

PREVENTING AND COMBATING THE EFFECTS OF THE CONSUMPTION OF TOBACCO PRODUCTS IN ROMANIAN PRISONS

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Abstract: *As settled in the Frame-convention WHO for the tobacco control, the first treaty negotiated under the auspices of the World Organization of Health, any person has at the highest standards of health protection against the awfully damaging effect that the producing, consuming and selling of tobacco can have against every person's health. The measures settled in this case by the National Administration of Prisons can be considered a good start in implementing the legislation in this matter in all Romanian prisons. Surely we expect that in the future the above-mentioned authority shall intensify and diversify the actions taken in this matter, as a result of adapting and modernizing prisons at the present day requirements.*

Key words: *smoking, health, prisons, violation, degrading treatment*

According to the Law No.332/2005 published in Romanian Official Gazette, Part I, No. 1088/02.12.2005, Romania ratified the Frame-Convention WHO regarding tobacco control, adopted in Geneva, Switzerland on 21st of May 2003.

Ratifying this convention, Romania agreed to adopt and implement efficient legislative, executive or administrative measures and to cooperate adequately regarding prevention and reducing tobacco consumption, nicotine addiction and smoking exposure, as settled in Art.5 paragraph 2 letter b.

As a consequence, the norms of controlling tobacco, and implicitly, its consuming, are part of the efforts states make following international negotiation.

These negotiations emphasized that any single person enjoys his/her acknowledged right to health, and he/she must enjoy the best physical and mental health he/she can reach. According to the Universal Declaration of Human Rights, each state is obliged to adopt the measures required in "ensuring the decreasing of mortality of new born and of infant death, as well as the healthy developing of the child" [1].

Without doubt, the accomplishment of the right to health is not possible without creating the conditions necessary to ensure all the medical services and aid in case of illness, no matter if we deal with a person with or without exercise capacity, with or without discernment or persons under judicial interdiction, convicted or arrested.

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In underdeveloped countries, for example, where medical services are poor, the medical conduct or the lack of logistics required in this case represent forms of infringement upon this human right from "this sensitive environment".

At that moment, in Romania another law – Law No.349 from 6th of June 2002 for preventing and fighting the effects of tobacco consumption - was in force, its main purpose being, as settled in Art.1, "the protection of smokers and non-smokers' health from the damaging effects of smoking, the prevention of smoking spread within underage persons and the insurance of an adequate level of population life quality" in this country.

The legislation adopted by the Romanian state in this field took into consideration: Council Directive 90/239/CEE from 17th of May 1990 with regard to the harmonization of administrative legislation, settlements and provisions of the States-Members in the issue of maximum content of cigarettes goudron, as well as Council Directive 89/622/CEE from 13th of November 1989, with regard to the harmonization of administrative legislation, settlements and provisions of the States-Members in the issue of stamping and inscription of tobacco products, modified by means of Directive 92/41/CEE and the Council Directive 89/622/CEE.

At European level, but reported to the European Council, the Ministers Committee of the member states adopted a recommendation regarding the rules in the European prisons (RECOMMENDATION 2006). According to the recommendation, all the imprisoned persons must be treated with respect to human rights. Due to this principle of criminal execution law, another principle comes out, namely the conditions of prison that infringe upon the human rights cannot be justified by lack of resources. The authorities of the prisons must protect the health of all the convicts, and the health policy in prisons shall be

integrated in the national policy of health, being comparable to it. The measures required at the prisons' level couldn't infringe upon the internal or European legislation with regard to protecting and respecting the right to health; one should include here the problem of creating and administrating the smoking places.

Though the presented issues of internal legislation took place in the recent past, the applicability of the European provisions in this matter have become more efficient by their effective transposition in the new Law No.257/2006 and in the Regulation of applying the law, approved by Government Decision No.1897/2006. Therefore, opposed to the legislation coming out of force that settled only the obligation of measured required in the prison in order to ensure the convicts' health by medical assistance, Art.27 paragraph 1 from Law No.275/2006 settles that the individualization of the regime of executing the punishments with imprisonment is established by the commission to individualize the regime of executing the punishments with imprisonments according to the behavior, personality, age, and the *health condition* of the convicts. In applying these provisions, Art.18 paragraph 1 letter n) from the Regulation settles that the structure of the regulations of internal order in the prison must contain the smoking places that can be used by the convicts. Art.63 paragraph 2 from the same normative act settles a series of limitations of exerting the convicted persons' rights, among the limitations we can mention the fact that "convicted persons are not allowed (...) to smoke in other places than in those where it is permitted".

