fundamental right of the person provided exactly in the constitutional form, which is common to that of the right to life and which shows the close bond between these two rights.

The right to mental integrity cannot be separated from the right to physical integrity because the person is a unitary bio-mental entity. Any violation of the right to physical integrity falls on the mental integrity, even if sometimes this is not noticeable.

Although the constitutional provisions do not show this, we could say that the right to physical and mental integrity has certain limitations.

Besides the general causes which remove the penal character of the action and which acts, obviously, in the same situation (self defense, state of necessity etc.), the implicit character of the action can also be removed on the hypothesis that, in certain limitations, violence is admitted, by law or by custom. It is the case of some sports games, some medical interventions, some fashion related practices (tattoos), religion (circumcision) etc¹. From this perspective we have to mention that “in the case that a certain limitation of the person’s physical integrity is necessary to be guaranteed at least at the same level of other fundamental rights or for the protection of other values of the same importance to the organized society in the state and can be used in refraining the exercise of this right, accomplished only by law, under the conditions of Art.53 of the constitution.”²

¹ V.Cioclei – Penal Law. Special Part. Infractions against the person, page 97;

² M.Constantinecu, A.Iorgovan, I.Muraru, E.S.Tanasescu – Reviewed Romanian Constitution. Commentary and Explanations, Pub. All Beck, Bucharest, 2003, page 37;

The regulations of Art.22 paragraph 2 of the Constitution gives special protection to these two rights regarding the possibility to exercise the abuse of power. So, torture, punishment and inhuman or degrading treatments are forbidden.

The notion of torture is used here in the sense of gaining evidence or, in other words, as a procedure, obviously illegal, as investigation, exercised by an agent of public authority, or at the order of such an agent. In the same logic, the notions of punishment and treatment refer to punitive or coercive measures exercised onto persons who are under the power of an agent of public authority³. Torture, as a means of investigation, has been for centuries, a habitual instrument in the mechanism of penal court. Confession was considered the “queen” of evidences, and to obtain it, the accused were subjected to torture or “the thing” as it was also known. Beside the merit of abolishing the death penalty, Beccaria had also the merit of requesting the banning of torture.

The Romanian legislation took over the explanation of the terms of torture, punishment and inhuman or degrading treatments from the international legislation.

The Convention against torture and other cruel, inhuman or degrading punishments and treatments, adopted by the U.N. General Council at December 10th 1984 defines torture (Art.1, paragraph 1) as “every act through which to a person is provoked, intentionally, powerful pains or sufferings, physical and mental, especially with the goal of obtaining from it or from a third person information or confession, to punish him/her for an action, which he/she or a third person had committed or was suspected of committing, to intimidate or to make pressure on a third person, or for any other reason based on a form of discrimination whatever the kind, when such a pain or suffering is applied by an agent of public authority or by any other person who acts with an official title or at the instigation or at the haste or silent consent of such persons”.

Also, in the European Court’s jurisprudence the content of “torture”, of “inhuman punishment and torture”, and of “degrading treatments” has been set. So, “torture” represents a deliberate inhuman treatment which causes grave and cruel sufferings, “inhuman punishments and treatments” represents hurts and punishments which cause intense physical and mental sufferings and the “degrading treatment” represents that treatment through which it is created onto the victim the feelings of fear, anguish and inferiority with the effect to humiliate and possibly destroy the mental and physical resistance of the victim.

Concerning the notions above, the European Committee ruled on the violence in schools on students, establishing that punishing a 16 years old student with hitting her by a man in the presence of another man constitutes a humiliation which brakes Art.3 of the Convention, while the European Court stated that bodily punishments on students in schools does not create a sufficient degree of humiliation or indignity to invoke the violation of Art.3 of the Convention.

At the same time the European Court had decided that it represents inhuman and degrading treatments: covering the convicts’ heads, exposing them to a loud and continuous whistle; sleep deprivation; food limitation; forcing them to stand up, at the wall, in an awkward position, for several hours.

The European Court had also decided that it stands as inhuman treatments the blows with feet and fists, which can cause powerful sufferings and body damages, sometimes considerable.

³ Ioan Muraru, Elena Simina Tanasescu – Romanian Constitution. Commentary on articles, Pub. C.H. Beck, Bucharest, 2008;

All these practices have been considered, in the European Court's jurisprudence as torture, inhuman and degrading treatments, if they reached a certain degree of intensity of caused sufferings, or a minimum of gravity, and the appreciation of this minimum depends on the overall data of the cause.⁴

An inhuman treatment has also been considered the passing of a period (of 6-8 years) between the pronouncement and execution of a death penalty and the powerful tensions inherent to the rigorous incarceration process, as effect to the exposure to the "death row syndrome".

