

ABOLISHMENT OF THE DEATH PENALTY IN EUROPE. STUDY CASE: BELARUS

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Abstract: *The right to life* is considered by both the international doctrine and the universal and regional international treaties in the field of fundamental human rights and liberties as being the first among all these fundamental human rights and liberties, an essential principle among the core rights because inter alia it represents the foundation for the enjoyment of all the other human rights. The right to life is an intangible and inalienable right of the human being. As a consequence, this core of fundamental values which must be common to all nations, states and individuals may not be derogated from. *The right to life*, as well as the prohibition against torture and the violation of human dignity are included by the international doctrine within this category. The European standards on the protection of the right to life and the abolishment of death penalty respectively are established by the Council of Europe through first of all the legal foundation consecrated by the European Convention on Human Rights, its Protocols 6 and 13 and the case-law of the European Court of Human Rights. The Council of Europe qualifies *the death penalty as cruel, inhumane and degrading*. It is against human rights and is a symptom of a culture marked by violence. Moreover, there is no evidence that capital punishment deters crime. Regardless of the gravity of the offence and the public interest in imposing a proportionate sanction, European democratic standards prohibit the use of the death penalty in all circumstances. Currently, Belarus is the only state on the European continent that still carries out executions in its territory. Therefore, the goal to introduce a moratorium on the death penalty as soon as possible and to consider its full abolition in the future it is a zero priority for the Council of Europe.

Keywords: right to life, death penalty, abolition, human rights, Council of Europe, European Convention on Human Rights, Belarus, moratorium

1. Introduction

The idea of some human rights being more fundamental, considered even to be sacred, compared to other human rights is a common denominator within the international doctrine on human rights.¹ First, this idea is based on the understanding of the fact that a limited set of basic human rights, that must be firmly established, are to be foreseen as a precondition for other rights.² As a consequence, these basic rights require primacy in relation to the non- basic rights, which remain nevertheless also fundamental rights.³

On the other hand, this core of fundamental values which must be common to all nations, states and individuals may not, therefore, be derogated from.⁴ *The right to life*, the prohibition against torture and the violation of human dignity are included by the international doctrine within this category.

The application of some other values can allow some limitations, according to strictly defined legal conditions and need to take into account national conditions. The doctrine⁵ makes reference to the relevant provisions of several important international treaties in the field of human rights, like the International Covenant on civil and political rights, the American Convention on human rights and the European Convention on Human Rights, list “six conditions for a State to be authorized to adopt measures derogating from their obligations under the above mentioned instruments: the existence a public emergency threatening the life of the nation; the measures adopted must be strictly required by the exigencies of the situation; they must not entail a discrimination on the ground of race, colour, sex, language, religion or social origin; the measures derogating from these instruments may only be allowed to the extent that they are not inconsistent with the other obligations of the State concerned under

1 Martin Scheinin, „Core rights and obligations”, in *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton, Oxford University Press, Oxford/ United Kingdom, 2015, p. 527.

2 Ibidem, p. 528.

3 Henry Shue, cited by Martin Schein, op. cited, p. 528.

4 Antonio Cassese, cited by Philip Alston, Ryan Goodman, *International Human Rights, The successor to International human rights in context*, Oxford University Press, Oxford, United Kingdom, 2013, p. 163.

5 Olivier de Schutter, *International Human Rights Law*, Cambridge University Press, second edition, Cambridge/ United Kingdom, 2015, pp. 583-584.

International law; the derogation may not justify the suspension of certain guarantees, which are defined as "non-derogable"; and the derogation must be notified to the other States parties to the instrument concerned."⁶ Definitely, *the right to life* is not part of this category of fundamental human rights that accepts derogations.

As a more general conclusion of these introductory remarks, the authors of International law consecrated a clear understanding that *Jus cogens* rules included norms concerning human rights, like those banning genocide, slavery, racial discrimination and later especially *the right to life*.⁷

2. The right to life

The doctrine emphasizes that certain rights may not be derogated from in the various human rights instruments in times of peace or even in times of war or other public emergency threatening the nation. For instance in the case of the European Convention on Human Rights these are *rights to life* (article 2; except in cases resulting from strict cases established by the initial text of the Convention from 1950), the prohibition of torture (article 3) and slavery (article 4.1) and non-retroactivity of criminal offences (article 7).⁸ The most recent of the above mentioned three human rights instruments providing for the possibility of derogations, the American Convention on Human Rights, contains the longest list of non-derogable rights. Only four rights - *the right to life*, the prohibition of torture or cruel, inhuman or degrading treatments or punishments, the prohibition of slavery or involuntary servitude, and the prohibition of retroactive criminal law - are excluded from derogations.⁹

It is therefore easy to acknowledge that there is a clear consensus among the international doctrine and the international human rights treaties that the nature of *the right to life*, the first among all fundamental human rights and liberties, considered as an essential principle because this right is the foundation for the enjoyment of all the other human rights, it's an absolute one.¹⁰ This is why the Universal Declaration of Human

