THE OBSERVANCE OF FUNDAMENTAL HUMAN RIGHTS. THE DEATH PENALTY AND CORPORAL PUNISHMENTS. THE PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING PUNISHMENTS

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Abstract

Corporal punishments by and large and death penalty specifically raise serious problems as to respecting human dignity and the fundamental human rights. The supreme courts of the UN member states quasi-unanimously consider that the death penalty infringes on the absolute ban of torturing, inhuman or degrading treatments due to the pain and psychological suffering they cause to the sentenced people who may wait for years in a row or even decades, more often than not in isolation and in an uncertain legal situation. Human rights represent a concept that develops rapidly, and most bodies for monitoring the international and regional treaties apply a dynamic interpretation of the law on treaties concerning the human rights. From the historical point of view, the protection standard granted by the absolute prohibition of torture and cruel, inhuman or degrading punishments is the result of a progressive and dynamic interpretation, according to the evolution of the society

This publication aims at describing the constantly evolving standards, according to which the death penalty or the corporal punishments, largely accepted decades ago, have become the contemporary equivalent of torture or inhuman or degrading treatment. Thus, they anticipate the establishment of international norms that would absolutely forbid the use of such punishments.

Keywords: *Fundamental rights of convicted persons, limitation on the right to life and bodily integrity, prohibition of torture, inhuman or degrading punishments, death penalty, corporal punishments, standards and evolution of the international and regional jurisdictional bodies' case law.*

Introduction

Even nowadays death penalty and corporal punishments represent global phenomena, and few countries succeeded in completely eliminating them, while many others scored significant success against such practices. At the same time, we must notice that there are many states that consider that they should be maintained, by invoking various reasons (such as combating terrorism, extremely unstable political climate or exceptional situations such as war) so as not to eradicate or at least reduce them.

Thus, we must observe that the death penalty is still in force in some states, while corporal punishments are applied in many others, being justified by the enforcement of judicial sanctions, and most victims aren't political prisoners or terrorists, but regular persons, belonging to vulnerable groups, suspected of committing common law offences, such as women, children, disabled persons or persons with a sexual orientation that is forbidden by the dominant religious concepts.

This work aims at making a contribution through a comparative and punctual approach to the evolution of international standards regulating the death penalty and the corporal punishments, as well as the compatibility of such standards with the states' obligation to comply with the unconditional ban on torture and ill-treatment.

Furthermore, this presentation completes the existing specialized literature by means of a critical approach to the evolution of the international case law bodies in the matter of capital punishment, at the same time describing the mismatches and inconsistencies of the approaches related to capital punishment and corporal punishments.

Last but not least, the present study also contains a comparative law presentation but also a historical presentation of the regional and international standards and values in the field, explicitly outlining the qualitative leap of the protection provided in the European system, both within the European Union and the Council of Europe.

Paper content

Death penalty represents the only exemption from the fundamental right to life, inherent to any human being, set forth by art. 2 of the Universal Declaration of Human Rights[1] and art. 6 of the *International Covenant on Civil and Political Rights*[2], provisions that imposed to all signatory states to protect this right by law. Although they did not force the states to abolish death penalty, the two documents restrict the rights of the states to enforce death penalty, by establishing that a

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[1] Adopted by the UN General Assembly on 10 September 1948

[2] Adopted and opened for signing by the UN General Assembly on 16 December 1966. Entered into force on 23 March 1976, according to art. 49, for all provisions except for the ones at art. 41, and on 28 March for the provisions of art. 41. Romania ratified the Covenant on 31 October 1974 by Decree no. 212, published in the "Official Journal of Romania", part I, no. 146 dated 20 November 1974.

death sentence can only be ruled for the most severe crimes, according to the laws in force at the time the crime was committed and such laws should not be in conflict with the provisions of the Covenant or with the ones of the Convention on the Prevention and Punishment of the Crime of Genocide.

