**The death penalty in the international and regional human rights standards**

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*(3280 parole)*

1. **Introduction**

The right to life is one of the most important rights guaranteed by international and regional human rights law. Namely, the right to life is an inherent right which every human being has, according to the Universal Declaration of Human Rights (hereinafter “UDHR”).[[1]](#footnote-1) Moreover, it is also called the supreme right because is considered as “the fountain from which all human rights spring”.[[2]](#footnote-2) This is because the protection of the right to life represents the necessary condition for the enjoyment of the all the rights that are due to every human being. Obviously, if the human being does not live, he/she cannot enjoy any other right. However, a broader interpretation must be given to this right in order to enhance its protection. In this sense, the definition of the Human Rights Committee is accurate:

“[it] concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”[[3]](#footnote-3)

Hence, there is a violation of the right to life whenever human dignity and freedom are infringed. This has a significative relevance because the dignity of human person is seen as “a major foundation” on which the protective human rights legislation was built. Quoting Elizabeth Wicks:

“The major UN documents protecting rights also explicitly state that human rights derive from the inherent dignity of the human person and, although the ECHR it is regarded as an underlying principle by the treaty bodies enforcing that document.”[[4]](#footnote-4)

 In light of this, the purpose of this essay is to understand whether death penalty violates the right to life by referring to international and regional standards. Nowadays, the death penalty has been abolished or is not applied in most of the states of the world, whereas it is still used in some others, such as China, Japan, the United States of America, India and Belarus. This probably depends on the interpretation given to “right to life” and “penalty” concepts, but it is also surely linked to the level of civilization that a country has.[[5]](#footnote-5)

The topic will be presented as follows: section 2 will provide an answer on how the death penalty violate the right to life, while section 3 will analyse the conception of death penalty under international law. Finally, section 4 will consider the conception of death penalty under the regional standards of Europe and USA.

1. **The right to life vs. the death penalty**

In order to understand whether death penalty is in contrast with the right to life or not, it is necessary to analyse both “life” and “penalty” concepts.

Indeed, in Europe, the death penalty is considered a violation of the right to life especially because this continent is permeated with the Christian-Catholic philosophy, according to which life is a gift of God and is not property acquired by people who do not have absolutely the right to dispose of the life of other people.[[6]](#footnote-6) This argument is respectable but may be fallacious if one considers themes such as euthanasia and abortion, which in Europe are contemplated more favourably than the death penalty. Furthermore, in the European context, penalty has the aim to re-educate the offender and thus the death penalty does not fulfil absolutely this purpose.

Conversely, the death penalty is accepted in nations, such as the USA, which retain that it is the penalty itself having the widest practicable deterrent and/or a retributive effect. Unfortunately, empirical evidences - capable to demonstrate that the death penalty is a greater deterrent than other types of penalty - are not available. Moreover, it is also argued that “the death penalty is not narrowly tailored to achieve deterrence or retribution because its imposition is marred by arbitrariness, delay, and unreliability, and because execution belies narrow tailoring”.[[7]](#footnote-7) This is also the opinion of Amnesty International which, every year, produces a report about death penalty usage around the world. In the 2014 report there was a catchphrase of Jay Inslee, which is set out below:

“There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an imperfect system.”[[8]](#footnote-8)

This all means that, although we may consider life as a not-so-absolute right, the death penalty undoubtedly violates it in a disproportionate way, even weighing its power of deterrence. Since it is not able to guarantee the protection of the dignity of the human person and the non-arbitrary deprivation of life, prohibited also by Article 6 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”). The uncertainty of the guilt linked to the irreversible nature of this penalty makes the death penalty incompatible with fundamental human rights. Hence, the death penalty results in violation of the right to life representing a humiliating and degrading treatment for the human being.

Moreover, it is doubtful whether the State has the authority to inflict death penalty to offender. By accepting the State as a social contract, according to Tomas Hobbes’ theories, citizens alienate all their rights in favour of the State, in order for it to exercise these rights by guaranteeing them peace and security. However, in the Hobbesian model, individuals do not transfer to the State also the right to dispose of their life. The stipulation of the social contract is, as written above, aimed at guaranteeing peace and security to every citizen, which is incompatible with the suppression of a life.[[9]](#footnote-9) As also pointed out by Beccaria,[[10]](#footnote-10) the provision of the death penalty would be incoherent with the purpose of the law and the State.

