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DEVIANT STATE IN THE CONTEXT OF THE ANTI-TORTURE POLICY

The paper is focused on the scope, limits, and consequences of contemporary anti-torture policies, shaped and implemented at both national and international levels. This research put a new critical view on the agenda, a view about the future of anti-torture policy in Europe, where the State deals as a deviant. The author tries to shape his view of the future of torture prevention and highlight the challenges that are already on the agenda of the national governments. The author argues that the economic problems of the State cannot in any case justify inhuman conditions of detention. It is stressed that the State must be the only actor responsible for any acts of torture and other forms of ill-treatment in places of detention, even those committed by private individuals. The author stresses that the prohibition of torture and other forms of ill-treatment is absolute. However, the author distinguishes absolutisation of the scope of the prohibition of torture from absolutisation of the means of the prohibition of torture. The author applies the Foucault's concept concerning the real preconditions of the abolition of torture as a tool of criminal investigation and form of punishment. Contemporary States should be evaluated in the system of coordinates of the mixture of the following open and hidden policies: 1) a policy of stigmatising of every violent act as "torture" or "ill-treatment"; 2) a policy of maximal spreading of anti-torture restrictions; 3) a policy of permanent hidden (sometimes – open) use of torture and ill-treatment; 4) a policy of supporting of spreading of torture (for example, the existence of prison violence and especially prison gangs in contemporary prisons). In the paper, the author identifies the problem of conceptual contradiction between Article 3 and Article 6 of the ECHR. In the author's opinion, a danger exists that the presumption of innocence, under several circumstances, is in danger of being transformed into the hidden tool of the release of the State from its responsibility for torture committed both by its agents or private individuals in the places of detention. The author argues about a circle of incarceration and, in fact, planned victimisation of citizens in the context of the anti-torture policy. More demands for "security" mean more inmates and other individuals under punitive and semi-punitive control of the State. More inmates mean less prison beds, less food, and less resources per a prisoner. More inmates mean more corruption in closed institutions, more institutional subculture, informal institutional hierarchies, and violence. More inmates mean more ill-treatment in places of detention. At the same time, more inmates mean planned victimisation of the State in the context of its anti-torture policy. In other words, deviantisation of citizens leads to the deviantisation of the State in the context of its anti-torture policy. In the paper, the author identifies the problem of absolutisation of the scope of the prohibition of torture, while the States failed to deal with even lesser "volumes" of torture and other forms of ill-treatment in closed establishments and even in a free society. In parallel, attempts by the State to shape a 'safer and securer society' stimulate a bigger incarceration, which, in turn, leads to not obeying the standards of ill-treatment prevention by the States, even on the minimal level. Finally, the author also presents and analyses a definition of auto-deviantisation. The author argues about auto-deviantisation of the state in the context of the declared anti-torture policy.

***Keywords**: torture, ill-treatment, the European Court of Human Rights, the European Convention of Human Rights, the European Committee for the Prevention of Torture, ECHR, the ECtHR, the CPT, deviant state, mass incarceration, criminal law of freedom, criminal law of security, deviantisation, auto-deviantisation*

This paper is about the scope, limits, and consequences of contemporary anti-torture policies, shaped and implemented at both national and international levels. This research aims at putting a new critical view on the agenda, a view about the future of anti-torture policy in Europe, where the State deals as a *deviant*.

Why should we define the contemporary State as a *deviant* one in the context of the national anti-torture policy? This issue is discussed in this paper, where the author tries to shape his view of the future of torture prevention and highlight the challenges that are already on the agenda of the national governments.

The first and main brick in this political and legal construction is of an *economic nature*. It is concerned with the well-known thesis that *only the State is responsible* for the proper management and protection of human rights in prisons and other places of detention on its territory. This idea is clearly reflected in numerous judgments of the European Court of Human Rights (hereafter – the ECtHR) as well as in the reports of the European Committee for the Prevention of Torture (hereafter – the CPT).