In order to accomplish the goals established by the above-mentioned normative documents, Romania banished smoking in closed public spaces defined as "all the spaces in central and local public institutions, economic, public administration, educational and sportive

institutions, all transport devices, stations, bus stops and airports, all closed spaces from institution environment or other spaces settled by law, excepting delimited and especially arranged spaces for smoking within the space of the above-mentioned institutions”. The legislator chose to define the term “closed public space” by enumerating in limitative manner different types of spaces in which smoking should be banished, and not by using a concise formula to underline the definite elements of the notion by means of which other spaces that respect the above-mentioned legal settlements can be identified, spaces that otherwise could be omitted.

Art.3 paragraph 2 from Law No.349/2002 establishes the mandatory conditions regarding the permission of smoking in places especially arranged in the closed public spaces: “they must be build in such a way as to allow smoking and to infringe the penetration of vitiated air in closed public spaces; they must be equipped, endowed with ashtrays and extinction devices, and they must be arranged according to the legislation in force regarding the prevention and extinction of fire”. We must also mention that the Art.2 letter m) from the same normative act defines the term “closed public spaces” as being “all the spaces from central and local public institutions (...)”.

Still, the Romanian legislation didn't mention the case of semi-public spaces or of the spaces that had the nature of a temporary residence, as it is the case for imprisonment spaces from prisons. This situation led to a legislative vacuum in this matter, therefore, for a certain period of time, the right to health of the non-smoking convicts didn't have juridical content and didn't enjoy effective protection.

In this matter, the Territorial Office Brasov of the institution Advocate of People registered in 2006, a petition

addressed in the name of Maria (fiction name) convicted to execution of a privation of liberty sentence at the Prison of Maximum Safety Regime Codlea in Brasov county. The petitioner sustained, among other things that in exercising the sentence, the interior order regulation is not respected by most of the convicts who smoke in room; therefore the person who addresses the People's Advocate is obliged to passively inhale the smoke.

The People's Advocate is the constitutional name under which the Ombudsman is organized and functions in Romania. Law no.35/1997 on the organization and functioning of the People's Advocate institution, republished in the Official Gazette of Romania, 1st Part, No.844 from September 15, 2004, followed by several modifications and the Regulation on the organization and functioning of the People's Advocate institution, republished in the Official Gazette of Romania, 1st Part, no.922, from October 11, 2004 regulate the attributions given to the People's Advocate institution. So, its purpose is to defend the rights and freedoms of the individuals in their relations with the public authorities. It is a public authority, autonomous and independent from any other public authority; has its own budget which is an integrant part of the State budget. In the exercise of its powers, the People's Advocate shall be no substitute for any other public authorities; it cannot be subjected to any imperative or representative mandate, no one can compel the People's Advocate to obey any instructions and orders; its activity has public nature; the institution exercises its duties *ex officio* or upon complaints lodged by aggrieved persons. Its areas of specialization are: a) human rights, equal opportunities for men and women, religious cults and national minorities; b) children rights, family, youth, retired persons, disabled persons; c) army, justice,

police, penitentiaries; d) property, labor, social security, taxes and duties;

In this light, one could appreciate that in prison where the petitioner executed her sentence, and quite possibly in other prisons in Romania, the legislation in this matter that is in force, be it adopted by the authorities of the Romanian state, or by institution of European Union or even international bodies, is not respected.

As a result of the action made by our authority, the prison above-mentioned respond that the criteria taken into consideration in order to ensure a rigorous separation of convicts that are settled in accordance with the legislation in force in this matter, namely Law No.23/1969 with regard to execution of sentences [2], are the following: the juridical situation (arrested preventively/convicts), the nature of the infringements committed (convicted for infringements of serious social danger/ convicted for other infringements), the duration of sentence (convicted up to 10 years/convicted for more than 10 years/convicted to life imprisonment), status of recidivism (recidivist/non-recidivist), sex (male/female), age (underage/youths 18-21/adults), type of applied prison regime (maximum safety/closed/semi-closed/open), behavior and receptivity to social-educative activities (person with good behavior/person with bad behavior), labor (used at labor/not used at labor), health status. Among these criteria, no condition referring to smoking, prevention of smoking or protection of persons who don't smoke can be found.

