

The criminal offence of torture in the context of criminal-law protection of human person in the Western Balkans

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Abstract

With the transition of the countries from a social system to another, it is understood that major changes have happened in all the areas of life, affecting even the field of the illegal criminal offences including the criminal offences directed against the human person. The human rights movements have played an important role in different time periods of the human history. The human rights and their further development represent one of the ways of the realization of the social changes. The states themselves have undertaken long-term social changes through the protection of the human rights. Due to the commitments of the civil movements for the human rights, nowadays we have laws that protect, respect and guarantee the human rights and fundamental freedoms, among which: the prohibition of torture. As a consequence of the efforts of such movements, international documents or acts have been ratified and national laws have been implemented by the state authorities resulting in providing a complete and wide protection for the citizens. In this context, the prohibition of torture and inhuman or degrading treatments or punishments constitutes a guarantee for the citizens against any kind of abuse and it represents an incontestable norm.

Keywords: torture, prohibition of torture, criminal-law protection of the human person, Western Balkans.

Introduction

The human rights and fundamental freedoms constitute absolutely one of the main aspects of human society. The process of democratization of a country passes from their recognition and guarantee. Historically, there have been numerous efforts to respect them in the name of democracy. However, often, arbitrary positions and infringements of the human rights and fundamental freedoms, the non establishment of the appropriate institutional mechanisms by the states in order to protect these rights have led to the outrage of human dignity and to the creation of serious obstacles for the implementation of the real democracy (Zaganjori, 2002, 18). The civil movements for the human rights have played an important role In this direction, during different periods of the human history constituting in themselves one of the ways for the realization of the social changes. Namely, these social changes with global effects were followed by significant changes in all the areas of human life including the criminal offences against the human person. Following these consecutive social changes, today all the social systems are built and based on a system of values that have in center the human person and that require more and more the expanding of

the human rights and fundamental freedoms, as well as the creation of a convenient and effective legal norms system in order to respond to the purpose of ensuring a broader protection to the human person, protection which among others includes also the right to physical integrity or prohibition of torture. Naturally, the extraordinary process of the society as a result of the social changes imposes a maximal attention to the physical integrity of the person, and this is not only due to the huge importance of the person's protection, but also due to the fact that it affects a very sensitive part of the human society such as the human health. Of course that any right and freedom has its specific importance and no right can be underestimated in relation to each other, but the right to physical integrity has a fundamental and particular importance. Without a full and rigorous protection of the human life and health, it would be infringed even the essence of the existence of this society.

Social changes: The international instruments and acts regarding the prohibition of torture

As a result of the developments and social changes that have happened, today we have the ratification of the international important documents and implementation of the national legislations resulting in providing a full and complete protection of the human person. In this context, the prohibition of torture and inhuman or degrading treatments constitutes one of the fundamental values of the human society and a warranty for the citizens against any kind of abuse.

Indisputably, the prohibition of torture is first sanctioned in the most important international instrument for human rights and fundamental freedoms: the European Convention of Human Rights and Fundamental Freedoms, a Convention that has been ratified by all the member states of the Council of Europe (including all the Western Balkans countries).

Specifically, article 3 (*Prohibition of torture*) of the Convention provides that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The formulation of this article points out five components that infringe the right to physical integrity and human dignity: torture, inhuman punishments, degrading punishments, inhuman treatments and degrading treatments (Pradel, Corstens & Vermeulen, 2009, 291). Furthermore, not only the European Convention of Human Rights and Fundamental Freedoms, but also other international instruments of a particular importance such as The Universal Declaration of Human Rights adopted by the General Assembly of the UN on 10 December 1948 and the International Covenant on Civil and Political Rights respectively provide that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5 of the Universal Declaration of Human Rights); and

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation" (Article 7 of the International Covenant on Civil and Political Rights).

