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Review Paper

Inter-Prisoner Violence and the Case Law of the European Court of Human Rights: Protection of Vulnerable Groups of Prisoners*

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Introduction: In the course of last several decades, the protection of prisoners from abuse has been significantly improved by adoption of relevant international documents and the activities of independent monitoring mechanisms. However, the focus is on abuse by state authorities, while there has been no adequate attention dedicated to violence among prisoners. *Subject*: The author reviews the practice of the European Court of Human Rights in the context of violence among prisoners and the protection of human rights. *Method*: Normative-logical method and content analysis were applied. *Aim*: The aim of the paper is to highlight recommendations that would be applicable in Serbia. *Results*: The key principles on which the court's decision-making is based in cases related to the violation of the prohibition of torture referred to in Art. 3. of the European Convention for the Protection of Human Rights and Fundamental Freedoms, such as the absolute prohibition of all types of abuse. *Conclusion*: States are obliged to undertake abuse-prevention measures i.e., to thoroughly investigate and sanction the behaviour of those responsible. Evidence gathering is not the responsibility of the prisoner, but of the state authorities. Both employees and prisoners, but also the general public need to be educated about abuse in prisons.

KEYWORDS: prison / abuse / torture / European Court of Human Rights

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Introductory Notes and Definition of Torture and Similar Concepts

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, amended in accordance with the protocols... (*Official Gazette of SCG – International Treaties*, no. 9/03, 5/05 and 7 /05 and *Official Gazette of the RS – International Treaties*, no. 12/10 and 10/15, abbreviated: ECHR) prescribes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. It is understood that this prohibition protects all citizens without any discrimination, however persons unable to protect themselves are more likely to find themselves in situations where they are subjected to inhuman or degrading treatment, and none more so than persons deprived of freedom.

In order to understand the state's obligations regarding the prohibition of torture and inhuman treatment, the term torture must be defined, that is, how is torture different from inhuman and degrading treatment. To start, we need to take the concept of abuse as an umbrella term that includes both torture and inhuman and cruel treatment and punishment (Dragičević-Dičić & Janković, 2011), whereby abuse represents any treatment that endangers someone's mental and physical integrity. On the other hand, there is no precise definition of torture, but in literature, it is generally defined as the infliction of intense, primarily physical, but also mental, suffering (Strauss, 2004).

If torture is exclusively connected to the actions of state authorities, then its concept is somewhat narrower. Thus, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law on the Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Official Gazette of the SFRY – International Treaties, no. 9/91), signifies "torture" as any act that intentionally inflicts pain or severe physical or mental suffering on a person, with the purpose of obtaining information or confession from that person or a third party, or to punish, intimidate or exert pressure, i.e. for any other reason based on a discriminatory basis, 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 (Article 1). Presently, it is indisputable that torture does not have to originate only from officials, and that it does not have to be aimed at achieving goals such as extorting confessions, and that it is absolutely prohibited.

Since torture refers to the infliction of severe suffering, the above mentioned implies that inhuman and degrading treatment include the infliction of suffering of a somewhat lesser intensity, and that they are forms of abuse that generally exclude infliction of stronger physical pain. It is emphasized that inhuman treatment includes mostly intentional and unreasonable infliction of suffering of a

physical or mental nature, while degrading treatment involves severe humiliation in front of others, i.e., forcing a person to act contrary to their will, personal dignity and values (Weissbrodt & Heilman, 2011).

Positive and Negative Obligations of the State in the Context of Preventing Torture and other Forms of Abuse

The state is obliged to prevent any action by the authorities that would imply unnecessary and excessive infliction of suffering. This norm belongs to *ius cogens* or peremptory norms, which means that it is of a generally binding character, and that there are no circumstances that could justify any country not adhering to it. However, the obligations of the state in the context of the prohibition of torture are both negative and positive in nature. Just as the state must refrain from unlawfully causing suffering through its own mechanisms, it is also obliged to act proactively in order to prevent suffering caused by the actions of third parties. Therefore, the state has these obligations both with regard to civil servants and officials, as well as with regard to the prevention of illegal actions by non-state subjects. Unlike the negative obligations of the state, which imply refraining from activities, positive obligations require that the national authorities undertake necessary and adequate measures so that every citizen can actually exercise their rights. These measures can be of legal character, such as when it comes to sanctioning those who prevent citizens from exercising their rights, but also of practical character, and in some cases a synergy of both measures will be needed (Akandji-Kombe, 2007; Dickson, 2010). Thus, in order to protect the lives, health and dignity of prisoners, it is necessary not only for state authorities not to inflict physical pain on convicted individuals through illegal actions of security officers and other employees, but also to undertake, for example, measures to mitigate violence among prisoners (Akandji-Kombe, 2007). Hence, the decisions of the European Court of Human Rights (abbreviated: ECHR) explicitly indicate that states are obliged to take preventive measures in order to preserve the mental and physical integrity and well-being of imprisoned individuals (Premininy v. Russian Federation, application no. 44973/04, decision of February 10, 2011, § 83). States must also ensure adequate conditions in penal institutions, as well as the implementation of procedures whose implementation excludes the infliction of suffering that exceeds the intensity of discomfort necessarily associated with the deprivation of freedom and the way penal institutions function.

