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THE EUROPEAN COURT OF HUMAN RIGHTS AS AN INSTITUTION WITH THE PREVENTIVE PURPOSE

The article considers the European Court of Human Rights as an institution with the preventive purpose. The aim of the article is to identify the preventive purpose of European Court of Human Rights' activities and to demonstrate that one of the key goals of the existence and functioning of the European Court of Human Rights as a quasi-judicial institution of a regional system for the protection of human rights is to prevent the violation of human rights. European Court of Human Rights functioning, assignment of individual and general measures, interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms as the main fence against violations of human rights on the continent, etc., all this reflect the preventive purpose of the ECtHR, no matter how many times the word «prevention» is used in its normative acts or judgements. The ECtHR prevents ambiguity, legal uncertainty, discrimination, and at last violation of the relevant conventional rights by interpreting the Convention's provisions on these very rights as well as their realization, both the interpretation of proportionality (adoption of the three-part proportionality test) of human rights restrictions. On the other hand, in its judgement of September 1, 2016 in the case of *Mikhno v. Ukraine*, the ECtHR does not contribute to the future prevention of human rights violations: this judgement did not recognize the state to be guilty in violating its the substantive positive obligations. And it means lack of adequate general legal and regulatory framework for organizing air shows and for air show planning and preparation. Consequently, the state is not obliged to establish strict rules for preparing and holding an airshow, thereby preventing the violation of the right to life (Article 2 of the Convention). In this case, the ECtHR has not sufficiently realized its preventive potential.

Keywords: European Court of Human Rights, prevention of human rights violations, monitoring and assessment actors, case of *Mikhno v. Ukraine*.

The point of the law is not to respond to harmful phenomena, as to prevent them. Preventing measures are the way to establish public relations to avoid or decrease the number and scope of violations of human rights and freedoms, to minimize adverse phenomena and processes caused by certain events or actions.

Absolute prevention of human rights violations is, of course, an utopia, but, as J. Habermas says about human dignity, it is a "realistic utopia". Humanity must strive for the greatest possible and most effective implementation of measures, preventing human rights violations.

Each participant's awareness of the preventive purpose of his activities as well as the improvement of activities aimed at preventing human rights violations is a significant underrated contribution to the implementation of the preventive purpose of the law.

The implementation of the preventive purpose of the law is usually made by the subjects (participants) whose aim is to prevent human rights violations. These subjects can be legal persons of public and private law, international organizations and bodies, their operating parts, social groups, natural persons.

The purpose of any punishment is the prevention of further legal offences. The negative consequences of the penalties shall not go beyond the stated purposes and be redundant. Thus, all institutions, foreseeing, detecting and investigating offences, determining and applying penalties (the parliament, courts, the prosecutor's office, the police, security agencies, probation service institutions, international organizations, even employers), serve a preventive purpose. However, their preventive functionality lies not only in actions, mentioned above and law enforcement agencies are not the only subjects of prevention.

The categorization of the subjects of prevention human rights violations can be formed according to their major preventing functions (in other words – by the criterion of functionality):

a) ideological (provide education, inform about phenomena and processes, lay the ideological groundwork for the rule-making, law implementation and law application, have a permanent impact on all

subjects of prevention and establish, clarify or change people's lawfulness, moral and legal values, vital priorities and more specific person's views and opinions. They also form the basis (both rational – sociological, historical, political, economic, etc., and irrational – for example, artistic, religious) for person's argumentation and views on certain legal issues – for example, educational and cultural institutions, mass media);

b) rule-making (participate in the creation of a normative basis for the activities of all subjects of prevention, proclaim and consolidate human rights, procedures for its implementation and protection, procedures which prevent obstacles to the implementation of human rights and avoid opportunities to act illegally – for example: the parliament, international organizations and their bodies (in particular, the Venice Commission), the head of the state, the government, local authorities);