Four of the six paragraphs of article 6 of the Covenant, referring to the right to life, regulate the conditions related to the imposition of the capital punishment, establishing that such punishment may be executed only based on a final order of a competent court, pronounced according to the minimum guarantees of a fair trial and in accordance with the other provisions of the Covenant; it may only be applied for the most serious crimes. In accordance with the principle of humanity, a death sentence may not be pronounced for crimes committed by persons under the age of 18 and may not be executed against pregnant women. Distinct from the right to life and correlative with such right, it is expressly regulated that the persons sentenced to death have the right to require the pardoning or the commutation of the sentence, and it is set forth that the amnesty, pardon or commutation of death sentence may be granted in all cases. In addition, article 6 - paragraphs (2) and (6) - clearly express the message that the Covenant promotes the abolition of death penalty and that the abolitionist party states undertake not to reinstate it.

Article 4 of the American Convention on Human Rights, a regional document inspired by and based on the Covenant, develops a higher protection system, expressly establishing a ban for the abolitionist states to reinstate the death penalty in their internal legislation, it forbids its enforcement for political offences or related common offences, but also the application of such sanction to the persons who, at the date when the offence was committed, were over 70 years of age.

The Convention on Children's Rights[3], in article 37 (a), requests the party states to make sure that no capital punishment will be imposed for the crimes committed by persons under 18 years of age.

Despite the global tendency to abolish death penalty, its application and execution do not represent an actual infringement of the right to life if carried out according to the severe restrictions and guarantees provided by the international regulations and by the internal regulations in compliance with the international ones. At the same time, the above-mentioned international documents forbid in absolute terms the torture and the cruel, inhuman or degrading treatment or punishment, as set forth by article 7 of the Covenant and art. 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment[4], art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5], art. 2 of the American Convention on Human Rights and art. 4 of African Charter of Human and Peoples' Rights.

It had been constantly accepted in the doctrine and case law that the provisions of art. 6 of the Covenant and the ones of art. 1 of the din Convention against Torture should be interpreted in the sense that the death penalty may not be considered in itself a breach of the ban on torture and cruel, inhuman or degrading punishment. However, as underlined by UN Special Rapporteur in its 2009 report on death penalty[6], in what concerns the judicial bodies, such interpretation may change in time, just as it happened to the corporal punishments. Human rights represent a concept that develops rapidly, and most bodies for monitoring the international and regional treaties apply a dynamic interpretation of the law on treaties concerning the human rights.

From the historical point of view, the protection standard granted by the absolute prohibition of torture and cruel, inhuman or degrading punishments is the result of a progressive and dynamic interpretation, according to the evolution of the society. As for the corporal punishments, they can be compared to the death penalty in the sense that, beyond the physical pain and the suffering that they cause, they have come to be considered a direct attack upon the dignity of the individual and, consequently, they are forbidden by the international law.

Thus, in 1950, at the time of the ECHR adoption, the corporal punishments were widely accepted in European societies, mainly as a family punishment and as a disciplinary punishment in schools, prisons, military institutions, etc., and they were not considered cruel, inhuman or degrading punishments in most European countries. However, this attitude changed significantly in the 1960's and 1970's, reaching a peak when the European Court of Human Rights pronounced its judgment in the case Tyrer v. United Kingdom[7], which stated, in a dynamic interpretation of art. 3 of the European Convention on Human Rights, that giving three strokes of birch rod to a student, a traditional punishment on the Isle of Man, was no longer compatible with a modern in interpretation of the human rights in Europe.

Referring to the European Convention as to a "living instrument" that must be interpreted in the light

[3] Adopted by the General Assembly of the United Nations on 20 November 1989. So far, the Convention has been adopted by 194 countries that are members of the United Nations (except USA and Somalia);

[4] Adopted and opened for signing by United Nations General Assembly, by Resolution 39/46 dated 10 December 1984. It entered into force on 26 June 1987 according to the provisions of art. 27(1).

Romania joined the Convention on 9 October 1990 by means of Law no. 19, published in the "Official Journal of Romania ", part I, no. 112 dated 10 October 1990.

[5] Fundamental document of the protection system set up at European Council level. It is effective as from 3 September 1953, and Romania became a party by its ratification on 20 June 1994.