1. **The death penalty and the International standards**

Under international law, the death penalty is not explicitly prohibited, on the contrary there is a clear prohibition of torture and ill-treatment[[11]](#footnote-11). It is thought that:

“this is because international law is not a system that operates by majority rule. State practise is a key element and as long as a substantial minority of states maintain the death penalty – especially states as influent as China, India, and the US – international law will have to reflect that reality”.[[12]](#footnote-12)

International law rather guarantees the right not to be “arbitrarily deprived of life”[[13]](#footnote-13) and this is not a denial of the death penalty because, if the domestic legislation of a State imposes this type of penalty with appropriate procedures and in predictable manner, the deprivation of life is certainly not arbitrary. Actually, even though international law does not explicitly prohibit the use of death penalty, it does not accept this type of penalty and, in fact, seeks to reduce the phenomenon, imposing substantive, procedural and personal limitation to the countries where death penalty is applied and through documents, such as non-binding resolutions of the UN General Assembly, which demand a universal moratorium on the use of death penalty. In this regard, it is also worth mentioning the “Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty” (hereinafter “ICCPR-OP2”) which is the only international treaty in the world that requires the abolition of the death penalty by the states that ratified it.

For what concerns the limitations that international standards impose, the ICCPR – in particular Article 6 – and the UN Economic and Social Council’s Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (hereinafter “ECOSOC Safeguards”)[[14]](#footnote-14) contain the relevant provisions to consider. These limitations are related only to states where the death penalty is still not prohibited, while for those that have abolished it, there is an obligation not to reintroduce it.

First of all, the main substantial limitation obliges the states to adopt capital punishment only for the “most serious crimes”.[[15]](#footnote-15) This implies that the deprivation of life is not arbitrary and that the principle of proportionality – between penalty and offence – is respected.[[16]](#footnote-16) Furthermore, according to Article 6(2) and 15 ICCPR, the crime and the following punishment must be provided by the law in force at the time of the commission of the act.

Secondly, the main procedural limitation imposes the right of fair trial in death penalty cases and the guarantee of exercising the right to appeal.[[17]](#footnote-17) Indeed, “this penalty can only be carried out pursuant to a final judgement rendered by a competent court”.[[18]](#footnote-18) Furthermore, death penalty has not to be in contrast with the provisions of the Covenant and has to inflict “the minimum possible suffering”.[[19]](#footnote-19)

Finally, personal limitations Article 6(5) ICCPR and paragraph 3 of the ECOSOC Safeguards require not to apply death penalty to people under 18 years old and pregnant women. Moreover, the ECOSOC Safeguards prohibit the capital punishment also for “recent mothers” and “person who have become insane”.

The ICCPR-O2 explicitly asserts that “abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights”[[20]](#footnote-20) and severely prohibits State parties from using this practise within their national borders. This is the unique treaty which concretely tries to eliminate the capital punishment but, unfortunately, it is not applicable within those countries that are not part of the 88 that ratified it.

1. **The death penalty and the regional standards**
	1. **European Continent**

The European Union and the Council of Europe are two different legal systems that operate in the same geographical context, which is the European continent. All member States of the EU and the Council of Europe have abolished death penalty. The abolition in legislation or practice is a prerequisite for membership of the Council of Europe and the absolute prohibition of death penalty, in all circumstances, is sanctioned by protocols no. 6 and no. 13 of the European Convention on Human Rights (hereinafter “ECHR”) and the Charter of Fundamental Rights of the European Union (hereinafter “EUCFR”).

With regard to the Council of Europe, initially Article 2 of the ECHR justified the death penalty ruling that:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”[[21]](#footnote-21)

Only later this provision was partially overtaken in 1983 by Protocol no. 6 which abrogates the death penalty in peacetime - justifying acts committed in time of war or of imminent threat of war – and totally in 2002 by Protocol no. 13 which abrogated the death penalty under any circumstance. This is because the States signatories are convinced that “everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings”[[22]](#footnote-22). In *Al-Saadom and Mufdhi v United Kingdom[[23]](#footnote-23)* a Chamber of the European Court of Human Rights asserted that, thanks to Protocol no. 13, “Article 2 has been amended so as to prohibit the death penalty in all circumstances.” Hence, death penalty was completely abolished because Article 2 was emended by Protocols no.6 and no.13. Moreover, there is also a violation of the Protocols whenever a Contracting Party extradites an accused to another State where the capital punishment is retained[[24]](#footnote-24).