c) legally assisting (provide legal counselling and other assistance in the realization of rights before, instead of or along with application to supervisory entities – for example: the bar, legal clinics, non-governmental human rights institutions, mediators, natural persons: parties to contracts, heirs, employers, employees, landowners, land users; public and economic management bodies (except rule-making and control-supervisory ones), guardianship and custody bodies and services, administrations of institutions, enterprises, organizations, labor collectives);

d) control-supervisory (have the authority of coordination (validation, expertise), certifying, registration, appeal (complaint handling, possibility to change and cancel the decision), investigation and sanctioning (possibility to investigate offences and to hold a person liable), monitoring (data accounting, collection and analysis; relevant institutions inspection, surveys and visits), inspecting (inspections, audits), recommendation (possibility to provide conclusions, recommendations) to other subjects of prevention) – for example: international human rights treaty bodies (committees, tribunals, courts, commissioners), the notary, registrars, the Ombudsman, national preventive mechanism, state inspections, guardianship and custody bodies, courts, the Constitutional court, arbitrations, military tribunals, public organizations, legal departments of enterprises, institutions, organizations, the Ministry of Justice of Ukraine, law enforcement agencies).

The last category (control-supervisory bodies) is the largest category of prevention human rights violations subjects. European Court of Human Rights (*hereinafter – the ECtHR*) is a control-supervisory body which aim is to prevent human rights violation. This article aims to demonstrate the preventive activity work of ECtHR.

This article is taking ideas presented at the international scientific conference “ECHR's Jurisprudence in Digital Era” held in May 31 – June 1, 2019¹.

In 1997, professor U. Kriebaum pointed out that “strictly speaking, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is the only purely preventive human rights instrument, ... Inter-American Human Rights Court, the Inter-American Human Rights Commission and of their counterparts on the European and the global level ..., all of them being elements of human rights instruments, have the prevention of human rights violations as their prime objectives”²; “only one international human rights instrument primarily devoted to prevention has been established, viz. the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”³.

So, the conclusion about the preventive purpose of the normative act is made in case when the word “prevention” is mentioned in its title or when it is clearly defined in the aim of its own. In fact, the presence or absence of the word “prevention” in the title or text of a convention or other normative act can not reveal the presence or absence of a preventive purpose of a certain act.

European Court of Human Rights functioning, assignment of individual and general measures, interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms as the main fence against violations of human rights on the continent, etc., all this reflect the preventive purpose of the ECtHR, no matter how many times the word «prevention» is used in its normative acts or judgements.

There are at least seven aspects of the ECtHR's prevention that are proposed to be described below:

- 1) the purpose of establishment;
- 2) equal distance from both parties;
- 3) application of general and individual measures;

¹ Batan, Yu. (2019). The European Court of Human Rights as an institution with the preventive purpose. *ECHR's Jurisprudence in Digital Era: materials of international scientific conference (Odesa, May 31-June 1, 2019)*, 94-97.

² Kriebaum, U. (1997). Prevention of Human Rights Violations. *Austrian Review of International and European Law*, 2, 159.

³ Ibid, 188.

- 4) application of ECtHR practice and experience in domestic law-making and enforcement;
- 5) application of punitive measures;
- 6) interpretation of the Convention;
- 7) subsidiarity.

1. The purpose of establishment

The previous experience of massive violations of human rights by the Nazi regime in Germany and other territories being occupied by the Third Reich caused the creation of a European system aimed to protect fundamental human rights and freedoms. Functioning of supranational institutions aimed at guaranteeing of human rights in case of their violation by the state became the basis of such system¹. That is, the fact of emergence of the European Court of Human Rights as an institution itself was caused by the need to prevent the possibility of new massive human rights violations by the state. Moreover, at that time, the German State rarely violated its own laws, but these very laws violated human rights. To prevent such violations in future it was necessary to establish additional supranational institution that would primarily consider disputes between the individual and the state regarding violations of human rights by the last one.