[6] A/HRC/10/44

[7] Judgment dated 25 April 1978 in the case Tyrer v. Great Britain, Series A.26, par. 31

of the present conditions, the Court considered that the corporal punishment is degrading. After only four years, the Human Rights Committee, in its general comment on the prohibition of torture and cruel, inhuman or degrading treatment of punishment, expressed a unanimous opinion that the prohibition from article 7 of the International Covenant on Civil and Political Rights should also be extended to corporal punishments, including the excessive punishments as educational or disciplinary measures (paragraph 2). In 2000, the Human Rights Committee came to the same conclusion in the case Osbourne v. Jamaica, referring to the execution of a criminal punishment applied by a court, consisting in giving 10 strokes of tamarind switch across the buttocks in the presence of 25 prison warders. By unanimous decision[8], the Committee stated that, irrespective of the nature of the crime that must be punished, no matter how brutal such crime is, the corporal punishment represents a cruel, inhuman and degrading treatment or punishment, opposed to article 7 of the Covenant. This constant case law of the European Court of Human Rights and of the Human Rights Committee was also confirmed by the case law of the Inter-American Court of Human Rights[9], the one of the African Commission on Human and Peoples' Rights and of national courts, as well as by the practice of other monitoring bodies, including the Committee against Torture and by the Special Rapporteur on torture.

In March 2005, in the case Winston Caesar v. Trinidad and Tobago, the Inter-American Court of Human Rights condemned for the first time the application of corporal punishments as judicial sanction[10]. The Court unanimously stated that the punishment of the prisoner by whipping is, by its very nature, purpose and consequences, incompatible with the standards set forth by articles 5.1 and 5.2 of the American Convention on Human Rights ". The Court considered that the very nature of this punishment reflects an establishment of violence which, even though permitted by law, ordered by the state judges and applied by the penitentiary authorities, represents a sanction that is incompatible with the Convention. As such, the corporal punishment by whipping was considered a form of torture and, consequently, represents a breach of any individual's right to physical and mental integrity.

However, in several states, the corporal punishment is still permitted as judicial sanction in the criminal law or as disciplinary sanction of prisoners, in schools or in the army. In other countries, the corporal punishment is neither explicitly authorized, nor forbidden by law, which means that it is largely applied in practice. What is common for all forms of corporal punishments is that the physical force is intentionally used against the person in order to cause a significant level of pain. In addition, without any exception, the corporal punishment has a degrading and humiliating element, therefore all forms of corporal punishments should be considered to represent cruel, inhuman or degrading punishments that infringe the international law of human rights.

Although only a very limited number of states currently support the legality of such forms of judicial sanctions, they continue to be applied even nowadays, despite the incredible cruelty of some of the reported punishments, such as amputation of right hand, giving 5000 whip strokes, many of them being applied in order to repress sexuality-related acts, such as "non-Islamic sexual activities" "illicit relationships" or adultery[11]. Adultery is also the most common infringement in the cases when the individuals are sentenced to death by stoning.

The Criminal Code of Iran sets forth the following: a woman sentenced to death by stoning must be buried up to a line above her breasts (article 102 of the Criminal Code), before being hit with stones that shall not be so big as to kill the person by one or two strikes, neither shall it be so small that they cannot be called a stone (article 104 of the Criminal Code). Other corporal punishments provided for by Sharia law include public whipping and they are applicable in case of alcohol consumption, intimacy of unmarried couples or gambling. Such infringements are usually judged in public trials where the audience may shout at the defendant, making the reasonable doubt devoid of any content. In addition, the execution of the punishments is carried out in public, being often televised.

Moreover, the Criminal Code of Aceh (a province in Indonesia) enforces extremely discriminatory sanctions for women: apart from public whipping, the punishments include cutting woman's dress in public and forced cutting of the hair, which represent inhuman and degrading treatments. The fact that these punishments are carried out in public generates stigmatizations and social sanctions that are well beyond the punishment execution, the women condemned to such public punishments being labelled as immoral by their husbands, families and communities, this leading to social exclusion which also represents an inhuman and degrading treatment. In general, as shown in the report prepared by the UN Special Rapporteur, more often than not the women are the ones found guilty of adultery and of other related crimes and are subject to corporal punishments, including death penalty, which is incompatible with the prohibition of discrimination based on gender, established in all main instruments concerning human rights, including the Convention on the Elimination of All Forms of Discrimination against Women[12].