The ECtHR states that the economic problems of the State cannot in any case justify certain conditions of detention that are incompatible with the requirements of Article 3 of the European Convention on Human Rights (*Aliev v. Ukraine, Para 151*). The lack of prison staff does not relieve the State of its obligation to take care of the welfare of inmates in prisons (*Rodic and Others v. Bosnia and Herzegovina, Paras 17, 31, 71*). High crime rates, a lack of resources, or other structural problems are not circumstances that exclude or diminish the responsibility of the State for inadequate conditions of detention. The State has the obligation to manage its prison system in such a way that the functioning of the prison system does not lead to such conditions, regardless of financial or technical difficulties (*Neshkov and Others v. Bulgaria, Para 229; Muršić v. Croatia [GC], Para 99*).

The same idea is reflected in more specific cases of the ECtHR that are focused, for example, on the food supply issues. As the ECtHR rules, a failure to provide dietary food to a prisoner considering his health condition cannot be justified by the economic difficulties of the national authorities (*Ebedin Abi v. Turkey, Paras 31-54*).

In light of the Mediterranean migration crisis, the ECtHR stated that the States whose territories form the external borders of the European Union were experiencing significant difficulties in dealing with the growing influx of migrants and asylum seekers. The burden and pressure that this situation imposes on the States concerned should not be underestimated, and it is even more difficult in the current economic crisis. The ECtHR is more than aware of the difficulties associated with the phenomenon of migration by sea, which further complicates the border management of states in Southern Europe. However, given the absolute nature of the rights guaranteed by Article 3 of the European Convention on Human Rights (hereafter – the ECHR), this does not relieve the State of its obligations under this provision (*Hirsi Jamaa and Others v. Italy, Para 122*).

The same approach was developed by the CPT, which declares that it is aware that in periods of economic difficulties – such as those encountered today in many countries – sacrifices must be made, including in places of detention. However, regardless of the difficulties faced at any given time, the act of depriving a person of his liberty always entails a duty of care, which calls for effective methods of prevention, screening, and treatment. Compliance with this duty by public authorities is even more important when it is a question of care required to treat life-threatening diseases (*11th General Report on the CPT's activities covering the period 1 January to 31 December 2000, 3 September 2001, Para 31*).

Therefore, the above principle is correct and legitimate: the State must be the only actor responsible for any acts of torture and other forms of ill-treatment in places of detention, even those committed by private individuals.

It is a well-known statement that the prohibition of torture and other forms of ill-treatment is absolute. In light of the well-established ECtHR case law, Article 3 of the ECHR constitutes one of the fundamental values of a democratic society. It categorically prohibits – without any exceptions – torture, inhuman or degrading treatment or punishment, regardless of the circumstances or behavior of the victim (*Bekos and Koutropoulos v. Greece, Para 45; Buglov v. Ukraine, Para 68; Chember v. Russia, Para 48; Cobzaru v. Romania, Para 60; Davydov and Others v. Ukraine, Para 262; Đorđević v. Croatia, Para 137; Dybeku v. Albania, Para 35; Egmez v. Cyprus, Para 77; Enea v. Italy [GC], Para 55; Feilazoo v. Malta, Para 80; Gorbatenko v. Ukraine, Para 105; Hristozov and Others v. Bulgaria, Para 110; Idalov v. Russia [GC], Para 91; Iwańczuk v. Poland, Para 49; Jalloh v. Germany [GC], Para 99; Kapustyak v. Ukraine, Para 58; Karabet and Others v. Ukraine, Para 297; Khachaturov v. Armenia, Para 81; Khokhlich v. Ukraine, Para 162; Kobets v. Ukraine, Para 40; Korobov v. Ukraine, Para 63; Kozinets v. Ukraine, Para 51; Krastanov v. Bulgaria, Para 51; Kucheruk v. Ukraine, Para 131; Kudła v. Poland [GC], Para 90; Labita v. Italy [GC], Para 119; Lorsé and Others v. the Netherlands, Para 58; Lunev v. Ukraine, Para 90; Lutsenko v. Ukraine (№ 2), Para 115; Marguš v. Croatia [GC], Para 124; Mehmet Eren v. Turkey, Para 33; Melnik v. Ukraine, Para 92; Mocanu and Others v. Romania [GC], Para 315; Moiseyev v. Russia, Para 121; Muršić v. Croatia, Para 48; Naumenko v. Ukraine, Para 108; Nazarenko v. Ukraine, Para 124*).

