

# THE HUMAN RIGHTS OF OLDER PERSONS AND LONG-TERM CARE – ASPECTS REGARDING PROHIBITION OF TORTURE, DEGRADING OR INHUMAN TREATMENT\*

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## Abstract:

Cu toate că nu există un document internațional cu valoare juridică care să se refere în mod explicit la drepturile persoanelor vârstnice, aceste drepturi sunt prevăzute și se fac referire la ele în celelalte convenții, internaționale și regionale, cu privire la drepturile omului.

Interzicerea torturii sau a tratamentelor inumane și degradante nu numai că impune autorităților publice obligația de a nu supune persoana la un tratament rău. Dar are implicații și asupra măsurilor pe care autoritățile publice, inclusiv instituțiile implicate în îngrijirea medicală, trebuie să le ia pentru a preveni și, dacă este necesar, pentru a investiga abuzurile suspecte sau relele tratamente.

**Cuvinte cheie:** persoane vârstnice, drepturile omului, dreptul la sănătate, servicii medicale, centre de îngrijire.

## Résumé:

Bien qu'il n'y ait pas de document juridique international faisant explicitement référence aux droits des personnes âgées, ces droits sont prévus et mentionnés dans d'autres conventions internationales régionales sur les droits de l'homme.

Interdiction de la torture ou des traitements inhumains et dégradants exige non seulement l'obligation des pouvoirs publics de ne pas soumettre une personne à un mauvais traitement. Mais cela a aussi des implications pour les mesures que les autorités publiques, y compris les institutions impliquées dans les soins de santé, doivent prendre pour prévenir et, si nécessaire, enquêter sur des abus ou des mauvais traitements suspects.

**Mots clés:** personnes âgées, droits de l'homme, droit à la santé, services médicaux, centres de soins.

According to the United Nations Principles for Older Persons<sup>1</sup>, envisaging independence, participation and integration in economic and social life, access to health care, access to social and legal services, elderly people should be able to enjoy the fundamental rights and freedoms when living in any shelter, care or treatment institution, including full respect for their dignity, beliefs, needs and privacy, as well as the right to make decisions about the type of care and quality of life. At the same time, they must benefit from care and family and community protection, have access to health care to conserve or regain their physical, mental and emotional well-being.

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<sup>1</sup> Adopted by the UN General Assembly through Resolution no. 46/91 on 16 December 1991.

Although there is no international legal document explicitly referring to the rights of older persons, these rights are foreseen and referred to in several international, regional conventions on human rights. According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture can be understood as “any act by which intentional pain or suffering of a physical or mental nature is caused to a person”. Also, according to Art. 3 of the European Convention on Human Rights, “no one can be subjected to torture or punishment or treatment”, this is an absolute right from which there can be no derogation.

Despite a certain degree of overlapping, the concepts of “torture”, “inhuman treatment” and “degrading treatment” are conceptually distinct, with a cumulative threshold between the concept of “degrading treatment,” at one end of the spectrum, to that of “torture” at the other end.<sup>2</sup> Therefore, the threshold for each is

<sup>2</sup> See Northern Ireland Human Rights Commission, *In Defence of Dignity The Human Rights of Older People in Nursing Homes*, Belfast, 2012, p. 19.

different and, in the case of torture, it must be done intentionally. Thus, negligence will not be a form of torture, defined as the deliberate cause of “inhuman treatment that causes very serious and cruel suffering”<sup>3</sup>.

In accordance with the European Court of Human Rights, a treatment is considered to be degrading if it “is such as to arouse in the victims feelings of fear, anguish or inferiority capable of humiliating and debasing.”<sup>4</sup> There is no requirement for humiliation or degradation to be committed intentionally, so neglect that leads to humiliation may also violate the right of not being subjected to degrading treatment.

Inhuman treatment is of another type, with an emphasis on the physical or mental consequences of such acts. In order to reach inhuman treatment behaviour one must “cause actual bodily harm or intense physical or mental suffering.”<sup>5</sup> However, in order to decide whether a treatment reaches the “threshold” of being inhuman or degrading, the court may take into account the sex, age and state of health of the victim.

Prohibition of torture or inhuman and degrading treatment not only obliges public authorities not to subject the person to ill treatment. But it also has implications for measures that public authorities, including institutions involved in health care, need to take to prevent and, if necessary, investigate suspicious abuses or ill-treatment.