[8] Decision dated 15 March 2000 in the case Osborne v. Jamaica, no. 759/1997, para. 3.3
[9] Decision dated 11 March 2005 in the case Winston Caesar v. Trinidad and Tobago, Series C no. 123
[10] Idem
[11] E/CN.4/2006/6/Add.1, para. 398
[12] A/HRC/7/3, para. 40

As for the corporal punishment as judicial sanction, the following specifications need to be brought to attention, in the light of the many similarities with the capital punishment. In the stage of preparatory works of UN Convention against Torture, article 1 of the UN Declaration against Torture, dated 9 December 1975[13] and article 1 of this convention draft presented by Sweden[14] represented the starting point of the debates on defining torture, which took place within the work groups. Both provisions included a clause concerning the so-called legal sanctions, which were exempted from the definition of torture, specifying that it "does not include the pain or the suffering inherently resulting from the imposition of the legal sanctions, in so far as they are in compliance with the standard established by the Standard Minimum Rules for the Treatment of Prisoners[15]" and mainly by art. 31 of these rules that sets forth that "the corporal punishment, the punishment by incarceration in a dark cell and all cruel, inhuman or degrading punishments shall be completely forbidden as sanctions for disciplinary offences".

In the end, the referral to the minimum rules was removed from article 1 of CAT due to the fact that certain governments did not want to include in a treaty of mandatory nature a referral to a legal instrument without mandatory nature. When such governments realized that the removal of the referral to the Minimum Rules will eliminate a series of severe forms of corporal punishments from the torture prohibition scope, they tried to replace it with another referral to the mandatory international standards. For example, the United States proposed that the legal sanctions "that fragrantly break the accepted international standards" should not be permitted.

Under such conditions, until the drafting of the final form of the CAT Convention, no agreement has been reached concerning the defining of these "accepted international standards", many governments trying, without success, to completely eliminate the clause of legal sanctions. On the contrary, others insisted in their comments in writing that the term "legal sanctions" must be interpreted as referring to both the domestic law and the international law.

In an extreme interpretation, supported by certain Islamic states, it is considered that any sanction imposed under the national legislation, the criminal law, including the corporal punishment, is covered by the clause concerning the legal sanctions. Such interpretation is opposed to the international law on human rights, as unanimously stated in the above-mentioned case law of the Human Rights Committee, in relation to article 7, that decided that any form of corporal punishment represents an infringement of the international law and it would lead to the absurd conclusion that, by adopting in 1984 the CAT Convention, whose well-determined aim and purpose was the one of consolidating the already existing obligations of the states to prevent and punish torture, led to an actual diminution of the international standard. Consequently, such interpretation is obviously incompatible with the object and purpose of the convention and, therefore, it may not be admitted in the light of article 31 of the Vienna Convention on the law of treaties. In addition, the clause from article 1 paragraph 2 of CAT Convention prevents such an interpretation.

The evolution of the regulations of international law in the matter of corporal punishments continued with the adoption of the Declaration on the Elimination of Violence against Women in 1993, when the prohibition of such forms of sanctioning was also extended in the private sphere of the family, the states being imposed an obligation to adopt legislative and other measures in order to protect women against domestic violence, including the corporal punishments. Moreover, the positive obligation of the states to efficiently forbid and prevent the corporal punishment of children was confirmed by various monitoring bodies, including the Human Rights Committee and the European Committee of Social Rights.

In conclusion, in the light of the international law on human rights, any form of corporal punishment applied either as judicial or disciplinary or domestic sanction by state authorities or by private persons, including schools and parents, shall be considered cruel, inhuman or degrading, and it shall not be justified, even in exceptional situations, since the absolute and non-derogating prohibition of subjecting the human being to torture or cruel, inhuman or degrading treatments or punishments opposes.

Starting from this conclusion, the international bodies monitoring the respect for the human rights have the unanimous opinion that the same legal reasoning should also be applied to the death penalty, since it only represents an aggravated form of corporal punishment. By admitting that the amputation of the limbs is a cruel, inhuman or degrading punishment, in his report referring to torture and cruel, inhuman or degrading treatment or punishment[16], UN Special Rapporteur Manfred Nowak, was rhetorically asking himself how the beheading of a person could be differently judged, and he concluded that, according to the international law, the absolute prohibition of any form of corporal punishment cannot reconcile with hanging, electric chair, incineration or any other forms of execution of a death sentence, admitted under the same treaties.