2. Equal distance from both parties

Despite the concept of separation of powers, the judiciary remains to be influenced on the rest of authorities. Instead, the European Court of Human Rights, being equally far-off distant from the applicants and the State, prevents the possibility for public authorities to take an advantage of such effect or even to create it.

In this regard should be emphasized the preventive functions of the bar, legal clinics and non-governmental human rights organizations (and other entities providing legal assistance to applicants)

These subjects' presence pursues a goal to prevent violations of human rights and freedoms which is usually happening due to the person's ignorance of such rights and / or misunderstanding of the procedure for their protection.

The following directions of human rights bodies' preventive activity should be noted:

- a) providing of legal information (educational, scientific-advisory and methodological activities, as well as seminars, scientific papers publications emphasising the determinants of human rights violations and ways to their elimination or reduction), in particular, legal informing about the ECnHR and the ECtHR;
- b) legal consulting (explanation of lawful ways to eliminate the determinants of offences);
- c) prevention of criminal prosecution of innocent persons;
- d) prevention of violation of the right to a fair trial (assisting the courts and law enforcement agencies to clarify the circumstances of the case and to establish parties' rights and obligations)
- e) submission of the corresponding petitions concerning guarantee of personal safety for the participants of judicial (mostly criminal) process (prevention of the personal danger)
- f) prevention of violation of extrajudicial procedural rights of a person;
- g) specific violation of human rights and its determinants identification;
- h) assisting the law enforcement agencies and the courts to identify such determinants;
- i) mitigating circumstances identification;
- j) prevention of victimization by establishing the role of the victim of offence in the offensive activity itself;
- k) prevention of alleviation of human rights violations by the client, as well as other advocates (unethical behavior is prevented by the Model Rules of Professional Conduct);
- l) law-making activity by initiating (*eg*, through advocacy self-government bodies) changes to normative acts in order to more effective implementation of subject's preventive functions;
- m) analytical and statistical activity of the state of human rights protection research.

As an example, one of the largest charity foundations in Ukraine, the International Renaissance Foundation, declares the goal of its "Human Rights and Justice" program initiative as "to prevent human rights violations, promote effective anti-discrimination legislation and practices, and ensure disadvantaged and vulnerable groups have access to justice and legal aid"², *i.e.* to prevent human rights violations, in particular the prevention of discrimination and the violation of the right to a fair trial.

¹ Савчин, М. (2018). *Сучасні тенденції конституціоналізму у контексті глобалізації та правового плюралізму*. Ужгород: ПІК-У, 65.

² International Renaissance Foundation (2021). *Human Rights and Justice* <https://www.irf.ua/en/program/human_rights-en/> (2021, March, 22).

Human rights organizations can be divided into those of a general nature, *i.e.* focused on the prevention of all human rights violations (in Ukraine there are the Kharkiv Human Rights Protection Group, the Ukrainian Helsinki Human Rights Union, the Ukrainian Bar Association, the International League for Protection of rights of Ukrainian Citizens, the Vinnitsa Human Rights Group, the Committee for the Protection of Human Rights, etc.) and of a special nature with narrower scope of preventing functions: in the field of elections (Committee of Voters of Ukraine), elections and education (Civic Network “OPORA”), consumption (consumers protection organizations), labor (trade unions), environmental (“green” and other environmental NGOs).

3. Application of general and individual measures

If the European Court of Human Rights recognizes the violation of human rights guaranteed by the European Convention on Human Rights, the state must pay the material and, sometimes, moral compensation awarded by the ECtHR, as well as eliminate the violation of the rights of each person prevailed at the ECtHR, and at last take measures aimed to prevent similar violations. The very fact of the power of the ECtHR is to award compensation, to resume the status applicant had before the violation, etc., should be interpreted as a preventive mechanism, since the state is more interested in eliminating the causes and conditions of violations of certain human rights, without bringing the ECtHR action.