On the international level, we should absolutely highlight the importance of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or

Punishment, which holds a special significance serving as a basis for the criminal legislation of a large number of states during the formulation of the provision of torture as a criminal offence. According to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment:

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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹

In particular, the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment has brought the obligation over each state that has ratified such Convention to take all the necessary measures in order to ensure that all the acts of torture will be considered as offences under their criminal law and that these offences will be punishable by appropriate penalties which will take into account the grave nature of the acts.²

The provision of the prohibition of torture in the national legislations: The Western Balkan Countries and the obligation for the protection of human physical integrity from the use of torture

In addition to the ratification act of such international instruments which latter become part of the internal systems of states, the states themselves have also the obligation to protect the human life and health by creating an effective and precautionary system of criminal law, a system where is included even the provision and sanctioning in the criminal law of all the social dangerous and illegal actions / inactions performed intentionally and negligently directed against the human person.

The further social developments have caused a change even on the national legislations, which were cultivated with a democratic spirit and character, specifically in the guarantee of the human rights and freedoms. Such spirit has influenced even the Criminal Codes of the Western Balkans countries by pointing out the democratization and modernization of these Criminal Codes in relation to the criminal-law protection that they reserve to the important social relationships regarding the right to physical integrity and prohibition of torture. As a consequence, the prohibition of torture and the right to physical integrity is a fundamental, inalienable and undeniable right that everyone has by virtue of his existence. Following their obligation and in function of the guarantee of the right to physical integrity and prohibition of

¹ Article 1 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

² Article 4 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment:
1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

torture, the states have provided in their criminal law the respective categories of illegal behaviors, which are punishable as criminal offences directed against the human person. In this context, it is below presented the constitutional and criminal-law protection that some of the Western Balkans countries reserve to the right to physical integrity and prohibition of torture.

The Republic of Albania

The prohibition of torture is sanctioned in the principal document of the Albanian state: The Constitution of the Republic of Albania, which in its **Article 25** expressly provides that:

*No one should be subjected to torture, cruel, inhuman or degrading punishment or treatment.*³

Furthermore, **Article 15** of the Constitution provides that *the rights and fundamental freedoms are indivisible, inalienable and inviolable and stand on the base of all the judiciary system and it also provides that the organs of the public power, in fulfillment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.*⁴

In this way, one of the duties of a democratic state is the criminal-law protection of the human life and health (physical integrity) through the penalization and sanctioning of the criminal-law offences directed against the human health. Namely, the criminal offence of torture is found in Section III of the Criminal Code of the Republic of Albania (Criminal acts intentionally committed against health) included in Chapter II, immediately after the chapter of *Crimes Against Humanity*, which points out the great importance that the legislator has shown for the figure of such criminal offence:

Article 86- Torture⁵

Intentional committal of actions, as a result of which a person was subjected to severe physical or mental suffering, by a person who exercises a public function or incited or approved by him, openly or in silence, with the purpose:

- a) of obtaining from him or from another person information or confessions;*
 - b) of punishing him for an action committed or suspected to have been committed by him or another person;*
 - c) of intimidating or pressuring him or another person;*
 - ç) of any other purpose based in any form of discrimination;*
 - d) of any other inhuman or degrading action;*
- is punishable by imprisonment from four up to ten years.*

³ Article 25: *No one should be subjected to torture, cruel, inhuman or degrading punishment or treatment.*

⁴ Article 15: 1. The fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the base of the entire juridical order.

2. *The organs of public power, in fulfillment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.*

⁵ Article 86 (amended by law no. 9686, dated 26.02.2007, Article 10) of the Criminal Code of the Republic of Albania, 1995.

Article 87 – Torture resulting into serious consequences

Torture, like any other degrading or inhuman treatment, when it has inflicted handicap, mutilation or any permanent harm to the well-being of a person, or death, is punishable by ten to twenty years of imprisonment.

It should be emphasized that the object of such offence is generally wide including not only the legal relationships that protect the human health, but even those that refer to the protection of his dignity. Moreover, the definition of the criminal offence of “Torture” in the Criminal Code has been realized in a very precise manner referring to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment adopted by the General Assembly of UN in 1984 and without leaving any other option for interpretation. Another feature of such criminal offence is the fact that in general the subject of commission of the offence is a special subject: namely, the person exercising public functions. However, it is very important to mention the fact that the subject of commission of the criminal offence in this case is generally a special subject, but not necessarily.

