

The Romanian ' Law No. 275 of 4 July 2006 on enforcement of punishments and of measures ordered by the judicial bodies during the criminal proceedings' and ECHR

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As Galileo said about our planet, 'Eppur, si muove' - 'And yet it does move'- so Europe keeps moving and always ends up going forward and not just judicial Europe. The main thrust of the presentation is to recognize the importance of European Convention of Human Rights regarding the persons deprived of their liberty in order to strengthen the protection for these persons against torture and other cruel, inhuman or degrading treatment or punishment.

The Romanian ' Law No. 275 of 4 July 2006 on enforcement of punishments and of measures ordered by the judicial bodies during the criminal proceedings' may be consider not only an imminent vision of the society but also an example of how a persons surroundings can influence him . In this connection, particular attention was paid to the treatment of persons detained and the conditions of detention .A preventive mechanism providing for such protection must be of considerable value as an element of the universal protection of human rights. Such a mechanism should be based on the principles of the confidentiality, independence, impartiality, universality and effectiveness. It should rather be preventive, involving an evaluation of current conditions in places of detention and recommendations on how detention practices and facilities should be improved in order to strengthen the protection of human rights.

The European Court of Human Rights is often describe as the jewel in the Council of Europe's crown. The Court is a symbol of what effective democracy and rule of law should mean. The rights and freedoms it guarantees are both timeless and universal. Timeless ,due the fact that we find reflections of Roman law like non bis in idem or continuations of Cesare Beccaria's ideas from Dei Delitti e delle pene regarding the rule of law. Universal because law is above all a common language.

In this respect, the European Court of Human Rights occupies a crucial position ,through its very existence and thanks to its case law ,in the gradual improvements of human rights protection. Here are several cases concerning Romania followed by the provisions changed in the Romanian laws.

Petra v.Romania(115/1997/899/1111)

On 9 December 1995 Mr **Petra** sent a letter through his wife to the Commission, informing it that on 26 September 1995 he had been transferred to Aiud Prison and that when he had sought permission to communicate his change of address, the reply had been "the Council of Europe is at Aiud and nowhere else" and that if he persisted, he would be put under the special prison regime.

In his application bringing case before the Court applicant had complained of hindrance of his correspondence with the Commission, his family and the national authorities.

Court has jurisdiction *ratione materiae* within compass of Commission's decision on admissibility of an application – Commission had expressed opinion that there had been a violation of Article 8 on account of the opening and delaying of correspondence between applicant and it.

Case file did not contain any letters sent by applicant to his family or to his country's authorities that had been intercepted and monitored by prison authorities.

Court considered that it did not have to entertain those complaints.

At that time, domestic provisions on monitoring of prisoners' correspondence was Law no. 23/1969 which left national authorities too much latitude. Monitoring of correspondence seemed to be automatic, independent of any decision by a judicial authority and unappealable.

Implementing regulations was unpublished, so that applicant had been unable to acquaint himself with them.

Government had not disputed Commission's conclusion that domestic law did not satisfy the requirement of accessibility and did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities.

Applicant had not enjoyed minimum degree of protection to which citizens are entitled under rule of law in a democratic society. Interference complained of not in accordance with the law.

Court did not consider it necessary in instant case to ascertain whether the other requirements of paragraph 2 of Article 8 had been complied with.

Cotlet v. Romania (Application no. 38565/97)

The applicant, Silvestru Coteț, is a Romanian national who was born in 1964 and lives at Gura-Humorului. The case concerns his difficulties in corresponding with the Convention institutions after lodging his application.

On 23 July 1992 he was convicted of murder by the Caraș-Severin County Court and sentenced to 17 years' imprisonment. He was sent to Drobeta Turnu-Severin Prison and subsequently transferred to penal institutions in Timișoara, Gherla, Jilava, Rahova, Craiova, Tg. Ocna and Mărgineni. He lodged an application with the European Commission of Human Rights from prison in November 1995 complaining about the allegedly unfair nature of the proceedings that had ended with his conviction.

The applicant complained under Article 8 of the Convention of interference with his correspondence with the Convention institutions, including delays in forwarding his letters to the Court and the Commission, the opening of his letters to those institutions, and the prison authorities' refusal to provide him with paper, envelopes and stamps for his letters to the Court. He also complained of a violation of his right of individual application, as guaranteed by Article 34 of the Convention.