The UN bodies have stressed on several occasions the vulnerability of the elderly residing in institutions or under long-term care, to inhuman or degrading treatment and the need for States Parties to provide sufficient staff, to ensure training of care and medical assistance staff and to organize more in-depth inspections in care homes, to improve the situation of the elderly.

In terms of how this is regulated by national legislation the Constitution of Romania enshrines in its Art. 22 the right to physical and mental integrity and the fact that no one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment.

<sup>3</sup> See Case *Ireland v UK*, no. 5310/71, ECHR 1978.

<sup>4</sup> See Case *Kudła v Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI.

<sup>5</sup> *Ibidem*.

The law on mental health and the protection of persons with mental disorders<sup>6</sup> includes a number of provisions and measures defending the rights of persons with mental disorders. Thus, the law refers to voluntary confinement and to involuntary confinement, the latter being allowed only in severe cases and on decision by a medical commission.

The law provides that confined persons may be restricted their freedom of movement, by means of adequate devices, in order to save them from a genuine danger to them or to others’ life, physical integrity or health. Confinement may not be used as a form of punishment, may not be part of the medical treatment and may not be ordered for cases of suicide or self-isolation or as a solution for the lack of personnel or treatment, nor as a sanction, nor as a form of threatening nor to force good behaviour and nor to prevent the destruction of assets. In extreme cases, this measure may be used, but only if the application of less restrictive techniques proves inadequate or insufficient to prevent any harm or injuring.

According to minimum quality standards - the standard on respecting the rights of residents and professional ethics<sup>7</sup> - the care home must develop and implement a Charter of residents’ rights. The care home must develop and implement a Charter of rights of beneficiaries. The Charter, according to the normative act, envisages the respect of a number of rights that are listed, including the right of residents “not to be abused, neglected, abandoned, punished, harassed or exploited.”

Also in line with the standard on protection from abuse and neglect, the residential care home must take measures to prevent and combat all forms of abusive, negligent or degrading treatment of its residents.

In this sense the care home must use its own procedure for identifying, reporting and solving

<sup>6</sup> Law No. 487/2002, republished in 2012, on mental health and the protection of persons with mental disorders, published in the Official Gazette of Romania, I, No. 652 of 13 September 2012.

<sup>7</sup> Order No. 2126/05.11.2014 on approving the Minimal Quality Standards for the accreditation of the social services devoted to old persons, shelterless persons, young people who left the child protection system and other categories of persons in distress, as well as for the services provided by the community, the services provided in an integrated system and social canteens.

cases of abuse and neglect among their residents, to encourage and support residents to report any form of abuse, neglect or ill-treatment to which they are subjected by the people they come in contact with, both at the care home as well as in their family or in the community. Also, the care home must organize training sessions for their staff in the field and monitor the activities undertaken by the residents during the periods when they are not in its premises, in order to prevent risk of abuse or exploitation.

Seven of the eight care homes visited had the Chart in place, or had it incorporated in the internal regulations procedure and also had procedures on protection from abuse and neglect. Only one care home has not developed such a procedure. However, the management of the care home stated that periodic meetings with the staff are organized, during which the discussions focus on issues such as the appropriate behaviour towards the residents or periodical dialogues with them. This approach has been highlighted also by the other visited care homes.<sup>8</sup>

Following the interviews with specialized staff of all the visited care homes, a low level of knowledge regarding the Chart of residents' rights and the fundamental rights of elderly persons was noted, but in spite of this it was found that the staff has the required qualification to handle the situations when the residents refuse food or shower/bath.

In none of the visited care homes were signalled cases of violence during the visits or other cases of abuse or violence against elderly persons. There were no locked rooms (the field visits were organized following a request for admittance presented to the management of the care homes). Also in three of the six visited public care homes, some of the interviewed persons were reluctant in expressing themselves with regard to food, living conditions or the behaviour of the staff in order not to jeopardize or worsen their situation. All the other interviewed residents expressed their

<sup>8</sup> "We also have questionnaires by which we check the possible abuses during the beneficiaries' visits. They are applied to those beneficiaries who frequently go out of the premises and pay visits and then we check if they were not abused in the community", Head of Care Home A(public, rural).

satisfaction or great satisfaction with the way they are being treated and cared by the staff.<sup>9</sup>