Having observed these fundamental statements from the ECtHR case law, we can crystallise the main idea, which is the idea of absolutisation of the scope of the prohibition of torture.

Additionally, the second part of the Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter – the UN Convention) contains a critical provision that relates to the mentioned above *absolutisation of the scope*: "This article is without prejudice to any international instrument or national legislation that does or may contain provisions of *wider application*". In fact, the UN Convention calls for a wider absolutisation of the prohibition of torture, putting an *additional burden* on the States around the absolutisation.

At the same time, the ECtHR case law contains a message on *absolutisation of the means* of the prohibition of torture: the object and purpose of the ECHR as an instrument for the protection of individuals requires that its provisions be interpreted and applied in such a way that its guarantees are practical and effective (*Marguš v. Croatia [GC], Para 127*).

Here, we come to one of the main issues in our paper, which is concerned with the question, "*What is torture?*", and why it creates an atmosphere of *deviancy* for the State.

At the first glance, the first question and the answer to this question seem too simple. Indeed, there are corresponding definitions in international arts and national criminal codes. Moreover, the question about *the State's deviancy* seems to lie behind the rational limits.

However, the UN Convention and national criminal codes rely on the *most brutal and terrible examples* of ill-treatment: "For the purposes of this Convention, the term "*torture*" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third-person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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".

At the same time, Article 3 of the ECHR is limited to a laconic statement that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*". Nevertheless, such brevity in terminology does not lead to brevity in application. Moreover, the European concept of torture and other forms of ill-treatment has faced profound transformations in the last decades, aimed at absolutisation of both the *scope* and *means* of the prohibition of torture.

In many papers, scholars try to shape a classification of different forms of torture and ill-treatment. However, in our opinion, it would be impossible to count all possible manifestations of ill-treatment and, consequently, to shape an "*anti-torture criminal code*". First, such an approach restricts the State's actions against those acts that have the nature of torture and other forms of ill-treatment. Second, such an approach would deepen the *permanent deviant status* of the State. Third, the nature of human behaviour as well as social and technological development leave no chance for a 'closed' list of the forms of torture and other forms of ill-treatment.

However, shaping its case law, the ECtHR tried to draw a difference between torture and other forms of ill-treatment. Maybe one of the brightest examples could be the discussion within the *Irish Case*, where the ECtHR put on the agenda a question: to determine whether these five methods should also be qualified as torture, the Court considered the distinction between the *concept of torture* and *the concept of inhuman or degrading* treatment laid down in Article 3 of the Convention. This difference mainly stems from the difference in the severity of the suffering caused (*Ireland v. the UK, Para 167*).

According to the Court, torture constitutes an *aggravated and intentional form* of cruel, inhuman, or degrading treatment or punishment (*Ireland v. the UK, Para 167*). Torture is inhuman treatment inflicted intentionally and causing a very serious and severe suffering (*Ireland v. the UK, Para 167*). Inhuman treatment or punishment involves the infliction of severe physical or mental suffering (*Ireland v. the UK, Para 167*).

In the *Irish Case*, although the "*five methods*" used in combination undoubtedly amounted to inhuman and degrading treatment, although their purpose was to extract confessions, names of others, and/or information, and although they were applied systematically, they did not cause suffering from the severity and cruelty that is included in this understanding of the word "torture" (*Ireland v. the UK, Para 167*). Consequently, the use of the "*five methods*" amounted to inhumane and degrading treatment in violation of Article 3 of the ECHR (*Ireland v. the UK, Para 167*).

The same conclusions were drawn in other ECtHR cases where the Court was stated that the distinction between "*torture*" and "*inhuman or degrading treatment*" was implemented to denote a particular level of cruelty of intentional inhuman treatment resulting in severe and deep suffering (*El-Masri v. the FYRM [GC], Para 197; Batı and Others v. Turkey, Para 116; Kozinets v. Ukraine, Para 51; Kobets v. Ukraine, Para 40*). Torture was defined as intentional inhuman treatment causing a very serious and inhuman suffering (*Egmez*

v. Cyprus, Paras 76-79).