The Court noted that between November 1995 and October 1997 the applicant's correspondence had taken between 1 month and 10 days and 2 months and 6 days to reach its destination. Such delays amounted to an interference with his right to respect for his correspondence. Referring to its case-law, the Court observed that it had previously held that the Romanian legislation on the

monitoring of prisoners' correspondence was incompatible with the requirement under Article 8 § 2 of the Convention for an interference to be "in accordance with the law". Consequently, finding that that requirement was not satisfied, the Court held that there had been a violation of the Convention under this head(art 8).

As regards the period up to 24 November 1997, when a decree was issued guaranteeing the confidentiality of prisoners' correspondence, the Court found that the fact that the applicant's letters had been opened amounted to an interference with his right to respect for his correspondence: that interference had been based on national provisions which had not amounted to a "law" for the purposes of Article 8 paragraph 2 of the Convention. Consequently, it held that there had been a violation of the Convention under that head.

With regard to the period after 24 November 1997, the Court noted that the facts were in dispute. The case file showed that the interference with the applicant's right to respect for his correspondence had continued. In the absence of any specific information from the parties on the point, the Court assumed that the basis for the interference was the Minister of Justice's decree of 24 November 1997. It noted that the decree was referred to under various different numbers and did not appear to have been published. Accordingly, the Court found that the interference was not "in accordance with the law" and that there had been a violation of Article 8 of the Convention.

The prison authority's refusal to provide the applicant with writing materials for his correspondence with the Court

The Court noted that inherent in the right to respect for correspondence, as guaranteed by Article 8 of the Convention, was the right to writing materials. It noted that several letters in which the applicant had related the difficulties he was experiencing had arrived in envelopes from other prisoners. The Court did not find the Government's submission that the applicant had been entitled to two free envelopes a month substantiated. It also found that the applicant's right to respect for his correspondence was not adequately protected by the provision of envelopes. It noted that the Government had not disputed that the applicant's requests had been turned down because there were no stamped envelopes for overseas correspondents available. In the circumstances, the Court found that the authorities had not discharged their positive obligation to supply the applicant with writing materials for his correspondence with the Court and, accordingly, held that there had been a violation of Article 8 of the Convention.

The Court found that the applicant's fears about being transferred to another prison or encountering other problems as a result of lodging his application could amount to intimidation. When combined with the failure to provide him with the necessary writing materials for his correspondence with the Court, the delays in forwarding his correspondence to the Court and the Commission and the systematic opening of that correspondence constituted a form of unlawful and unacceptable pressure that violated the applicant's right of individual application. Consequently, the Court held that there had been a violation of Article 34 of the Convention.

As a result of these violations, the law was change as follows

ART. 44

Right to petition

(1) The right to petition of the persons who serve the punishments involving deprivation of liberty shall be safeguarded.

(2) The petitions and the answer to the petitions are confidential and may not be opened or retained.

(3) For the purpose of this law, the term petition shall include any request or intimation addressed to the public authorities, judicial bodies, courts or international organisations.

ART. 45

Right to correspondence

(1) The right to mail of the persons who serve the punishments involving deprivation of liberty shall be safeguarded.

(2) The mail shall be confidential and may not be opened or retained unless the limits and conditions provided by law are complied with.

(3) For the purpose of preventing the bringing into the penitentiary, by mail, of toxic substances, explosives or other similar objects whose possession is forbidden, the mail may be opened, without being read, in the presence of the convicted person.

(4) The mail may be opened and retained if there are solid evidences in respect of committing an offence. The person who serves the punishments involving deprivation of liberty shall be notified in writing forthwith with regard to taking such measures, and the mail retained shall be classified in a special file that shall be kept by the administration of the penitentiary.

(5) The opening and retaining of mail, according to paragraph (4), may only be carried out based on the orders issued, in writing and motivated, by the judge delegated for the enforcement of punishments involving deprivation of liberty.

(6) The provisions of paragraphs (3) and (4) shall not apply in case of mail with the counselor for the defence, with the non-government organisations that carry on their activity in the field of protection of human rights, as well as with the courts or international organisations whose competence is accepted or recognised in Romania.

(7) The persons who serve the punishments involving deprivation of liberty may receive and dispatch letters in their mother tongue, in compliance with the provisions of paragraphs (1) - (6).

ART. 46

Measures for ensuring the exercise of the right to petition and the right to mail

(1) In order to ensure the right to petition and the right to mail, the warden of the penitentiary shall be obliged to take all measures to make available to the convicted person the necessary materials, as well as to install mailboxes inside the penitentiary.

(2) The petitions and mail shall be collected by the personnel of the provider of postal services, to whom access inside the penitentiary is ensured.

(3) The personnel of the provider of postal services shall be accompanied inside the penitentiary by a person specially appointed by the warden of the penitentiary.