The prison also specified that it is confronted with overcrowd of the spaces for hosting the convicts, case that is not singular in Romanian prisons. This overcrowd was quantified at 165,52%.

More than that, it was also mentioned that the term closed public space is not applicable in this case, for the room of detention is regarded as a provisory domicile, not a public space as settled in

Art.145 from Criminal Code, as well as in Art.3 paragraph 1 corroborated with Art.2 letter m from Law No.349/2002.

Transporting the present situation, the limits of private life protection do not refer only to the residence, as a dwelling, but also to the spaces of imprisonment for the convicts. They can be thus filmed or pictured only in the public spaces of the prison. Still, in the United States of America, it is considered that the situation in which a journalist recorded the lawyer Marvin Holman crying and slanting in a cell of a prison of Arkansas, after being imprisoned due to the fact that he drove while he was drinking does not represent intrusion. It is not very clear if the picturing without permission of a convict in a cell represents intrusion [3]. On the other hand, he was imprisoned in a semi-public institution and therefore he has no right to intimacy. Since the imprisoned person has too little intimacy, in the American jurisprudence it was settled the idea that the convicts cannot sue the photographs if they took photos while they were sleeping.

Referring to the situation in our country, even under those regulations, the Prison of Maximum Safety Regime Codlea in Brasov county, but especially the National Administration of Prisons – authority under whose subordination all the prisons function – being obliged to respect the legal provisions that the Romanian state adopted due to its communitarian and international arrangements, took measures for the legislation to be properly applied in all Romanian prisons.

Thus, it was specified that the General Director of National Administration of Prisons emitted Decision No.436/30.05.2006 with regard to preventing the extension of tobacco products consume and to limiting the damaging effects of smoking. In this decision it was stated that starting with 30th of May 2006, in all the institutions, measures of establishing, delimiting,

arranging and inscription of the smoking places accessible to the convicts should be taken. It was also mentioned that, in rapport with the number of convicts and of the spaces established for every criminal category, rooms for the non-smoker convicts should be created. With regard to the rooms for smoker convicts, the decision settled that the only place for smoking should be the bathroom. The board of the Prison of Maximum Safety Regime Codlea specified that all the provisions of the above-mentioned decision should be taken into consideration; therefore they were in the process of creating a Plan of measures.

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According to a case that was brought to The European Court of Human Rights in the year of 1999, an applicant complained under Article 3 of the Convention about the conditions of his detention at a prison from the Republic of Lithuania (case *Karaličius versus Lithuania*). The applicant gave the following account of the detention conditions at the Šiauliai Remand Prison: living space for one prisoner amounted to 1.5 square meters, the applicant states that he lived and slept in cells of less than 20 square meters where from 10 to 15 inmates were held. There was an open toilet in each cell. They lacked ventilation and had a

strong smell due to the inmates' *smoking* and toilet use. The cells were very humid and cold, particularly during the winter. The insufficiency of the living space was aggravated by the scarce time for strolling in the prison yard (one hour daily). Prison bedding was in an awful and dirty condition. All washing had to be done by hand in a sink in the cell. There was a constant lack of hot and cold water. The applicant had access to a shower only once in 15 days.

On the other hand, the Government provided the following account of the applicant's detention conditions at that prison: inmates were allowed to smoke, but persons could apply to the prison administration to be transferred to a no-smoking cell upon request. According to the relevant domestic law and practice, Article 21 of the Lithuanian Constitution prohibits inhuman and degrading treatment. Conditions of detention shall not be inhuman or degrading. Article 3 of the European Convention of Human Rights provides as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Government emphasized that the competent authorities had regularly monitored the air and ventilation conditions at the prison, which had been proved to be compatible with the relevant norms established by the Ministry of Health.

The Court established that these factors, while not as such capable of justifying the notion of "degrading" treatment, are none-the-less relevant in addition to the focal factor of the severe overcrowding, to show that the impugned detention conditions of the applicant went beyond the threshold permitted by Article 3 of the Convention. Thus, the Court therefore found that there had been a violation of Article 3. The Court found that the applicant has certainly suffered *non-pecuniary damage* in relation to the violation found under Article 3 of the Convention in respect of the degrading

conditions of his detention. Making its assessment on an equitable basis, the Court awards EUR 3,000 for non-pecuniary damage in respect of the violation of Article 3 of the Convention.