The same author noticed that, surprisingly, the case law of the international bodies for monitoring the human rights is much less clear in terms of death penalty than in terms of corporal punishment.

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[13] Resolution of UN General Assembly no. 3452 (XXX) dated 1975.

[14] E/CN.4/1285 par.

[15] "Standard Minimum Rules for the Treatment of Prisoners", approved by UN Economic and Social Council by Resolutions no. 663C (XXIV) of 31 July 1957 and no. 2076 (LXII) of 13 May 1977

[16] A/HRC/10/44, par. 38

Even the European Court of Human Rights who had already stated in 1989 that the phenomenon of death corridors in Virginia was an inhuman or degrading punishment, never reached the conclusion that the death penalty infringes article 3 of the ECHR. The Human Rights Committee followed the systematic interpretation of the right to life and to individual integrity initially developed by the European Court, although it has become more and more obvious that there is an inconsistency between its approaches concerning the corporal and the capital punishments.

The execution methods vary very much among the states that continue to impose the death penalty. Within the last 50 years, several methods have been used in order to execute the condemned: beheading (Saudi Arabia), hanging (Bangladesh, Botswana, Egypt, Iran, Iraq, Japan, Malaysia, Pakistan, Saint Kitts and Nevis, Singapore and Sudan), lethal injection (China, United States of America), shooting (Afghanistan, Belarus, China, Indonesia, Iran, Mongolia and Vietnam), death by stoning (the Islamic Republic of Iran) and electrocution (the United States). There is a great dispute whether one or another method is unacceptably cruel, inhuman or degrading. For example, in an answer to the questionnaire sent to the Office of the United Nations High Commissioner for Human Rights, the Arabian Libyan Jamahiriya reported that the execution by electrocution on electric chair, the lethal injection or the toxic gases are not acceptable under the domestic law.

Referring to the different execution methods that may be considered cruel, inhuman or degrading punishments, the case law discrepancies also stand out. Although it is unanimously admitted that certain methods, such as stoning, that intentionally extend the pain and the suffering of the convict, represent cruel, inhuman or degrading punishments, the opinions considerably differ in terms of "human" executions. In the controversial decision for Kindler v. Canada[17], the majority of the Human Rights Committee acknowledged in 1993 that the execution by lethal injection, as practiced in Pennsylvania, does not represent an inhuman punishment. United States Supreme Court reached a similar conclusion in 2008. On the other hand, in its opinion in the case Ng v. Canada from 1993[18], the majority of the Human Rights Committee found that the execution by asphyxiation with gas, as practiced so far in California, represented a cruel and inhuman treatment and, consequently, Canada broke article 7 of the Covenant by extradition of the plaintiff to the United States.

In Staselovich v. Belarus, The Committee considered that the execution by a burning team was in compliance with article 7 of the Covenant, but, at the same time, it considered that authorities' failure to notify the mother about the date established for the execution of her son and about the place of its grave represented an inhuman treatment of the mother.

In the cause ÖCALAN v. Turkey[19], the European Court of Human Rights analysed the conventional case law in terms of capital punishment.

Abdullah Öcalan is a Turkish citizen that executes a life sentence in a Turkish prison. He complained about the imposition and/or execution of the death penalty in his case. Before being arrested, the plaintiff was a leader of PKK (Workers' Party of Kurdistan, an illegal organization). After having been detained in Kenya under contested circumstances, in the evening of 15 February 1999, he was brought to Turkey where he was sentenced to death in June 1999 for acts meant to lead to the separation of the Turkish territory. Following the abolition of death penalty in August 2002, in time of peace in Turkey, the State Security Court from Ankara commuted the death sentence decided for the plaintiff into life prison in October 2002.

The Court determined that there were no infringements of art. 2 (right to life), art. 3 (prohibition of inhuman or degrading treatment) or art. 14 (prohibition of discrimination) of the Convention, since the death penalty was abolished and the plaintiff's sentence was commuted to life prison. The Court acknowledged that the death penalty in time of peace came to be considered in Europe an inacceptable punishment form which was no longer allowed under article 2 of the Convention. However, no firm conclusion was reached whether the states that are parties if the Convention established a practice for considering the execution of death penalty an inhuman or degrading treatment, opposite to article 3 of the Convention.