When we talk about abuse in penal institutions, and about the abuse of prisoners inflicted by other prisoners, the state must tackle the well-known problem of informal prison culture and hierarchy. The prison informal system and culture imply the establishment of specific patterns that become dominant within the institution, which are conditioned by the prisoners' previous experiences, personal convictions, division into groups/classes within the prison, internal rules

on the use of material goods and generally accepted jargon (Wooldredge, 2020). It should be emphasized here that the contemporary discourse on prison culture largely depends on scientific interpretations. Literature indicates that a significant part of the research refers to strictly closed institutions and those convicted of the most serious criminal offences (Wooldredge, 2020). Describing the prison culture, Jovanić points out that prisoners are in constant fear of a possible attack on their bodily integrity, dignity or the few material goods they have, which leads to living in a state of constant anxiety and alertness (Jovanić, 2014). Even those who hold leading positions in the informal hierarchy are not spared from fear and uncertainty, because the acquired reputation and position must be defended against the claims of other convicts and possible provocations (Jovanić, 2014).

The topic of violence among prisoners in the context of the state's positive obligations is also significant because prisoners represent a vulnerable group whose victimization is not the focus of public interest. At times it appears that abuse of these persons does not even seem to deserve a special reaction (Krstajić et al., 2016).

Practice of the European Court of Human Rights

In the case of *D. v. Latvia* (application no. 76680/17, decision of 11 April 2024), the applicant, a sex offender, complained about the abuse he suffered in prison, after the other convicts found out about his criminal record. Namely, in the informal prison system of Latvia, convicts were divided into three categories, and the convict belonged to the lowest "caste", characterized by the worst status and subject to a series of restrictions imposed by other prisoners. In practice, this meant that the members of this group were forced to use separate toilets, forbidden to shower with others, excluded from joint activities, but also forced to complete tasks instead of others, such as maintaining hygiene in the premises and washing laundry (D. v. Latvia, §7). The applicant informed the prison administration, pointing out that he was constantly verbally insulted, intimidated and pushed around, especially in situations when prisoners collectively perform various activities, such as dining. Prison administration officials rejected the complaint, arguing that D. did not provide enough concrete data to support the fact that there were more serious threats to his mental and physical integrity. After several rejected complaints, the prisoner turned to the court, which determined that the claims about the caste system were not unjustified, but that at the same time there was no violation of human rights, bearing in mind that D. was not subjected to more intense violence. The Latvian court also took into account the fact that D. himself pointed out that the other prisoners did not manage to scare him, and that he did not allow them to take any of his personal items. This decision was confirmed by the highest court in the country. However, the ECHR was of a different opinion. The court's position was that it was not necessary for D. to prove

that there was an informal hierarchy in the prison, because there was agreement regarding that topic, and the ombudsman also spoke about the same in his reports. The ECHR stated that the prohibition stipulated in Art. 3 of the ECHR definitely included the infliction of mental suffering, even in the absence of physical injuries and physical pain. Insulting and isolating can cause mental suffering and affect the resilience of the convict, who is already in a difficult position even without experiencing additional discomfort. Threats can also cause mental distress, due to the continuous fear for one's own safety, especially intensified when the convicted individual is aware that he has no one to turn to for protection (D. v. Latvia, §47). In addition, the forced performance of notorious tasks instead of others exceeds the concept of labour exploitation and turns into symbolic humiliation.

In the case of *J. L. v. Latvia* (application no. 23893/06, decision of 17 April 2012), the applicant indicated that immediately after being admitted to the prison during the night, he was attacked, injured and raped by other prisoners. His nose was broken, and the reason was probably due to discovery that the applicant was a police informant. The doctor examined him, but made no report on his injuries. Afterwards, J.L. demanded to be adequately protected, since convicts whom he had previously testified against were also in the same prison. The applicant was transferred to another prison, but the incident he reported did not result in an investigation, with the authorities explaining that there was no evidence necessary for further action. The ECHR found that the state acted contrary to its obligations regarding the prevention of torture, both because the prison administration did not collect evidence about the incident and the injuries suffered, and because no steps were taken to determine what had happened and who was responsible.