6 Ibidem, p. 584.

7 Philip Alston, Ryan Goodman, op, cited, p. 163.

8 Malcom N. Shaw, *International Law*, Cambridge University Press, sixth edition, New York, 2010, p. 274.

9 Olivier de Schutter, op. cited, p. 624.

10 Jean- Francois Rennuci, *Traite de droit europeen des droits de l' home*, L.G.D.J., 2e edition, Paris, 2012, p. 89.

Rights from December 10, 1948 starts the list of the fundamental human rights and liberties proclaimed at universal level by article 3: "Everyone has the right to life..."¹¹ The same for the International Covenant on civil and political rights from December 19, 1966 that states: "Every human being has the inherent right to life"¹²

The right to life is an intangible and inalienable right of the human being. The doctrine underlines that this fundamental right is consecrated through an imperative¹³ norm and is considered as "the first among the human rights, the supreme value on the scale of the human rights within the international relations"¹⁴.

For guaranteeing the right to life, according to the European Convention on Human rights and the jurisprudence of the European Court of Human Rights the State is bind by both a negative obligation, i.e. to abstain from infringing the right to life of the individual, and a positive one, that means taking all necessary measures to protect life¹⁵.

Article 2 of the European Convention proclaims in para. 1: "Everyone's right to life shall be protected by law."¹⁶ It's true that the initial draft of the Convention from 1950 established provisions which not only safeguards the right to life but sets out the circumstances of 1 plus 3 other cases when the deprivation of life may be justified.¹⁷ On the other hand, part of the draft of article 2 has been later overtaken by provisions in Protocols amending the European Convention. The second sentence of article 2.1 reserves the right of State Parties to subject convicted criminals to *death penalty*.¹⁸ However, Protocol 6 from April 28, 1983¹⁹ abolishes on the European continent the death penalty in peacetime and Protocol 13 from May 3, 2002²⁰ abolishes it in all circumstances. Forty-

11 <https://www.un.org/en/universal-declaration-human-rights/>

12 <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

13 Titus Corlătean, *Protectia europeana si internationala a Drepturilor Omului*, Universul juridic, editia a II-a revizuita, Bucuresti, 2015, p. 59.

14 Frederic Sudre, cited by Titus Corlătean, op. cited, p. 59.

15 Jean- Francois Rennuci, op. cited, pp. 90- 91.

16 https://www.echr.coe.int/Documents/Convention_ENG.pdf

17 Jacobs, White& Ovey, *The European Convention on Human Rights*, Oxford University Press, sixth edition, Oxford/ United Kingdom, 2014, p. 143.

18 Ibidem, pp. 143-144.

19 https://www.echr.coe.int/Documents/Convention_ENG.pdf, p. 22

20 Ibidem, p. 29.

six States members of the Council of Europe ratified Protocol 6, only Russia just signed it in 1997 without ratification.²¹ Forty-four States ratified Protocol 13²², only Azerbaijan, Armenia and Russia either not signing or signing without ratification this instrument at this stage.²³

3. Council of Europe and the abolition of death penalty; study case: Belarus

The European standards on the protection of the right to life and the abolition of death penalty respectively, established by the Council of Europe through the legal foundation consecrated by the European Convention on Human Rights and its Protocols 6 and 13 were previously presented in clear terms.

It is true that these European legal standards in this field were preceded at the universal level by the Second Optional Protocol to the International Covenant on civil and political rights, aiming at the abolition of the death penalty, adopted in New York at December 15, 1989.²⁴ The Preamble of the Optional Protocol proclaims the fact that "the abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."²⁵

The clear stand taken by the Council of Europe²⁶ in favour of the abolition of the death penalty covers the members states of the Organization, but also its partners and observers. A number of resolutions

21 Chart of signatures and ratifications of Treaty 114- *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, Status as of 21/09/2019; https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=Ty4c3QRF

22 Protocol 13 is *banning the death penalty in all circumstances*, including for crimes committed in times of war and imminent threat of war. No derogation or reservation is allowed to Protocol 13.

23 Chart of signatures and ratifications of Treaty 187- *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Status as of 21/09/2019; https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=Ty4c3QRF

24 https://treaties.un.org/doc/Treaties/1991/07/19910711%2007-32%20AM/Ch_IV_12p.pdf

25 Ibidem.

26 The Council of Europe is an international organisation whose stated aim is to uphold human rights, democracy and the rule of law in Europe. Founded in 1949, it has 47 member states, covers approximately 820 million people and operates with an annual budget of approximately 500 million euros ; <https://www.coe.int/en/web/portal>

of the Parliamentary Assembly go in the same direction. Currently, almost all European states abolished *de jure* and *de facto* the capital punishment, with the exception of Belarus, state that doesn't have an active relationship with this Organization, but also Russian Federation, a member State that is respecting a *de facto* moratorium without abolishing *de jure* the death penalty. During the last years also the political leadership of Turkey mentioned publicly several times the intention to get back to the death penalty, in the context of a unsuccessful military coup d'Etat, intention not followed by concrete actions until now.