(4) The answer to petitions and mail addressed to the persons who serve the punishments involving deprivation of liberty shall be handed over immediately to the addressee, against signature.

(5) The expenses occasioned by the exercise of the right to petition and the right to mail shall be covered by the persons who serve the punishments involving deprivation of liberty. In case such persons do not dispose of necessary funds, expenses for the exercise of the right to petition by expenses and intimations addressed to the judicial bodies, courts or international organisations

whose competence is accepted or recognised in Romania and those for the exercise of the right to mail with the family, the counselor for the defence and the non-government organisations that carry on their activity in the field of protection of human rights shall be covered by the administration of the penitentiary.

Bălăsoiu v. Romania (Application no. 37424/97)

Friendly settlement

The applicant, Georgeta Bălăsoiu, is a Romanian national who was born in 1949 and lives in Stefănești.

In July 1993 she lodged a criminal complaint, together with an application to join the proceedings as a civil party, against a number of police officers whom she accused of committing robbery and carrying out inadequate investigations. A medical examination of the applicant in July 1993 recorded numerous bruises on her face, arms, breasts and thighs and two fractured ribs. The police officers concerned were acquitted at first instance. However, in April 2001 the Military Court of Appeal held that they should have been convicted but that criminal proceedings against them were now time-barred. The applicant was awarded the equivalent at the material time of approximately EUR 1,600 for non-pecuniary damage.

The applicant alleged that she had been the victim of a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention in that the authorities' investigation into the treatment inflicted on her by agents of the State had been ineffective. She also complained, under Article 6 § 1 (right to a hearing within a reasonable time) of the Convention, of the excessive length of the criminal proceedings which she had joined as a civil party.

The case has been struck out following a friendly settlement in which the applicant is to be paid EUR 8,500 for any non-pecuniary and pecuniary damage and for costs and expenses. .

Notar v. Romania (Application no. 42860/98) ***Friendly settlement***

The applicant, Gheorghe **Notar**, is a Romanian national who was born in 1979 and lives in Tg. Mures. He was arrested by the police on 7 July 1996 on suspicion of having been involved in a robbery. The case was discontinued in February 1997.

The conditions of his arrest and subsequent detention were in dispute between the parties. The applicant claimed that he had been beaten by the police while being transferred to the police station and during questioning. On the day of his arrest he was placed in the Mures Youth Shelter where he remained until 12 July. He alleged that he had had his head forcibly shaved, that he had been beaten, had had to endure cold showers and had been washed in diesel oil. The Romanian Government, which conceded that the applicant had undergone a number of hygienic and disinfection measures on his arrival at the shelter, denied any ill-treatment.

The applicant's father, acting on behalf of his son, lodged a criminal complaint in respect of ill-treatment, false imprisonment and trespass. The subsequent proceedings were discontinued.

The applicant claimed to have been a victim of a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the Convention on account of the treatment he had suffered at the hands of the police and the wardens at the Mures Shelter and complained of the lack of an effective investigation capable of leading to the identification and punishment of those responsible. Relying on Article 5 §§ 1, 2, 3, 4 and 5 (right to liberty and security), he also complained that he had not been arrested and detained "lawfully" or "in accordance with a procedure prescribed by law". He also alleged a breach of Article 6 § 1 (right to a fair trial) of the Convention. He complained further of an infringement of his right to be presumed innocent within the meaning of Article 6 § 2 of the Convention as his identity had been revealed during a television programme which had presented him as the perpetrator of an offence. Lastly, he complained of a breach of Article 34 (right of individual petition) of the Convention.

The case has been struck out following a friendly settlement in which the applicant is to receive EUR 40,000 plus EUR 875 for pecuniary damage and EUR 8,712.66 for costs and expenses.

The Romanian Government have also made the following declaration: "The Government undertake to initiate a process of reform of the existing stamp-duty legislation so that civil actions for damages for treatment contrary to Article 3 are exempted therefore.

"The Government will take the necessary measures to inform the police forces of the appropriate conduct to be observed in order to ensure respect for the presumption of innocence within the meaning of Article 6 paragraph 2 of the Convention.

"The Government will continue to make efforts in the area of protecting children in distress in accordance with their undertakings given in the legislation and the strategies adopted at national level (Government ordinance no. 26/1997 on the protection of children in distress, approved by Law no. 108/1998, and Government decision no. 539 of 7 June 2001 on the strategy for the protection of children in distress) which entirely replace the legislation in force at the material time.