4. Application of ECtHR practice and experience in domestic law-making and enforcement

Besides, ECtHR has a preventive assignment. That is because deputies and other law enforcement bodies usually take into account possibility of suing the ECtHR while passing and applying laws. The activity of a certain judge analyzed via its judgements also could be recognized as preventive phenomenon of ECtHR. The same could be stated regardless the laws which violate Convention for the Protection of Human Rights and Fundamental Freedoms. However, it is important to be pre-established by the ECtHR.

Establishment of an obligation to pay damages to a person who suffered with an unfair judgement or illicit act or omission committed by a public authority or its officers could be an additional preventive measure to avoid human rights violation.

The direction of the ECtHR’s precautionary influence on domestic law-making and enforcement is the statement of preventive purpose of certain norms, principles, etc. The limitation periods are just one example. In the case of *Volkov v. Ukraine* the ECtHR stated: “The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, Reports 1996-IV)” (§ 137)¹.

The limitation periods, like other time limiting norms, are designed to prevent injustice, legal uncertainty and disproportion, as confirmed by the ECtHR as a relevant institution.

5. Application of punitive measures.

Paulo Pinto de Albuquerque, the ECtHR’s judge, and Anne van Aaken prove that the ECtHR “uses punitive damages implicitly” and believe that the Court should do so more frequently in the future in order to prevent repetition of wrongful conduct by states².

Punitive or exemplary are the damages which “being established with the purpose of ... preventing repetition of wrongful act by the offender, or emulation by third parties, without being limited to mere compensation for the pecuniary and non-pecuniary losses caused to the claimant, including loss of profit”³.

6. Interpretation of the Convention

The ECtHR prevents ambiguity, legal uncertainty, discrimination, and at last violation of the relevant conventional rights by interpreting the Convention’s provisions on these very rights as well as their realization, both the interpretation of proportionality (adoption of the three-part proportionality test) of human rights restrictions.

For example, in the judgment of November 6, 2018 in the case of *Burlyta and Others v. Ukraine*, the ECtHR pointed out the effectiveness of measures to prevent the risk of ill-treatment (Article 3): “not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that

¹ ECHR (2013). *Oleksandr Volkov v. Ukraine*, 21722/11 <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-115871"\]}](https://hudoc.echr.coe.int/fre#{)> (2021, March, 22).

² Albuquerque, P. P. D., Aaken, V. A. (2018). Punitive Damages in Strasbourg. In: Aaken, V. A., Motoc, I. (eds). (2018). *The European Convention on Human Rights and General International Law*, 230.

³ Ibid.

risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge” (para 124)¹.

On the other hand, in its judgement of September 1, 2016 in the case of *Mikhno v. Ukraine*, the ECtHR stated: “in the applicants’ view, the State’s responsibility was engaged ... on account of a failure to put in place an adequate general legal and regulatory framework for organising air shows and for inadequate planning and preparation of the air show in question” (para 126). “In this relation, it is to be noted that in the aftermath of the accident a number of new regulatory acts were passed domestically with a view to improving relevant safety standards. ... where the State is required to take positive measures the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation” (para 127)². Such an approach does not contribute to the future prevention of human rights violations: this judgement did not recognize the state to be guilty in violating its substantive positive obligations. And it means lack of adequate general legal and regulatory framework for organizing air shows and for air show planning and preparation. Consequently, the state is not obliged to establish strict rules for preparing and holding an airshow, thereby preventing the violation of the right to life (Article 2 of the Convention). In this case, the ECtHR has not sufficiently realized its preventive potential.

7. Subsidiarity.

The European Court of Human Rights, like almost national courts, implements all the preventive roles but as a subsidiary body in case if national courts fail to prevent a violation of human rights adequately.

Conclusions.

Thus, one of the key goals of the existence and functioning of the European Court of Human Rights as a quasi-judicial institution of a regional system for the protection of human rights is to prevent the violation of human rights. On the effectiveness of the realization of this goal depends further progress of humanity in the gradual reduction of human rights violations.

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² ECHR (2016). *Mikhno v. Ukraine*, 32514/12 <<http://base.garant.ru/71645680/>> (2021, March, 22).