In the European Court's jurisprudence it was retained that there is not torture, nor inhuman punishment, in the sense of Art.3 of the European Convention, the suffering caused by the legal enforcement of a body punishment. For a punishment to be degrading and contrary to Art.3, the humiliation or contempt caused must reach a considerable level and has to differ from the usual element of humiliation, which normally and almost inevitably the judicial punishments use. Appreciation regarding this is relative; it depends especially on the nature and context of the punishment, as for its ways of execution. Also, the Court has retained that judicial body punishments involve, by their nature, that a human being use physical violence on one of his peers; besides this, it is about institutionalized violence, which character merges with the whole official procedure, supposed of punishment and with the circumstances in which the illegal deed had been committed.

The primary international conventions in the field of human rights do not mainly refer to the right to physical integrity, preferring to set only the protection coordinates of this right through the banning of torture and inhuman and degrading punishments or treatments.

The process of total elimination of torture from the sphere of legal procedures has been difficult and long⁵. An important contribution in this manner went to the international conventions regarding human rights, where it can be found provisions regarding the banning of torture. So, in Art.5 of the **Human Rights Universal Declaration** it is stated that: "No one will be subject to torture or to cruel, inhuman and degrading punishments or treatments". **The International Pact regarding the civil and political rights** sets in Art.7 the following: "No one will be subject to torture or other cruel, inhuman and degrading punishments or treatments. Especially it is forbidden that a person be subject, without his/hers consent, to a medical or scientific experience". In its turn, **The European Human Rights Convention** proclaims the banning of torture in Art.3, which provides the following: "No one can be subject to torture, or inhuman and degrading punishments or treatments".

The international community created specific instruments, through which torture can be defined, the deeds that go into this sphere can be watched, and the states that tolerate such deeds can be warned and sanctioned. As such the following were adopted: The U.N. Convention against torture and other cruel, inhuman or degrading treatments and punishments (New York, December 10th 1984, ratified by Romania through law no.19/1990) and The European Convention to prevent torture and inhuman or degrading

⁴ Gheorghe Iancu – Fundamental Rights, Freedoms and Duties in Romania, pub. All Beck, Bucharest, 2003, page 116;

⁵ Ioan Muraru, Elena Simina Tanasescu – Romanian Constitution. Commentary on articles, Pub. C.H. Beck, Bucharest, 2008;

punishments and treatments (Strasbourg, November 1987, ratified by Romania through law no.80/1994).

Even in the most difficult of circumstances, like the fight against terrorism and organized crime, the Convention forbids, in absolute terms, torture and inhuman or degrading punishments and treatments. Article 3 does not provide restrictions, which is in contrast with most normative depositions of the Convention and Protocols no.1 and no.4 and, regarding to Art.15 paragraph 2 of the Convention, does not support any derogation, even in the situation of a public danger which threatens the life of the nation. The interdiction of enforcing torture or other inhuman or degrading treatments and punishments is absolute and referenced to the person's behavior to which it is enforced⁶.

Guaranteeing the right to physical and mental integrity, internally, it is accomplished with the help of penal rules and penal procedure. The rules of the New Civil Code also regulate this right, making reference to more aspects related to physical and mental integrity.

Guaranteeing the right to physical integrity, proclaimed by the Constitution, gains efficiency, mainly by incriminating in the penal code of certain facts directed against the integrity of the body or of the health. They are the infractions in Title II, Chapter I, and Section II of the Penal Code – the hitting and injury of physical integrity or health. They are incriminated in this section: Hitting or other violence (Art.180 P.C.), Body injury (Art.181 P.C.), Severe body injury (Art.182 P.C.), Hitting or injury causing death (Art.183 P.C) and negligent body injury (Art.184 P.C.).

The right to mental integrity, being inseparable to the right of physical integrity, finds shelter among the penal rules mentioned above. As in the case of physical integrity, the right to mental integrity enjoys an indirect protection, by incriminating in the Penal Code of facts which have a main juridical object which refer to another social value, but which can also have as a result the violation of mental integrity (rape, robbery etc.). We also have to notice that, as in the case of the relation between physical integrity and physical freedom, the right to physical integrity cannot be separated from physical freedom. That is why the constitutional guarantee regarding the physical integrity of the person is protected indirectly and through the criminalization in the Penal Code of certain facts which violate directly mental freedoms (threat – Art.193 P.C. and blackmail – Art.194 P.C.).

The constitutional rules regarding these rights also gain efficiency through the consecration in penal law (including here the penal procedure) of the banning of torture, inhuman or degrading punishments and treatments.