Within the last 10 years there have been important international evolutions in terms of death penalty, within inter-governmental organizations, within international courts and human rights monitoring bodies. The most significant evolution was probably the adoption of the resolutions of the UN General Assembly in 2007 and 2008, by which a moratorium concerning the death penalty was requested.

The Assembly debate concerning the issues related to death penalty at the end of the 1960's had led to the adoption in 1968 of an initial resolution (no. 2393 (XXIII)), that actually determined the preparation of the first five-year report on death penalty.

In paragraph 1 of Resolution 32/61 from 8 December 1977, the Assembly stated that the main target pursued in the field of death penalty was the one of the progressive restriction of the number of crimes for which death penalty could be imposed, in order to completely eliminate this punishment. However, many years passed until there were new attempts to approach the issues related to death penalty in the Assembly.

[17] Human Rights Committee, Decision dated 30 July 1993, no. 470/1991, para. 15.1.
[18] Decision dated 5 November 1993 in the case Ng v. Canada, no. 469/1991, par. 16.4.
[19] No. 46221/99 Decision of the Great Chamber dated 12 May 2005

In November 2007, an interregional group of member states presented in the General Assembly a resolution draft by which a moratorium on death penalty is requested. On 18 December 2007, the Assembly Resolution 62/149, entitled "Moratorium on the use of the death penalty" was adopted.

Following the adoption of the resolution, on the 11th of January 2008, the representatives of 58 permanent missions within United Nations Organizations addressed a Note Verbal to the Secretary-General in order to express their wish "to emphasize that they have persistent objections against any attempt to impose a moratorium on the use of the death penalty or on the abolition of such penalty by infringement of the existing provisions in compliance with the international law".

On 21 April 2004, the eighth annual resolution on death penalty was adopted by the Human Rights Commission.

By Resolution no. 2004/67, the Commission requested the states that had still maintained the death penalty to completely eliminate it and, meanwhile, to establish a moratorium on the executions and urged these states not to enforce the death sentence for the crimes committed by persons under the age of 18 or by the ones suffering of mental illnesses.

In Resolution 2005/59, entitled "Death Penalty Issue", The Human Rights Commission reiterated the content of the previous resolutions, but it asserted at the same time the right of each person to life and declared that the abolition of the death penalty is essential in order to protect this right. In the same resolution, the Commission reproved the use of death penalty based on the legislation, discriminatory policies or practices, as well as the disproportionate use of such penalty against the persons belonging to national or ethnical, religious or linguistic minorities, and requested that the states should not impose mandatory death sentences under the internal criminal legislation.

Human Rights Commission was replaced in 2006 by the Human Rights Council. The Council took the responsibility for the reports and studies on the mechanisms and mandates taken over from the Commission.

At European level, the death penalty was eliminated from all 27 Member States of the European Union. The Charter of Fundamental Rights prohibits the death penalty, as well as the extradition to a state where such penalty may be imposed.

The Charter is included in the Lisbon Treaty that entered into force on 1 December 2009. The activity of the European Union concerning the death penalty is carried out according to the "Guidelines on EU Policy towards Third Countries on Death Penalty" adopted on 29 June 1998 according to an EU declaration in the Amsterdam Treaty, dated 2 October 1997. They were revised and updated by the Council of European Union in 2008, and in the future they will be revised every three years. The Guidelines include a list of "minimum standards" that are to be used for the auditing of the third countries that still maintain the death penalty. At a certain extent, these minimum standards exceed the ones contained in the Safeguards of the United Nations.

For example, the Guidelines of the European Union declare that "death penalty should not be imposed for non-violent financial crimes or non-violent religious practices or expressions of conscience". In 2008, the following words were added: "and for sexual relations between consenting adults, as well as no mandatory sentence".