In the case of *S. P. et al. v. Russian Federation* (applications no. 36463/11, 11235/13, 35817/13 and others, decision of 2 May 2023) a group of prisoners reported abuse by other convicts, based on the applicants' being in the lowest caste in the informal system that divided convicts into four classes/castes. The highest caste represented the "elite" and included those convicted of the most serious crimes and all other convicts were their subordinates. The "elite" did not perform any work tasks, refused to communicate with the prison administration, but at the same time were called to resolve conflicts between prisoners. The second group were those who cooperated with the guards and as such enjoyed certain privileges. The third class was the most numerous and those were the "regular" prisoners, who generally respected the informal hierarchy. The fourth and lowest caste were the "renegades" i.e., prisoners who no one respected, who were isolated from the group and forced to perform tasks such as emptying bins and cleaning toilets for everyone. Prison guards also expected additional tasks from this group, given that other prisoners openly refused certain responsibilities (S.P. and others v. Russian Federation, §9). As a rule, renegades were those who were obviously of poor financial status, "snitches", those who appeared neglected, as well as sex offenders, child abusers and convicts who had, or at least others claim they had,

anal and oral sex, voluntarily or due to being forced. These prisoners were also sexually abused, so one of the prisoners/applicants stated that he contracted the HIV virus during his prison term. The renegades had their own separate dishes and linen, they slept in corners, and if they had to stay too close to other groups, they had to sleep on the floors. The other prisoners refused to touch them or shake hands with them, and they could only visit the doctor when everyone else had their turn. They were beaten. If they notified the prison authorities, they were mainly ignored, although occasionally they were transferred to another institution or a special room where only the lowest caste stayed. Nevertheless, the guards made sure that a renegade was always present in the "mixed" group, because in his absence other prisoners would have to do degrading tasks. The ECHR determined that in the case of this group of convicts, there were multiple gross violations of Art. 3 of the ECHR, and that the state was obliged to prevent abuse, receive complaints, and investigate them in detail, regardless of the indisputable practical difficulties related with that undertaking, and to do everything to stop the abuse and ensure the injured parties receive adequate satisfaction.

In the case of *Rodić et al. v. Bosnia and Herzegovina* (application no. 22893/05, decision of 27 May 2008), the applicants indicated that they were abused by other prisoners because it was common knowledge in the penitentiary that they were convicted of war crimes against Bosnians. The applicants were members of minority national groups in an institution with a majority Bosnian prison population. The applicants were repeatedly insulted and attacked, and one of them was punched in the eye. Their requests to be transferred to other prisons were initially rejected due to technical issues and difficulties in the cooperation between the Bosnia and Herzegovina entities. The ECHR determined that the state ignored Art. 3 of the ECHR, taking into account that it was known that, after the war in the country, there was a real risk that convicted members of a minority group would be encounter hostility, especially bearing in mind their criminal records. The state did not fulfil its obligations regarding the prevention of violence.

Conclusion

It has long been said that a state's progress in humanity and civilization can be evaluated based on its relations towards the most vulnerable groups of citizens, such as prisoners and other persons deprived of freedom. In this regard, the ECHR, during its many decades of practice related to the abuse of prisoners, has produced certain postulates, the respect of which should contribute to a higher level of humanity and respect for personal dignity.

In the first place, prisoners have the right to protection from abuse, and the state must take all the necessary measures to prevent their suffering from even

occurring. Prison administrations must not only focus on detecting intense physical violence, other forms of abuse and degradation are also relevant. The threshold of tolerance for suffering should be lowered year after year. At the same time, this does not mean that the state is obliged to completely extinguish all forms of abuse, nor that it has failed in its obligations if violence is manifested. The fact is that prison is a world of its own, and that the way it functions, as well as the individual characteristics of individual prisoners, can lead to conflicts and violence.

However, in the case where torture and other forms of abuse have occurred, the state is obliged to verify the injured parties' allegations and investigate the incidents in detail in order to determine who is responsible and proceed with fair sanctions. Prisoners are not required to provide evidence, nor can they be expected to do so, so the action based on the application should be automatic, without any improvisations or delays. State authorities are obliged to do everything in their power to determine the truth, and to improve the procedures in institutions based on their findings. It goes without saying that a prisoner whose human rights have been violated is entitled to moral, material and any other compensation.

In order for the described mechanisms to function, the work of impartial supervisory bodies is extremely important, as well as the contemporary education of employees in penal institutions in order to acquire the necessary competencies to perform extremely responsible tasks. Additionally, education about the elements, patterns, causes and consequences of violent behaviour should be included in the treatment programmes for convicts. In addition to the above, it is necessary to adequately inform the public about the issues related to the execution of criminal sanctions, so that prisoners do not continue to exist only as a group of forgotten people behind high walls and locked doors.

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