So, Art.5C, having as a marginal description: "Compliance of human dignity" states the following: "Any person who is under criminal or court investigation must be treated with the respect of human dignity. Subjecting them to torture or cruel, inhuman and degrading treatments is punishable by law". In the conversion of the constitutional principle and in accordance with the penal trial rules, the Penal Code incriminates torture among the infractions which obstructs the achievement of justice in Art.167. In the official draft of the infraction (Art.167, paragraph 1) the definition of torture is taken from the U.N. Convention mentioned previously (Art.1), being incriminated "the action through which it is caused to a person, with intent, a pain or powerful sufferings, physical or mental, especially to obtain from this person or from a third person information or

⁶ M.Constantinescu, A.Iorgovan,I.Muraru, E.S.Tanasescu – Reviewed Romanian Constitution. Commentary and explanations, Pub. All Beck, Bucharest, 2004;

confessions, to punish him/her for a deed which this person or a third person had committed or is suspected of having committed, to intimidate or make pressure on him/her or to intimidate or put pressure on a third person, or for any other reason based on a form of discrimination whatever the kind, when such a pain or such sufferings are applied by an agent of public authority or by any person who acts with an official title or at the instigation and express or silent consent of such persons”. The aggravated variations of the infraction of torture refer to the fact which had as a consequence a body injury or a severe body injury (Art.167, paragraph 2), and the act which led to the victim’s death (Art.167, paragraph 3). The attempt to torture is punishable (Art.167, paragraph 4). According to Art.167, paragraph 5:”No exceptional surrounding, whatever the kind, may it be a state of war or the threat of war, of internal political instability or any other exceptional state, cannot be invoked to justify torture; also, the order of a superior or of a public authority cannot be invoked”. We also have to mention that in the final paragraph of Art.167’ a cause is provided which excludes the existence of infraction, in the official type, respectively that in which, “the pain or sufferings result exclusively from legal sanctions and are inherent to these sanctions or incurred by them”⁷. Finally, it must be shown that protecting the person against torture and inhuman or degrading punishments and treatments is ensured also through the incrimination of other facts which bring the accomplishment of justice, such as: “Illegal arrest and abusive research” (Art.266 P.C.) and “The subjection to ill treatment” (Art.267 P.C.).

For an efficient protection of the right to physical and mental integrity, alongside its regulation by rules of law, penal and penal trial, the Romanian legislator introduced in the **New Civil Code** rules which offer a supplementary guarantee of it.

So in Chapter II of this normative deed it is referred to “The respect of the human being and its inherent rights”. Article 58 refers to the personality’s rights showing that “any person has the right to life, health, physical and mental integrity, to honor and reputation, the right to respect private life, as well as the right to its own image”.

To complete the dispositions of this article, in section 2 called “The rights to life, health and integrity of the physical person” more aspects regarding the right to speak are regulated. Article 61 shows that beside the right to life and health, the physical and mental integrity of each person is guaranteed and protected. The guarantee and protection of these values is made equally, and as such operating the constitutional right of equality.

As regards to the other normative acts which consecrate and protect the right to physical and mental integrity, the regulations of the New Civil Code, obviously and directly shows the sacredness of the human body⁸, stating in Art.64, paragraph 2, that any person has the right to physical and mental integrity and that the integrity of the human being cannot be touched unless in the cases and the express and limited conditions provided by the law.

The regulations of the New Civil Code refer most of all to more medical procedures which would cause the endangerment of life, health but also to the physical and mental integrity of the human person. As such, eugenics, cloning, and the genetic characteristics exam, the heritage of the human body, experiments and tests for therapeutic or scientific purpose and the sampling or transplant from living persons are incriminated.

⁷Toan Muraru, Elena Simina Tanasescu – Romanian Constitution. Commentary on articles, Pub. C.H.Beck, Bucharest, 2008;

⁸ Art.64, paragraph 1 of the New Civil Code – “the human body is inviolable”.

For all these procedures it is shown that they can be made only in the cases and express and limited conditions provided by the law.

The sampling and transplant of organs, tissues and cells from living persons knows a more ample regulation from the rules of the New Civil Code. So Art.68 shows that these medical procedures are made exclusively in the cases and conditions provided by the law, with the written, free, in advance and intentional approval of these persons. Also, alongside the cumulative fulfillment of conditions to validate approval (consent), there is also the obligation to inform the person, subject to such a medical procedure, on the risks of intervention. Information will come before the medical procedure having the purpose to state the approval, fully aware of the cause, the donor having the option of reconsidering on his/her consent but no later than the moment of sampling.

The Romanian legislator understood to protect through special measures certain categories of persons namely the minors and the persons lacking the consent because of a mental handicap, a serious mental disorder or "some other similar reason". The total or partial lack of discernment brings the nullity of the given consent. In this situation the legislator's position regarding these categories of persons is clear. Still, the regulations of Art68, paragraph 2, shows the existence of some exceptions to the rule mentioned above, the possibility of organ sampling, tissues or cells from the mentioned persons being admitted in express cases provided by the law.

Regarding these rights the state has certain obligations. The obligations that belong to authorities have a double nature. On one side, there is a negative general obligation, which means that the public authority, through its agents, must not harm the right to life, to physical and mental integrity. In other words, there is the obligation not to cause death or physical or mental damage of any person. On the other side, there is the positive obligation, which means that the public authorities must take all necessary measures regarding the effective protection of life, of physical and mental integrity of each person.

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