In some cases, the ECtHR relies on the UN Convention: "In addition to the severity of the treatment, the *purpose* of such treatment is also a *sign of torture*, as set out in the UN Convention. Thus, Article 1 of this Convention defines torture as the intentional infliction of severe pain or suffering to obtain information, punish or intimidate, among other things" (*El-Masri v. the FYRM [GC], Para 197; Aleksakhin v. Ukraine, Para 50; Akkoç v. Turkey, Para 115*).

Moreover, there are cases in the ECtHR case law where the treatment could only be defined as torture (*Batı and Others v. Turkey, Para 121; Selmouni v. France [GC], Para 105; Dikme v. Turkey, Paras 94-96; Aydın v. Turkey [GC], Paras 83-86; Aksoy v. Turkey, Para 64*).

The Court found a violation of Article 3 of the Convention in the following cases: repeated caning (*A. v. the UK, Para 21*); severe neglect and ill-treatment over several years (*Z. and Others v. the UK [GC], Paras 11-36, 40, 74*; beatings with wooden boards, which caused multiple fractures of the ribs (*Šečić v. Croatia, Paras 8, 11, 51*); an anal fissure caused by an attack by several persons in very horrific circumstances (*Nikolay Dimitrov v. Bulgaria, Paras 9, 70*).

The application of electric shock to a person is a severe form of ill-treatment capable of causing severe pain and unbearable suffering and therefore should be considered torture, even if it does not lead to any long-term health problems (*Polonskiy v. Russia, Paras 7, 9, 103, 110, 122, 124; Nechiporuk and Yonkalo v. Ukraine, Paras 157, 159; Buzilov v. Moldova, Para 32; Zhyzitskyy v. Ukraine, Para 43; Badalyan v. Azerbaijan, Para 7*).

Questioning of the prisoner of war with the use of severe physical violence, beating, and noise impact for the aims of obtaining the information that led to serious mental disorder also constituted a form of torture (*Badalyan v. Azerbaijan, Para 7*).

As far as sexual violence is concerned, all accidents of rape, as the ECtHR stated, always constitute torture (*Yuriy Illarionovich Shchokin v. Ukraine, Para 51*). In Aydin Case, the totality of the acts of physical and mental violence inflicted on the applicant, and in particular the brutal rape to which she was subjected, amounted to torture in breach of Article 3 of the ECHR. The ECtHR would have reached such a conclusion on any of these grounds taken separately (*Aydin v. Turkey, Para 86*). Correspondingly, torture is also systematic sexual violence over a long period of time (*D.P. and J.C. v. the UK, Paras 66-74*), or severe sexual and physical violence over a prolonged period *(E. and Others v. the UK, Paras 43, 89*), or a repeated rape (*M.C. v. Bulgaria, Paras 16-21, 30, 153*).

So, in the cases of rape, sexual violence, electric shock and *falaka*, it is obvious that such and/or similar violent practices constitute a form of *torture*, not simple ill-treatment. However, the ECtHR case law tends to widen its evaluation of different acts of physical and psychological violence.

For example, discrimination on the grounds of race may constitute degrading treatment within the meaning of Article 3 of the ECHR (*Burlya and Others v. Ukraine, Para 121; East African Asians v. the UK, Para 207*).

Failure to adequately protect children and other socially vulnerable groups from ill-treatment of which the authorities knew or should have known constitutes a form of ill-treatment (*O'Keeffe v. Ireland [GC], Para 144; Z. and Others v. the UK, Para 73; E. and Others v. the UK*).

Failure to effectively investigate alleged death threats against a victim of sexual violence also constitutes a form of ill-treatment (*J.I. v. Croatia*).

The stay of a disabled person in a room without proper equipment constitutes a form of ill-treatment (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], Para 131; Price v. the UK, Para 30*).