With regard to the EU, the abolition of death penalty in the world is one of the utmost priorities that the EU pursues in several ways. In this sense, its legislation[[25]](#footnote-25), which prohibits trade in goods that can be used for capital execution or torture, and the initiative with Argentina and Mongolia to create the “Alliance for Torture-Free Trade”. Furthermore, the UE is the most generous donator in supporting this fight and, in fact, from 2008 to 2016, assigned more than €22 million to projects that have the aim of eliminating the death penalty around the world[[26]](#footnote-26).

To conclude this paragraph, it is important to underline that Europe is the continent that fights most of all for the abolition of the capital punishment word-wide and is the unique “death-penalty free zone”[[27]](#footnote-27) in the world, except for Belarus which is the only country on the European continent that still applies death penalty.

* 1. **The USA**

The United States of America are currently the unique out of the 35 member states of the Organization of American States (OAS) which carried out death sentences in 2018. Furthermore, the US, together with Japan, were the only two G8 countries to carry out death sentences during the same year.[[28]](#footnote-28) Although there has been a slight increase in executions in the past two years, the general trend shows a decrease in the use of death penalty in the US. Until 2021, Washington was the last abolitionist State, following the pronouncement of its Supreme Court, which held that the death penalty was unconstitutional[[29]](#footnote-29) and there were twenty States that had abolished the death penalty and ten of these had not been executing death sentences for at least 10 years.[[30]](#footnote-30)

The Eight Amendment of the US Constitution forbids anyone being subjective to “cruel and unusual punishments”[[31]](#footnote-31). This provision, even if it does not lead to an unconstitutional declaration of the death penalty, helped the Supreme Court of the United States (hereinafter “SCOTUS”) to establish some limits. During the last decades, the SCOTUS declared unconstitutional death penalty for crimes committed mainly in three situations: firstly, at the age of eighteen or above[[32]](#footnote-32) and, secondly, by mentally retarded offenders[[33]](#footnote-33) and thirdly for non-homicidal crimes like child rape[[34]](#footnote-34). In addition, the Supreme Court does not allow death penalty being executed using sodium thiopental[[35]](#footnote-35) or electrocution[[36]](#footnote-36). However, in the recent decision of *Bucklew v. Precythe*, the Court held that even if “cruel and unusual punishments” are forbidden, a painless death is not guarantee to prisoners. It should be highlighted that, despite of the Supreme Court’s attempts to limit the atrocity of capital punishment, nowadays the US continue to practise this violation of human rights.

However, in 2021 something epochal happened: in March the US state of Virginia abolished the death penalty. This is important because Virginia is the first US state to abolish punishment among those in the traditionally more conservative southern United States. Furthermore, Virginia is historically one of the States where the highest number of death sentences was carried out. It has carried out nearly 1,400 since its founding, including 113 since the Supreme Court reintroduced the death penalty in 1976. The Associated Press notes that only Texas has carried out more death sentences since then.

In recent times something had nevertheless changed. In 2002, a law passed by a large majority established an office to finance the defence of defendants who risk the death penalty with specific public funds. The Washington Post writes that in the twenty years preceding the establishment of the office, there were 86 executions, while since then they have been 26. In Virginia, a court has not sentenced a defendant to death for about ten years, and in local prisons only two sentenced to death.

Moreover, the debate on the death penalty had resurfaced in recent months, when the Democratic Governor Northam had explored the issue after the summer of protests anti police violence against African Americans and had come to the conclusion that the death penalty is also disproportionately decided against persons belonging to ethnic minorities. Northam - who had previously voted in favour of expanding the death penalty for certain crimes - publicly said he had changed his mind and wanted to abolish it state-wide, and the rest of the party supported him in his decision.

1. **Conclusion**

This analysis shows that death penalty is an irreversible violation of the right to life in whatsoever form. As Albert Camus asserted:

“[it is] the most premeditated of murders. […] It adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is in itself a source of moral sufferings more terrible than death. […] Such a monster is not encountered in private life.”[[37]](#footnote-37)

While recognising this serious violation, international standards do not explicitly prohibit death penalty, even though they are pushing for a total deletion of this practice in all Counties. By taking into account this point of view, the European continent is surely the most admirable, because capital punishment is not tolerated and practised in any States – with the exception of Belarus. This safeguard has been guaranteed thanks to the EU and the Council of Europe commitment in order to reach this goal worldwide. Conversely, it is undeniable that the USA have not yet reached this sensitivity to human rights.

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