Within the latest years, the European Union has issued over 80 initiatives to third countries or territories, at the same time offering substantial financing to the non-governmental organizations in their efforts to promote the abolition of death penalty in the entire world. As part of the budget of 100 million euro of the European Initiative for Democracy and Human Rights, the European Commission supported projects meant to reduce the use of death penalty, e.g. by publishing the inefficiency of the death penalty as a mechanism for reducing criminality.

In the last years, there have been four new ratifications or accessions to Protocol no. 6 to the European Convention on Human Rights, which repeal the death penalty, except for time of war or of imminent threat of war: the ones in Monaco, Montenegro, Romania and Serbia. At the end of 2008, all 47 members of the European Council, except for the Russian Federation, were parties of the protocol. The Russian Federation signed the Protocol in 1997.

Protocol no. 13 to the European Convention on Human Rights that totally repeals the death penalty, including in times of war, was adopted on 3 May 2002.

Based on article 6 of the Treaty on European Union, the respect for human rights and fundamental liberties represents one of the common principles of the member states. Therefore, the Community decided in 1995 to consider that the respect for human rights and fundamental liberties is an essential element of its relationships with third countries. In this respect, it was decided that a clause should be included in any new commercial agreement of general nature for cooperation and association that the Community concludes with the third countries.

Article 2 paragraph (2) of the Charter of Fundamental Rights of the European Union[20] stipulates that no person may be sentenced to death or executed. On 29 June 1998, the Council approved "the Guidelines to European Union Policy towards Third Countries on Death Penalty" and decided that European Union shall make efforts in order to globally abolish the capital punishment.

Article 4 of the Charter provides that no person may be subjected to torture or inhuman or degrading treatment and punishment. On 9 April 2001, the Council approved "the Guidelines to the European

[20] OJ C 364, 18.12.2000, p. 1.

Union Policy towards Third Countries on Torture and Cruel, Inhuman or Degrading Treatment or Punishment". These guidelines refer to the adoption in 1998 of the European Union Code of Conduct on arms export and other current activities, having the purpose of introducing a control of the exports of paramilitary equipment at the European Union level, as examples of measures aiming at efficiently contributing to the prevention of torture and of other cruel, inhuman or degrading punishment or treatment within the common foreign and common security policy. These guidelines also stipulate that third parties must be obliged to prevent the use and production, as well as the trade of equipment designed for torture and for other cruel, inhuman or degrading punishments or treatments and to prevent the abusive use of any other equipment for this purpose. Besides, they indicate that the prohibition of the cruel, inhuman and degrading punishments requires clear limits for resorting to the death penalty. That is why, according to these texts, the death penalty is under no circumstances considered a legitimate sanction.

In its resolution on torture and other cruel, inhuman or degrading treatment or punishment, adopted on 25 April 2001 and supported by the European Union member states, the Human Rights Commission of the United Nations invited UN members to take proper measures, especially legislative measures, in order to prevent and prohibit, among others, the expert of materials especially designed for torture of other cruel, inhuman or degrading treatment or punishment. This point was confirmed by the resolutions adopted on 16 April 2002, on 23 April 2003, on 19 April 2004 and on 19 April 2005.

On 3 October 2001, the European Parliament adopted the Resolution[21] concerning the second annual report of the Council, prepared by applying point 8 of the European Union Code of Conduct for arms export, requesting the Commission to act rapidly in order to propose an adequate community mechanism that forbids the promotion, trade and export of police and security equipment, the use of which is inherently cruel, inhuman or degrading, and to make sure that this community mechanism enables the suspension of the transfer of equipment with little known medical effect and of equipment with a practical use that proved to have a significant risk of abuse or unjustified wounding.

It was considered that it is necessary to establish community regulations concerning the trade with third country on goods likely to be used for imposing the death penalty, and on goods likely to be used in order to apply torture and other cruel, inhuman and degrading punishment or treatment. Taking into consideration that these regulations shall contribute to the furtherance of the respect for the life and the fundamental rights of the human beings and that they shall serve to protection of the ethical principle of the society, the European Parliament concluded that it is required to establish a system of guarantee that the community economical operations should not gain any profit from the trade that either encourages or otherwise facilitates the enforcement of policies on death penalty or torture or other cruel, inhuman or degrading treatment or punishment, that are not compatible with the relevant guidelines of the European Union, with the Charter of Fundamental Rights of the European Union and with the international conventions and treaties.