An enforced disappearance of a person or the neglecting attitude of the investigating authorities toward the family members of the disappeared person may raise the question of a violation of Article 3 of the ECHR in relation to the close relatives of the disappeared person (*Zhebrailova and Others v. Russia, Para 63; Babusheva and Others v. Russia, Para 108; Karimov and Others v. Russia, Para 124; Bazorkina v. Russia, Para 139; Orhan v. Turkey, Para 358; Gongadze v. Ukraine, Para 186; Takhayeva and Others v. Russia, Para 103*).

Desecration of corpses may constitute a violation of Article 3 of the ECHR (*Akpinar and Altun v. Turkey, Para 83; Kanlıbaş v. Turkey; Cangöz and Others v. Turkey, Paras 158-168*). The same can be said about the impossibility of burying relatives (*Khadzhialiyev and Others v. Russia, Para 121*) and about the removal of organs from the deceased without the consent of relatives (*Elberte v. Latvia, Paras 141-143*).

The destruction of the victim's house or property by agents of the state during a police operation

constitutes inhumane treatment (*Dulaş v. Turkey, Paras 54-56; Selçuk and Asker v. Turkey, Paras 77-78*).

Even an imposition of excessively harsh punishment and grossly disproportionate sentence may be qualified as ill-treatment at the time of its imposition (*Steven Willcox and Scott Hurford v. the UK (dec.), Para 74*).

The *case of Bouyid v. Belgium [GC]* could also reflect the problem. In the light of this important Great Chamber's judgment, for the purposes of torture prevention, it is not enough for the police officer to be a law-abiding and professional one. He/she must be patient. He/she must not only avoid causing pain. Furthermore, he/she must bear the pain of the brutal or immoral behaviour of the detained suspect. Otherwise, he/she is at risk of "giving" ill-treatment to a detained person under his/her control.

It is not even discussed that the prohibition of torture and other forms of ill-treatment is *absolute*. At the same time, the trend of *absolutisation of the absolute prohibition* of torture and other forms of ill-treatment can play an *ironical* role in the protection of human rights in places of detention.

Here, we should mention those actors who make the State evolve in – in line with the academic terminology of this paper – the "*deviant*" way.

The paper is of a *universal* nature. However, the main emphasis is on the European states and the corresponding European system of torture prevention established within the Council of Europe.

The CPT demonstrates the important positive trend of increasing *the scope* of its standards for the places of detention. Since it was established, it has undergone a profound transformation. Now, it is a unique mechanism of human rights protection and prevention of torture and other forms of ill-treatment in Europe committed by the States' agents and – to a little extent – private individuals.

On the other hand, both the CPT and the ECtHR demonstrate a trend to apply Article 3 of the ECHR to cases of torture and ill-treatment committed by *non-governmental actors* and *private individuals* (here, one of the brightest examples could be the problem of prison violence and the informal prison hierarchies in prisons). All their activities are permanently increasing the burden put on States in the area of torture prevention.

In line with Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the CPT acts as a purely *preventive* body aimed at highlighting the preconditions, facts, and consequences of inadequate public policies for the management of places of detention. As the CPT stated, unlike the ECtHR, the CPT is not a judicial body authorised to resolve legal disputes regarding alleged breaches of contractual obligations (i.e., to resolve complaints *ex post facto*). The CPT is primarily a mechanism designed to *prevent* ill-treatment, although in special cases it may also intervene after a certain event has occurred. Thus, if the ECtHR activities aimed at "*conflict resolution*" at the legal level, the CPT activities aimed at "*conflict avoidance*" at the practical level (*Report of the CPT on the visit to Cyprus carried out by the CPT from 2 to 9 November 1992, Preface, P. 6.*).

However, having analysed the CPT reports, one can conclude that, by placing *individual* cases in the reports and demanding national authorities provide detailed information on *individual* investigations, the CPT occupies a special place as *an instrument of stimulation* of pre-trial anti-torture investigations on the national level.

Therefore, the statement about the unique role of the CPT is *not* a declaration. It represents a big piece of activity and attempts by all interested actors to develop a permanent "*watchdog*" – for someone sometimes bureaucratic, sometimes inflexible – but with no *doubt* – effective, perspective, and oriented for the future. For several decades, the CPT has established an effective system for preventing ill-treatment.