"The Government consider that the supervision, by the Committee of Ministers of the Council of Europe, of the enforcement of the Court's judgment constitutes an appropriate mechanism for ensuring that progress will continue to be made in this area."

As a result of these violations the law was change as follows

ART. 50

Right to medical assistance

(1) The right to medical assistance of the persons who serve the punishments involving deprivation of liberty shall be secured.

(2) The medical assistance in penitentiaries shall be ensured, whenever necessary or upon request, with qualified staff, free of charge, according to the law.

(3) The persons who serve the punishments involving deprivation of liberty shall benefit by free medical treatment and medicines.

ART. 51

Medical examination

(1) The medical examination of the persons convicted to punishments involving deprivation of liberty shall be carried out upon the admittance to penitentiaries and while serving their punishment, periodically.

(2) The medical examination shall be carried out under terms of confidentiality.

(3) The doctor that makes the medical examination shall be obliged to notify the prosecutor in case it finds that the convicted person has been subjected to torture, inhuman or degrading treatments or to other ill treatments, as well as to write down in the medical record the facts found and the declarations of the persons convicted in relation to these and with any other aggression declared by the convicted person.

(4) In the cases provided in paragraph (3), the person convicted to a punishment involving deprivation of liberty shall be entitled to request an examination, at the place of arrest, by a forensic doctor or by a doctor outside the penitentiary system, designated by the convicted person.

(5) The expenses occasioned by the medical examination provided in paragraph (4) shall be covered by the applicant.

Sabou and Pircalab v. Romania (Application no.46572/99)

The applicants, Dan Corneliu **Sabou** and Călin Dan Pîrcălab, are Romanian nationals who were born in 1971 and 1968 respectively and live in Baia Mare (**Romania**). They are reporters on a local newspaper "Ziua de Nord-Vest".

In April 1997 the newspaper published a series of articles written by both journalists on the allegedly unlawful acquisition of land by the mother of the President of the Baia Mare District Court. The first article condemned this acquisition, claiming that it had taken place at the expense of farmers from the Ulmeni municipality. The following articles included allegations that the judge had allegedly resorted to threats and sought to use forged documents to dispossess a neighbor.

Criminal proceedings were brought against the applicants after the judge filed a complaint for criminal defamation. In a judgment of 15 December 1997 Năsăud District Court convicted the applicants of the charges against them. It sentenced Mr **Sabou** to 10 months' imprisonment and also banned him from exercising his profession and suspended his parental and electoral rights for the duration of his imprisonment. In addition, the court fined Mr Pîrcălab 500,000 Romanian leis (ROL) (EUR 62), which was suspended, and ordered the applicants, jointly and severally with the newspaper, to pay the judge ROL 30 million (EUR 1,582.42).

An appeal lodged by the applicants was dismissed on 3 April 1998 by Bistrița Năsăud Regional Court on the ground that the impugned articles did not set out the truth and that it was clear that the reporters had not acted in good faith or with a view to protecting certain moral values in society, but had sought to attack the judge's reputation.

On 20 August 1998 Mr **Sabou** was imprisoned. At the time, he was living with his partner and two of their children. Four days later, his partner gave birth. Mr **Sabou** was released on 5 October 1998 after his request for a stay of execution was granted. He received a presidential pardon on 19 January 1999.

In May 2002 the newspaper paid the judge the sum she had been awarded by the courts. Mr Pîrcălab later repaid this sum in full through monthly deductions from his salary. The Court pointed out that the child's interest had to take precedence over all other considerations and that only particularly unworthy behavior could justify a person being deprived of his or her parental rights in the child's best interests.

The offence for which Mr **Sabou** had been convicted was completely unrelated to questions of parental responsibility and at no time had any allegation been made concerning a lack of care on his part or ill-treatment of his children. Under Romanian law, the ban on exercising parental rights was an ancillary penalty which was imposed automatically on any person who served a prison sentence, without the supervision of the courts and without taking account of the type of offence and the child's interests. Accordingly, the ban represented a moral reprimand aimed at punishing the convicted person rather than a child-protection measure.

Accordingly, the Court concluded that there had been a violation of Article 8.

The Court emphasised that, under Romanian law, the removal of parental responsibility was a statutory measure that was automatically imposed as an ancillary penalty whenever a person served a prison sentence. With regard to the Romanian Government's argument that Mr Sabou could have raised the objection that the law in question was unconstitutional, the Court pointed out that the Constitutional Court had found the relevant provision to be compatible with the Constitution and had ruled that the introduction of ancillary penalties was a matter of criminal policy for Parliament to decide.