In order to give a final solution to this issue, The Constitutional Court throughout its Decision No 3, dated 11.02.2004 concluded that:

“as long as the prohibition of torture and mistreatment is defined as a human right and as long as human rights are considered as indivisible, inalienable and inviolable, everyone has the right to not be subjected to torture or mistreatments, despite the fact that he is in the hands of a public officer or to an individual. The obligation of the contracting states in the international agreements to respect and secure the prohibition of torture and mistreatment consists not only in the obligation of the state to protect its citizens from the commission of torture or mistreatment by the public officers, but even in the obligation to take measures in order to protect the people against the acts of torture or mistreatment committed by the individuals too”⁶

The Criminal Code of the Republic of Albania provides a tougher sanction for the criminal offence of “Torture resulting into serious consequences”. Namely, such sentence consists of a prison sentence from 10 to 20 years.

The Republic of Kosovo

The Constitution of the Republic of Kosovo reserves a special protection to the respect and guarantee of the right to physical integrity and prohibition of torture as one of the most fundamental human rights and freedoms by containing a special chapter in itself (Chapter II – The Human Rights and Fundamental Freedoms).

Article 21 of the above-mentioned Constitution emphasizes the fundamental importance that the protection and guarantee of such rights has⁷.

⁶ Decision of The Constitutional Court of the Republic of Albania No.3, dated 11.02.2004

⁷ Article 21:

1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.
2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.
3. Everyone must respect the human rights and fundamental freedoms of others.
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Furthermore, the Constitution of the Republic of Kosovo provides that the human rights and fundamental freedoms which are guaranteed by the international agreements and instruments such as:

- *Universal Declaration of Human Rights*;
- *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*;
- *International Covenant on Civil and Political Rights and its Protocols*; and
- *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*;

are also guaranteed by this Constitution and they are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions (Article 22 of the Republic of Kosovo).

The democratic character of the Constitution Republic of Kosovo and the complete protection that it reserves to the right to physical integrity and prohibition of torture is also distinguished in at least three other legal provisions founded in Chapter II of the same Constitution, and more specifically in:

Article 23: Human Dignity: *Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.*

Article 26: Right to Personal Integrity⁸: *The right to have his/her physical and psychological integrity respected*; and

Article 27: Prohibition of Torture, Cruel, Inhuman or Degrading Treatment: *No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment.*

Additionally, the protection of the right to physical integrity is provided through the penalization of the offence of torture that is included in Chapter XVII of the Criminal Code of the Republic of Kosovo: "Criminal offences against liberties and human rights":

Article 199: Torture

1. *An official person, or a person acting at the instigation of or with the consent or acquiescence of an official person, who commits an act of torture shall be punished by imprisonment of one (1) to fifteen (15) years.*
2. *When the offense provided for in paragraph 1 of this Article is committed against a child, the perpetrator shall be punished by imprisonment of three (3) to fifteen (15) years.*
3. *For the purposes of this Article, an act of torture means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from such person or from a third person information or a statement, or punishing such person for an act that he or she or a third person has committed or is suspected of having committed, or for intimidating or coercing the person or a third person or*

⁸ Article 26 [Right to Personal Integrity] Every person enjoys the right to have his/her physical and psychological integrity respected, which includes: (1) the right to make decisions in relation to reproduction in accordance with the rules and procedures set forth by law; (2) the right to have control over her/his body in accordance with law; (3) the right not to undergo medical treatment against his/her will as provided by law; (4) the right not to participate in medical or scientific experiments without her/his prior consent.

for any reason based on discrimination of any kind. An act of torture does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

The act of torture, *inter alia*, is provided as a qualifying / aggravating circumstance even in other provisions of the Criminal Code of the Republic of Kosovo in connection to certain figures of criminal offences as for example the criminal offences directed against the humanity.