Nevertheless, in a judgment from the year of 2006 (Case *Ostrovar versus Moldova*) The European Court of Human Rights held unanimously that there had been a violation of Article 3 of the Convention.

The applicant complained, in particular, about his conditions of detention about not having an effective remedy in respect of the violations of his rights guaranteed by Article 3 of the Convention.

The applicant claims to have been detained in a 25 m² cell together with at times more than twenty people. Among other issues, smoking inside the cells was not prohibited by the internal regulations of the prison, and because of lack of alternative smoking facilities, the inmates had to smoke inside the cells. The applicant suffered from asthma and the prison administration was aware of this since he had been arrested and brought to prison immediately after undergoing asthma treatment in hospital, where he was arrested. Because of the exposure to cigarette smoke the applicant suffered many asthma attacks, which usually happened two or three times a day. Because of the lack of medication he had to endure the attacks and wait for them to pass, being obliged to sit in a vertical position. His attacks became more frequent and started to last longer. While the prison doctor knew that the applicant suffered from asthma, he gave his permission for the applicant to be placed in a cell with smokers. The applicant had to rely entirely on the supply of medication from his family. His situation was worsened by the fact that the cell's window was closed by shutters and there was no fresh air coming through it. Moreover, the cell was not provided with a ventilation system, and was therefore very damp. Because of poor

medical assistance and bad hygienic conditions, the cells were infected with bed bugs, lice and ants. The inmates were exposed to infectious diseases like tuberculosis, skin and respiratory infections.

The Moldavian Government claimed that, in accordance with Article 17 of the Law on Pre-Trial Detention, the applicant could have asked the prison authorities to be removed to another cell with non-smokers. The prison authorities were aware of the applicant's asthma. According to the Government, the prison register stated that the applicant requested medical assistance only twice. The Government stated that a doctor consulted him and prescribed medication. The Government did not present to the Court a copy of the prison register. The Court deliberated that the Moldavian Government deliberately omitted to attach to their observations copies of his written requests for medical assistance. The applicant also submitted that he orally requested to be transferred to a non-smoking cell, but there were no non-smoking cells in the prison.

As Article 3 of the Convention enshrines one of the most fundamental values of democratic society, torture or inhuman or degrading treatment are prohibited in every way. To fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. The Court has considered treatment to be "inhuman" when, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" when it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a

particular form of treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance

The Court further noted that the Government did not deny that the applicant was kept in a cell with prisoners who were permitted to smoke in the cell. At the same time it is an undisputed fact that the applicant was suffering from asthma and that the prison authorities were aware of his condition but did not take any steps to separate him from smokers. The Court considered that the Government did not fulfill their obligation to safeguard the applicant's health and instead allowed him to be exposed to cigarette smoke, which was dangerous in view of his medical condition, particularly, since the applicant was kept in the cell twenty-three hours a day. For these reasons, the Court unanimously held that there has been a violation of Article 3 of the Convention and that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, 3,000 euro in respect of non-pecuniary damage, and 1,500 euro in respect of costs and expenses.

The equality in exerting the human rights represents the basic concept of regulating individual rights. “The human rights are the same in any case or any place” [4] and we can add that they are the same for everybody. We can perceive the internal and international juridical settlements in the case as a kind of inverted discrimination that smokers can invoke due to the restrictions of smoking in certain conditions and certain spaces settled by the law. Being part of the category of economic and social rights – as they were nominated by the International Pact regarding Economic and Social rights – we consider that the right to health of the individual can be included in the second generation of human rights. According to the nature of this generation, the state represents an active element, an intervenient, actively implied in guaranteeing the respect of this right by adopting an internal legislation in accordance with the European and international one. This new generation of human rights represents the passage from the minimal and subsidiary state specific to the classic liberalism to the state-providence. “The state-providence” [4] tends to settle as many aspects of human life, with the purpose of protecting the social and natural environment, interfering more and more in the individual and group behavior. Without mentioning the philosophical details, we agree upon the idea that these issues tend to protect the individual against the civil society, or the individual against himself. Preserving the specific aspect of the above-described situation, we can report these characteristics to the level of prison spaces.

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