However, in Romania they were also reported violence and abuse cases, torture, excessive sedation, exploitation at the working place; these are some of the accusations launched by the Legal Resources Centre, in a criminal complaint on the living conditions of persons with disabilities living in a care home for elderly people with disabilities in Romania<sup>10</sup>. Such cases clearly highlight the lack of administrative, social and educational measures or of any other appropriate measures for the protection of persons with disabilities against all forms of exploitation, violence and abuse<sup>11</sup>.  
Freedom of Movement, and Use of Restraint

The law on mental health and the protection of persons with mental disorders<sup>12</sup> includes a number of provisions and measures defending the rights of persons with mental disorders. Thus, the law refers to voluntary confinement and to involuntary confinement, the latter being allowed only in severe cases and on decision by a medical commission. The law provides that confined persons may have their freedom of movement restricted, by means of adequate devices, in order to be saved from being a genuine danger to them or to other person's life. Confinement may not be used as a form of punishment, may not be part of the medical treatment and may not be ordered for cases of suicide or self-isolation or as a solution for the lack of personnel or treatment, nor as a sanction, nor as a form of threatening

<sup>9</sup> "Out of 100 residents we also have some people who are at odds with water, they don't like to wash, even though they have access to warm water and they don't have to pay for it; however, much to their dissatisfaction, we have a strict schedule, willy-nilly: twice a week, for they are old and must wash.

We've been successful so far, with diplomacy. We can't do it by force. Those who are immobilized in bed, are washed by nurses/attendants, but among those who are independent, who can walk, there are some who refuse to take a bath. Nevertheless, they eventually give in, they have to, we wouldn't like to have problems (diseases, etc.)", Head of Care Home B (public, urban).

<sup>10</sup> <http://www.gandul.info/stiri/ancheta-la-un-camin-sau-persoane-internate-ar-fi-batute-legate-de-paturi-sau-abuzate-sexual-12394136>.

<sup>11</sup> See Annex to Government Decision HG 50-2015.

<sup>12</sup> 22 Law No. 487/2002, republished in 2012, on mental health and the protection of persons with mental disorders, published in the Official Gazette of Romania, I, No. 652 of 13 September 2012.

nor to forcibly impose good behaviour and nor to prevent the destruction of assets. In extreme cases, this measure may be used, but only if the application of less restrictive techniques proves inadequate or insufficient to prevent any harm or injuring<sup>13</sup>.

The use of confinement devices should be proportional with the danger, should be applied only for the needed time period and only when there is no other way to prevent the danger, and never be a sanction. “We had situations when we had to immobilize the patient but in order to comply with the law we called 112 for the help of the police of psychiatric attendance.”

In none of the visited care homes were found any reports during visits on cases of use of force for immobilization (in the sense of restraint) against residents, or of restriction of freedom of movement of elderly persons or on rooms locked with the key, but mention should be made that the visits were organized after obtaining prior agreement from the management of the respective care home.

However we encountered some situations in which freedom of movement of persons was affected. Thus, a resident (who was in the care home for 5 years) suffering from dementia, had a partially amputated leg (gangrene). He had no prosthesis since having no insurance the insurance house cannot cover the expenses for it.

In a public care home, there were bars on the windows of the upper levels, in the opinion of the management this being an attempt to protect beneficiaries suffering from a form of dementia or of other mental disability.

Last but not least, the insufficient number of existing staff, reported to the number of beneficiaries, especially residents with disabilities endangers the right to freedom of movement, the right to participation, the right to autonomy, creating conditions for possible violations of these rights. The insufficient number of staff makes residents dependent (including the mentally ill confined in bed) their programme being limited to

meals, personal hygiene, provision of medication and cleaning of the rooms.

Older persons are extremely vulnerable to inhuman or degrading treatment in care homes. The existence of an adequate number of care staff, along with training of nurses and inspections, can help avoid inhuman or degrading treatment in care homes. At the same time, there is a need for a higher degree of consultation with the elderly regarding all aspects concerning them directly and at the level of public policies. It is necessary to empower all groups of representatives at all levels (local, county, national) since their involvement is necessary in the evaluation of community needs.

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<sup>13</sup> Rights of persons with disabilities in Romania. Recent developments, RIHR, Bucuresti, 2014, pp. 49-50.