The Republic of Macedonia

The Constitution of the Republic of Macedonia establishes the rights and fundamental freedoms of humans and citizens, recognized in the international law and settled down in the Constitution where is included among others even the prohibition of torture as one of the fundamental values of the constitutional order.⁹

The right to physical integrity and prohibition of any kind of torture is first sanctioned in Article 11 of the Constitution of the Republic of Macedonia where is provided in an explicit manner that:

*The human right to physical and the moral dignity is irrevocable; and that any form of torture, or inhuman or humiliating conduct or punishment, is prohibited.*¹⁰

Article 11

The prohibition of torture, as well as in the other democratic countries of the Region and Europe, is provided among others through the sanctioning in the respective criminal legislation of the criminal offence of torture as a criminal offence directed against the rights and freedoms of the humans and citizens and more precisely, it is included in The Special Part 15 of the Criminal Code of the Republic of Macedonia: "Crimes against the freedom and rights of humans and citizens":

Article 142: Torture and other cruel, inhuman or humiliating activities and punishments

(1) *A person who while performing his duty, as well as a person instructed by an official person or based on an agreement of the official person, shall apply force, threat or some other illicit instrument or an illicit manner with the intention to force a confession or some other statement from a defendant, a witness, an expert witness or from some other person, or will inflict on another person severe bodily or mental suffering in order to punish the other person for a crime which the other person has committed or for which the other person or some other person is under suspicion, or to intimidate him/her or to force him/her to forfeit some of his/her rights, or shall cause such suffering due to any kind of discrimination, shall be punished with imprisonment for three to eight years.*

(2) *If, due to the activities stipulated in paragraph 1, the damaged party has come to severe bodily harm or other especially severe consequences, the perpetrator shall be punished with imprisonment for at least four years.*

⁹ Article 8: The fundamental values of the constitutional order of the Republic of Macedonia are:

- the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution;

¹⁰ Article 11: The human right to physical and the moral dignity is irrevocable.

Any form of torture, or inhuman or humiliating conduct or punishment, is prohibited.
Forced labor is prohibited.

The Republic of Montenegro

In the context of the guarantee and protection of the human rights and freedoms¹¹, the Constitution of the Republic of Montenegro specifically provides in its Second Part entitled "Human rights and liberties":

Article 28: Dignity and inviolability of persons

The dignity and security of a man shall be guaranteed.

The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed.

No one can be subjected to torture or inhuman or degrading treatment.

No one can be kept in slavery or servile position

Furthermore, the criminal-law protection of the human health and physical integrity is provided through the provision in the Criminal Code of the criminal offence of torture, which is founded in Chapter XIV (Criminal offences against freedoms and rights of man and citizen) of the Criminal Code of the Republic of Montenegro:

Article 137 Ill-treatment and Torture

(1) *Whoever ill-treats another or treats such person in humiliating and degrading manner shall be punished with fine or imprisonment up to one year.*

(2) *Whoever causes anguish to another with the aim to obtain from him or another information or confession or to intimidate him or a third party or to exert pressure on such persons, or if done from motives based on any form of discrimination, shall be punished with imprisonment from six months to five years.*

(3) *If the offence specified in paragraphs 1 and 2 of this Article is committed by an official in discharge of duty, such person shall be punished for the offence in paragraph 1 by imprisonment from three months to three years, and for the offence specified in paragraph 2 of this Article by imprisonment of one to eight years.*

The legal comparison of the criminal law-protection of the right to physical integrity and prohibition of the torture between the countries of the Western Balkans

Taking into consideration the Constitution and Criminal Codes of the democratic states in general and some of the Western Balkans countries in particular, the duty of a democratic state, and the objective of the criminal law in democracy is the protection of the important social relationships from socially dangerous offences. The consumption of the offence of torture affects those social relationships that protect one of the fundamental human rights: the right to physical integrity and prohibition of the torture. Every democratic state responds to the right to physical integrity and prohibition of the torture of any person with the obligation to provide the protection of human person health by sanctioning by law the prohibition of torture and by sentencing any act / action resulting in the denial of this right. Thus, the Constitutions of some of the Western Balkans countries such as the Republic of Albania, the Republic of Kosovo, the Republic of Macedonia and the Republic of Montenegro contain a

¹¹ **Article 6 of the Constitution of Montenegro: Human rights and liberties** Montenegro shall guarantee and protect rights and liberties.

The rights and liberties shall be inviolable.

Everyone shall be obliged to respect the rights and liberties of others.

democratic spirit that is reflected not only in recognizing and guarantee of the rights and fundamental freedoms, but even in the rigorous and straight provision of the prohibition of torture.