In the light of these principles, EEC Regulation 1236/2005[22]of 27 June 2005 was adopted, which prohibits the export and import of equipment with no other practical use than for the purpose of capital punishment, or for the purpose of torture and other cruel, inhuman and degrading treatment or punishment. The guidelines of EU policy concerning torture and other cruel, inhuman and degrading treatment or punishment provides, among others, that the heads of missions in third countries should include in their periodical reports an analysis of the cases of torture and other cruel, inhuman and degrading treatment or punishment in the country for which they are accredited, as well as of the measures taken in order to combat them. The Regulation obliges the competent authorities in the member states to consider these reports and any similar reports prepared by the competent international organizations and by the civil society whenever taking decisions about the applications for authorizing exports, the measures thus provided being meant to prevent the use of the capital punishment, but also the torture and other cruel, inhuman and degrading treatment or punishment in third countries. Its rules contain restrictions on the trade with such countries, in relation to goods that may be used for the purpose of capital punishment, torture or other cruel, inhuman and degrading treatment or punishment. The European Parliament deemed it was not necessary to submit the operations inside the Community to similar controls, given that the capital punishment does not exist in the member states and that such states adopted adequate measures for preventing torture and the other cruel, inhuman and degrading treatment or punishment, their responsibility remaining the one of imposing and applying the required restrictions concerning the use and production of this equipment for the purpose of export to third countries, but also in order to provide technical assistance in relation to such equipment.

Conclusions

The purpose of applying a punishment is to re-educate, reintegrate the individual in the society, and not to physically liquidate that individual, as a final solution for removing him/her from the society, nor to

[21] OJ C 87 E, 11.4.2002, p. 136.
[22] OJ L 200/1, 2005

affect the physical or mental integrity of the condemned person, by applying corporal punishments that cause the humiliation and eventually the dehumanization of such individual.

We must certainly maintain a just balance between the public interest of protecting the society members against various crimes, especially the most severe ones, on the one hand, and, on the other hand, the private interest of the condemned person, forced to endure a capital punishment or corporal punishments.

The reasons invoked in order to legitimise the application of the death penalty and of the corporal punishments are varied, being different not only at regional level, but also from one state to another, or even inside the same state. Therefore, from the perspective of the civilisation level, many states still consider that death penalty or corporal punishments are not inadequate, and they believe that no eradicating measures should be adopted; in their opinion, such sanctions have a well-established role in maintaining the order of the society. On the contrary, other states, with a high level of economic development and with a high level of civilisation, consider that the capital punishment is necessary in certain cases, but the procedure applied for its execution must be efficient, and especially it should not violate the dignity of the respective person. The same states consider, based on a similar reasoning, but with completely opposite conclusions, that the corporal punishments violate the integrity and the dignity of the person, thus being incompatible with the respect for the fundamental rights of individual.

The present work extensively presents the interpretation manner of the absolute prohibition to subject a person to torture, cruel, inhuman or degrading treatment or punishment, from the perspective of the legality of violating the right to life, according to art. 2 of the Universal Declaration of Human Rights, but also to the evolution of the protection standard provided for by the Convention against Torture (CAT). The present work underlines that, despite the general obligation to respect the individual's right to physical and mental integrity, the imposition and execution of the death penalty is not considered in itself a treatment contrary to art. 1 of the Convention, while the case law of the international bodies for monitoring and controlling the respect for the human rights avoids raising this issue by applying the reasoning unanimously adopted in the matter of corporal punishments.

We consider that, distinctly from the legal and exceptional nature of the death penalty, such sanction cannot be seen but as an extreme form of corporal punishment that leads to the annihilation of the individual, and that, independently from the manner in which it is carried out, it inherently represents an inhuman or degrading treatment as it leads to the very annihilation of the human being. Therefore, the demarches of the international and regional bodies concerning the respect for the human rights must focus on the necessity to abolish this punishment, not on the necessity to define the "human" forms of execution, aiming not only at the elimination of the provisions contained in the national legislation, that provide for this form of punishment, but also at taking the required measures in order to prohibit the trade and technical assistance related to the equipment exclusively designed for the imposition of the capital punishment.

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