However, by taking this progress for granted, the CPT also established another side of its prominent success. Here, we must stress that this side is *not* negative. It is just *another* side that is hidden from the public agenda.

The attempts of the members of the Council of Europe and European Union to eliminate torture in their places of detention should be widely supported. On the other hand, for example, the problem of violence in prisons and other places of detention seems to be far from solved, although we must admit that the situation in Europe (Russia is not considered for obvious reasons) is incompatible with prisons, for example, in Latin America, South America and many Asian states. Therefore, the States of Europe are trying to build additional "floors" in the "building" of their anti-torture policies that have an *instable* political foundation.

How can we predict the evolution of the anti-torture policy of contemporary deviant States from a long-standing perspective?

There will be no clear answers, at least not right now. The problem is too complex and complicated. The complexity of the problem is concerned with the *re-emergence* of the *policy of torture*, which takes open forms. Let us recall the cases of "*enhanced interrogation methods*" in the USA after September 11, or maybe

the extreme case – intentional and sanctioned "*from above*" torture of the suspects in the Crocus City Mall case in Russia.

Moreover, the Russian military aggression against Ukraine put on the agenda an issue of torture as an *officially approved public policy*. The UN Special Rapporteur stated that all acts of torture by Russian military staff were *not* merely isolated or *ad hoc* incidents. The methods, purposes and targets were consistent and the mirroring of the same practices across different regions further reflects the State war policy. The torture is neither random nor aberrant behaviour. Torture and other ill-treatment or punishment were carried out in an *organised and systematic* manner, within the framework of a higher order policy requiring coordination, planning and organisation, as well as the direct authorization, deliberate policy, or official tolerance from superior State authorities (*Visit to Ukraine – Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/55/52/Add.1*).

Here, we should apply the Foucault's concept concerning the real preconditions of abolition of torture as a tool of criminal investigation and form of punishment. Officially approved public policies and practices of torture disappeared in Europe not because of the humanistic views of reformers but because of mainly *economic reasons*. In the same way, the restoration of torture in the XXI century as legally approved practices and – what is more important – as a public policy – cannot be explained just by humanism or its absence. In the light of the mentioned above, we can conclude that contemporary states should be described in the system of coordinates of the mixture of the following open and hidden policies: 1) a policy of stigmatising of every violent act as "torture" or "ill-treatment"; 2) a policy of maximal spreading of anti-torture restrictions; 3) a policy of permanent hidden (sometimes – open) use of torture; 4) a policy of supporting of spreading of torture (for example, existence of prison violence and especially prison gangs in contemporary prisons).

Coming back to the issue of the "*anti-torture criminal code*", we must point out the problem which is a blurring of borders between "torture" and "other forms of ill-treatment". Also, it is a process of a permanent increase in actions that are considered as "ill-treatment". Consequently, the process of increasing of an flexible list of "*the State's torture crimes*" shapes a structural problem in the following system of coordinates: 1) the obligations according to the ECHR and the ECtHR case law; 2) increasing scope of the CPT standards; 3) limited resources of States for the places of detention.

A long way to establishing a set of standards of the CPT and the ECtHR has led to additional obligations put on the States, where such obligations have risen the level of protection of persons provided and – consequently – demanded by the CPT and the ECtHR. On the other hand, the real situation in many European prisons is far from the requirements shaped in the international legal instruments and standards. As a result, the European states have already transformed or are in risk of being transformed into *deviant actors* which have a permanent *stigma* of violators of the legal instruments and standards of in the prevention of ill-treatment.

One of the aspects of the practical reflection of the problem that analysed in this paper is a *conceptual contradiction* between Article 3 and Article 6 of the ECHR. A danger exists that the presumption of innocence, under several circumstances, is in danger of being transformed into the hidden tool of the release of the State from its responsibility for torture committed both by its agents or private individuals in places of detention.