From the comparison of all the said Constitutions of the Republic of Albania, the Republic of Kosovo, the Republic of Macedonia and the Republic of Montenegro, it is observed that the Constitution of the Republic of Kosovo reserves a special and wide protection to the right to physical integrity and prohibition of torture. Such Constitution contains in itself a special chapter entitled "Human Rights and Freedoms", in which at least four provisions refer to the right to physical integrity and prohibition of torture. Furthermore, the first provision of the mentioned chapter is related in a direct way with the prohibition of torture and other cruel, inhumane and degrading act by explicitly providing that the human rights and fundamental freedoms guaranteed by the international agreements and instruments such as: The Universal Declaration of Human Rights, The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, The International Covenant on Civil and Political Rights and its Protocols and more specifically The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment are also guaranteed by this Constitution and they are directly applicable in the Republic of Kosovo having priority over provisions of the national laws and other acts. Additionally, three other provisions refer to the right to physical integrity including respectively the inviolability of the human dignity, the right to personal integrity and the prohibition of torture, cruel, inhuman or degrading treatments or punishments. Except the constitutional provisions sanctioning the prohibition of torture, the democratic character of the legislation of these states appears also in their criminal legislation where there are provided sanctions and penalties, mainly severe penalties, for any person who with his acts or omissions violates the right to physical integrity. In all the Criminal Codes of the Republics of Albania, Kosovo, Macedonia and Montenegro there are provided very severe criminal sanctions for the criminal acts of torture and other cruel, inhuman or humiliating activities and punishments. We should mention the fact that in the Republic of Albania such offence is included in the section of *the criminal acts intentionally committed against health* comprised within the chapter of *the criminal acts against the person*, in contrast to the Criminal Codes of some other countries of the Western Balkans such as the Republic of Montenegro, the Republic of Kosovo and the Republic of Macedonia where the criminal offence of torture is included in the special chapter of *the criminal acts against the freedoms and rights of humans and citizens*.

Conclusions

Nowadays, all the democratic systems are built and based on a system of values that have in centre the human person and that require more and more the extension of such fundamental freedoms and human rights. The right to physical integrity and prohibition of the torture as one of the fundamental human rights, reserves a special protection in the international legal instruments and acts of the main and most important matters (such as the Universal Declaration of Human Rights, the European Convention of Human Rights and Fundamental Freedoms, The International Covenant on Civil and Political Rights and The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment), in the Constitutions of all the democratic states including those of the Western Balkans countries, as well as in

their national legislations underlying in particular the democratization of the societies and states of the Western Balkans.

The prohibition of torture is a fundamental, inalienable and undeniable right that everyone has by virtue of his existence and such right cannot be infringed by anyone. As a consequence, emphasizing the importance of the obligation on which the democratic government stands and taking into account the criminal law of the Republic of Albania, the Republic of Kosovo, the Republic of Macedonia and the Republic of Montenegro regarding the prohibition of torture, it is obvious that the first of all, the national law enforcement agencies of each country should prosecute any illegal and socially dangerous action / inaction which is performed intentionally or negligently and is directed against human health. Thus, by comparing the criminal law-protection of the human life, despite of the minor differences in the Criminal Codes provisions and despite of the minimum and maximum sanctions provided in such Codes, it resulted that all the Criminal Codes of the Western Balkans countries in general, and particularly the Criminal Codes of the Republic of Albania, the Republic of Kosovo, the Republic of Macedonia and the Republic of Montenegro, give an huge importance to the criminal law protection of the human person health, his physical integrity and prohibition of torture. Furthermore, the Republic of Albania, the Republic of Kosovo, the Republic of Macedonia and the Republic of Montenegro explicitly provide in their respective Constitutions that no one may be subjected to torture, cruel, inhuman or degrading punishment or treatment. The protection of the human person health and in particular the prohibition of torture provided in the legislations of the Western Balkans countries (notably in their respective national Criminal Codes) is complete and does not present any major problems. Therefore, it is very important the fact that there should be done a straight and fair interpretation in practice regarding the criminal offence of torture in order to have more improvements in the prevention and prosecution of such criminal offence. For such reason, an efficient work performed by the judiciary organs including the criminal investigation bodies, Prosecutor and court bodies would help in fighting against the diffusion of these criminal offences and in the prevention thereof.

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