In those circumstances, the possibility of raising an objection of unconstitutionality did not represent an effective remedy capable of providing appropriate redress for the complaint under Article 8. The Court accordingly concluded that there had been a violation of Article 13 taken together with Article 8.

As a result of these violations in the Romanian law, the removal of parental responsibility was a statutory measure is not anymore automatically imposed as an ancillary penalty whenever a person served a prison sentence(art 64 and 71 Criminal Code)

Bragadireanu v. Romania(Application no. 22088/04)

The applicant, Alexandru **Bragadireanu**, is a Romanian national who was born in 1954.

In June 1993, Mr **Bragadireanu** was remanded in custody, accused of having murdered his partner. He was found guilty of aggravated murder and sentenced to 20 years' imprisonment in May 1995. The applicant appealed before the Supreme Court, alleging in particular that the evidence had been wrongly interpreted by the courts.

During those proceedings his health was in constant decline. He was sent to a prison hospital several times and underwent surgery. In 1996, he was diagnosed with a perianal tumour. Due to a severe problem with his eyes, doctors recommended his release. The Supreme Court therefore suspended the proceedings from 27 May 1997 to 2 June 1999 and ordered the applicant's release. In February 2004, the Supreme Court ultimately upheld Mr **Bragadireanu**'s sentence.

The applicant lodged a request for the suspension of the sentence, which was refused on the ground that the Forensic Institute concluded that, given the stage of his illness, he could stay in prison and that his medical treatment could be continued in prison hospitals.

Mr **Bragadireanu** was imprisoned in March 2004. He alleged that he had been placed in a cell with 30 beds arranged at three levels and with badly damaged mattresses, with two detainees in each bed, two toilets and no shower or warm water in the room. Due to his medical condition (as he had an artificial anus, he was unable to control his bowel movements) he asked to be transferred to a single-bed cell, but his request was rejected on the ground that no such cells existed in the penitentiary, except those for solitary confinement. He repeatedly requested to be examined by a doctor, but to no avail. He also claimed that his medicine had not been provided by the authorities and that his family had had to send it to him. He was hospitalised several times from 2004 to 2006. The applicant lodged unsuccessful complaints before the Romanian courts about the conditions in prison and the lack of medical care. Relying on Articles 3 and 6 § 1, Mr **Bragadireanu** complained in particular about the conditions of his detention and the lack of adequate medical treatment for his illness in prison. He also complained about the excessive length of the criminal proceedings brought against him.

Concerning the medical care in prison, the Court noted that the evidence available showed that the applicant had been examined by the penitentiary doctors on a regular basis and sent to public hospitals for further examinations when necessary. Therefore the penitentiary authorities had generally responded adequately to his medical requirements. Moreover, while it was true that the applicant's family had provided medicines for him, the Court noted that it was only reported to have happened once, and held that the applicant's general health did not seem to have deteriorated in prison due to lack of medical treatment.

On the question of whether a severely ill person should be deprived of their liberty, the Court recalled that the national courts had based their refusal to suspend the execution of the sentence on a medical report that had concluded that the applicant was fit for detention.

The applicant did not, therefore, prove "beyond reasonable doubt" that his suffering attained the minimum level of severity in order to fall within the scope of Article 3. Accordingly, there had been no violation of Article 3 concerning the medical care in prison.

Concerning the conditions of detention, the Court considered that a separate issue arose concerning the conditions of Mr **Bragadireanu**'s detention. The applicant's allegations of the lack of organised help from the prison authorities were not contested by the Romanian Government. Moreover, it seemed that the applicant had not had a personal assistant in prison, required by his poor health, and had been forced to rely on his inmates for the most basic sanitary needs.

While the Government provided very detailed information concerning the medical surveillance of the applicant, it could not produce a single piece of information on the facilities offered to him in detention. The Court therefore concluded that no such facilities were provided to him.

The Court also recalled that the applicant's medical condition was severe and his basic sanitary needs were difficult to attend to. Although the authorities had been aware of those facts, he had still been detained in an ordinary prison and shared a cell with other people. He also had no showers or warm water at his disposal and had not received regular assistance. His poor condition had led to social segregation from the rest of the prison population. Furthermore, Mr **Bragadireanu**'s description of the prison facilities was not contested by the Romanian Government and was confirmed by reports of the Council of Europe's Committee for the Prevention of Torture (CPT) on **Romania**.

The Court concluded that the prison conditions, in particular the overcrowding and lack of access to sanitary and other facilities, caused the applicant suffering, in violation of Article 3.

*The cases presented are not spectacular. However they prove the effective protection offered by ECHR to the citizens when some simple, common rights are in danger.
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