Here, we would like to highlight the case from the ECtHR case law, which, in our opinion, can be an example of the issue discussed in this paper. The case that describes the problem, which reflects one side of the State's deviancy in the context of its anti-torture policy, is the case of *Kardišauskas v. Lithuania (application № 62304/12, judgment 07 July 2015).*

On 25 May 2003 the applicant was found beaten up and unconscious in the prison after being attacked by other prisoners. A pre-trial investigation into the incident was opened the same day. The authorities questioned 28 witnesses, including prisoners, operational investigation measures were ordered, medical examinations were carried out and photographs of possible suspects were shown to the applicant and witnesses. In July 2003, the authorities granted the applicant victim status. Photos of potential suspects were shown to the applicant and the witnesses (Para 70). However, no relevant information had been obtained. The pre-trial investigation has lasted for nearly 12 years, but the perpetrators are yet to be identified.

The ECtHR reiterates that an official investigation procedure must satisfy certain minimum standards as to its effectiveness (Para 64). At the same time, the Court has also held that an obligation to investigate is not *an obligation of result*, but of means: not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events. However, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations are true, to the identification and

punishment of those responsible (Para 65).

The ECtHR also reiterated its constant position that the obligation on the State to conduct an effective investigation is one of means, not of result (Para 79). Having regard to the facts of this case and in the absence of tangible omissions for the investigators, the ECtHR did not find that the Lithuanian authorities were unwilling to bring to justice the person or persons who injured the applicant whenever the available evidence so warranted. The ECtHR held that there had been *no violation* of the procedural aspect of Article 3 of the ECHR (Para 76).

Additionally, it could be stressed that the number of criminal cases (proceedings) on torture and ill-treatment in different jurisdictions could also be used as an indicator of the deviantisation of the State in the context of its anti-torture policy. As usual, the number of opened criminal proceedings is minimal, and the number of indictments is much smaller.

Another aspect of the problem of the State's deviancy is the problem of *mass incarceration*.

In the light of *a society of security and control*, the State has taken steps away from classic criminal justice towards a preventive one, where the latter is based on the "*pericolosita*" concept. The *criminal law of freedom* has been replaced by the criminal law of security. Transforming free citizens into potential criminals, or at least "dangerous persons", is also the result of the policy that led to mass incarceration, even when the number of prisoners was reduced insignificantly.

Here, we can argue about a *circle of incarceration* and, in fact, *planned victimisation* of citizens in the context of the art-torture policy. More demands for "*security*" mean more prisoners and other individuals under punitive and semi-punitive control of the State. More prisoners mean less prison beds and less resources per a prisoner. More prisoners mean more corruption in prisons, more prison subculture, informal prison hierarchies and violence. More prisoners mean more ill-treatment in closed establishments. In fact, more prisoners mean *planned victimisation of the State* in the context of its anti-torture policy. In other words, *deviantisation of individuals* leads to the deviantisation of the State in the context of its art-torture policy.

Finally, we can argue about auto-deviantisation of the State in the context of the declared anti-torture policy.

Auto-deviantisation of the State is closely linked to mass incarceration. Further incarceration of the society leads to a complex dualistic process where the State has a status both as a victim and a perpetrator. There is a closed circle which should be broken, and solving of the problem should start from the basics – from the criminal and sentencing policies of the State. As we have mentioned before, we argue that the spreading of torture and other forms of ill-treatment is closely linked to the attempts of the state to increase the level of "*security*" in the society.

It should be stated that the CPT and other international actors stress on the seed of further reduce in prison populations, even considering relatively low incarceration rates on the national level. The policy of permanent and regular reminding to the national governments about the need of increase the number of prison staff, the number of prison beds and decrease in the number of inmates aims not only in the CPT standards but has far-reaching consequences helpful both for citizens and the State.

Making some concluding remarks, we would like to point out the following statements and thoughts:

1. We have grounds to identify the problem of *absolutisation of the scope* of the prohibition of torture, while the contemporary States failed to deal with even lesser "volumes" of torture and other forms of ill-treatment in closed establishments, and even in a free society.

2. In parallel, attempts by the State to shape a '*safer and securer society*' stimulate a bigger incarceration, which, in turn, leads to not obeying the standards of ill-treatment prevention by States, even on the minimal level.

3. On one hand, the State receives *wider obligations* to prevent and investigate acts of torture and other forms of ill-treatment. On the other one, the state has limited resources. At least, the States tend to declare they have limited resources. Having this *economic imperative*, the State has two choices – to decrease the prison population and corresponding expenditures, or to find additional resources for places of detention. Very often, the State rejects both opportunities, tending to incarcerate more citizens, even being severely criticised by international actors. As a result, the State turns on the mechanism of *auto-deviantisation*, obtaining the status of a persistent violator of both the national and international anti-torture policies.

Ягунов Д. В. Девіантність держави у контексті політики запобігання катуванням

У статті розглядаються масштаби, межі та наслідки сучасної політики протидії катуванням, сформованої та впровадженої на національному та міжнародному рівнях. Це дослідження має на меті поставити на порядок денний новий критичний погляд на майбутнє

політики запобігання катуванням в Європі, де держава розглядається як девіант. Автор намагається сформувати свій погляд на майбутнє запобігання катуванням та висвітлити виклики, які стоять на порядку денному національних урядів. Автор підкреслює, що економічні проблеми держави в жодному разі не можуть виправдовувати певні нелюдські умови тримання під вартою. Держава має бути єдиним суб'єктом, відповідальним за будь-які акти катувань та інших форм жорстокого поводження в місцях несвободи, навіть якщо вони вчиняються приватними особами. Автор наголошує, що заборона катувань та інших форм жорстокого поводження є абсолютною, при цьому автор розрізняє абсолютизацію обсягів заборони катувань від абсолютизації засобів заборони катувань. У статтях автор застосовує концепцію Мішеля Фуко щодо реальних передумов скасування катувань як інструменту кримінального розслідування та виду покарання. Автор заявляє, що сучасні держави слід описувати в системі координат суміші наступних відкритих і прихованих політик: 1) політика стигматизації кожного насильницького акту через «катування» або «жорстоке поводження»; 2) політика максимального поширення антикатувальних обмежень; 3) політика перманентного прихованого (іноді – відкритого) застосування катувань; 4) політика підтримки поширення катувань (наприклад, існування тюремного насильства та особливо тюремних банд у сучасних в'язницях). Автор визначає проблему, яка аналізується в цій роботі, як концептуальну суперечність між статтями 3 та 6 ЄКПЛ. Як на думку автора, існує небезпека, що презумпція невинуватості за певних обставин може бути перетворена на прихований інструмент звільнення держави від відповідальності за катування, вчинені як її представниками, так і приватними особами у місцях несвободи. Автор стверджує про цикл інкарцерації та по суті сплановану віктимізацію громадян в контексті політики запобігання катуванням. Більше вимог до «безпеки» означає більше ув'язнених та інших громадян, які перебувають під каральним і напівкаральним контролем держави. Більше ув'язнених означає менше тюремних місць, менше їжі та менше ресурсів на одного ув'язненого. Більше ув'язнених означає більше корупції в тюрмах, більше тюремної субкультури, неформальної тюремної ієрархії та насильства. Більше ув'язнених означає більше жорстокого поводження в закритих установах. Більше ув'язнених означає сплановану віктимізацію держави в контексті її політики протидії катуванням. Іншими словами, девіантність громадян призводить до девіантності держави в контексті її політики запобігання катуванням. Автор ідентифікує проблему абсолютизації сфери заборони катувань, в той час як держави не змогли впоратися з ще меншими «обсягами» катувань та інших форм жорстокого поводження у закритих установах та навіть у вільному суспільстві. Паралельно з цим спроби держави сформувати «більш безпечне та захищене суспільство» стимулюють збільшення кількості ув'язнених, що, в свою чергу, призводить до недотримання державами стандартів запобігання жорстокому поводженню навіть на мінімальному рівні. Нарешті, автор стверджує про автодевіантність держави в контексті задекларованої політики протидії катуванням. Відповідно, автор представляє та аналізує нове визначення автодевіантності.

Ключові слова: *катування, неналежне поводження, Європейський суд з прав людини, Європейська конвенція прав людини, Європейський комітет з питань запобігання катуванням, ЄСПЛ, ЄКЗК, девіантна держава, девіантність, автодевіантність, масове ув'язнення, кримінальне право свободи, кримінальне право безпеки*