The current situation at the international level nowadays can be briefly presented through some figures concerning the use of the death penalty in the world. At the end of 2018, *142 countries have abolished the death penalty or have not applied it for at least 10 years while 56 still applied it.*²⁷ There were 106 abolitionist states, including almost all Council of Europe states as some having a cooperation status with it such as Canada, Mexico and Kyrgyzstan. Eight states have abolished the death penalty for ordinary crimes only, including Israel (an observer State of the Council of Europe) and Kazakhstan (which cooperates with the Council of Europe). Twenty-eight states provide for death penalty in their legislation but do not apply it. This is the case, in particular, of Russia (member of the Council of Europe) and Morocco (whose parliament has a "partner for democracy status" within the Parliamentary Assembly of the Council of Europe"). Unfortunately, several States having a cooperation status with the Council of Europe – the United States, Japan, Jordan, and, to a certain extent, Palestine - still apply the death penalty in practice. Nevertheless, in general, the world tends to apply the death penalty *less and less*.

It's important in this context to briefly summarize *the work of the Parliamentary Assembly of the Council of Europe* and reiterate its call to continue the fight against the death penalty.

The Council of Europe strives to protect individuals against the death penalty, particularly in its member and observer States as well as in neighbouring countries with cooperative status such as "partner for democracy". Its arguments against the death penalty are based, as it was mentioned previously, on the *European Convention on Human Rights*, which sets out the right to life and the prohibition of torture, cruel,

27 Amnesty International Global Report, Death sentences and executions 2018, <https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF>

inhuman and degrading treatment. The European Court of Human Rights has come to the conclusion that the explicit recognition of the death penalty in article 2 of the European Convention is obsolete, putting forward the positive obligation of the State to protect life and highlighting the inhumane conditions in the death corridors, as well as the equally inhumane nature of enforcement methods in non-abolitionist countries. The Council of Europe has made some progress in the last decade in its fight for the abolition of the death penalty in Europe and worldwide. However, much remains to be done.

The Parliamentary Assembly has always played a key role in the fight against the death penalty, since the beginning of the process of enlargement of the Council of Europe after the fall of the Iron Curtain. The Assembly has insisted, as a *precondition for any membership* of the Council of Europe, on a concrete commitment by the candidate countries to the abolition of the death penalty. By going through the moratorium stage, the “new democracies” have found that the disappearance of the death penalty does not provoke an increase in the number of crimes against life, and that public have become accustomed to it even if the abolition was not always “popular”.

The Assembly has repeatedly called on the Council of Europe member states to sign and ratify Protocol 6 to the European Convention on Human Rights, abolishing the death penalty on peace time, and Protocol 13, abolishing the death penalty in all circumstances. It has continued to exert pressure on Council of Europe *observer states* to abolish the death penalty. Several texts have been adopted by the Assembly on this subject, notably Recommendation 1760 (2006) on the “Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the Death Penalty”²⁸, Recommendation 1627 (2003) on the “Abolition of the death penalty in Council of Europe observer states”²⁹, or Recommendation 1522 (2001) on “Abolition of the death penalty in Council of Europe observer states”³⁰.

In the *last Resolution on this subject - 1807 (2011) -* on “The death penalty in Council of Europe member and observer states - a violation

28 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17462&lang=en>

29 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17153&lang=en>

30 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16921&lang=en>

of human rights”³¹, the Assembly invited the United States of America and Japan, as observer states of the Council of Europe, and the Republic of Belarus, to join the growing consensus of democratic countries that protect human rights and human dignity by abolishing the death penalty. It also urged the competent authorities to declare a moratorium on executions without delay and to take the necessary measures to abolish the death penalty in law.

Since March 2012, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly has regularly appointed general rapporteurs on the abolition of the death penalty. In December 2018, the author of the current study was appointed General Rapporteur on this subject. He continues the outstanding work of his predecessors Yves Cruchten (Luxembourg, SOC), Meritxell Mateu Pi (Andorra, ALDE) and Marietta Karamanli (France, SOC), Marina Schuster (Germany, ALDE) and Renate Wohlwend (Liechtenstein, EPP).

The work of the Parliamentary Assembly’s general rapporteur consists, particularly, in quickly responding to cases of executions or pronouncements of the death penalty through public statements and by taking part in various events aimed to promote the abolition of the death penalty. Of course, this work is carried out in full cooperation with the others Council of Europe’s bodies, other international organizations, civil society and actors of the pro-abolitionist movement.

In fulfilling their mandates, the general rapporteurs have highlighted the current situation of states that have abolished the death penalty only for ordinary crimes, those who provide for death penalty in their legislation but who do not apply it as well as those who actually use the death penalty.

Geographically, the work of Assembly’s general rapporteurs on the abolition of the death penalty concerns Council of Europe member states, observer states, states whose parliaments have the status of “partners for democracy” (Jordan, Morocco and the Palestinian National Council), as well as Kazakhstan and Belarus. I, myself, have published several public statements criticizing executions and death sentences, notably in Belarus, Jordan and Palestine.

As regards Belarus, unfortunately, the use of the death penalty constitutes a major obstacle to the developments of its relations with

31 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17986&lang=en>

the Council of Europe. The Parliamentary Assembly of the Council of Europe has already had the opportunity to express its deep concern about the increase in executions in Belarus and the way they are carried out, in particular in Resolution 1857 (2012) from January 2012. The situation in this country is regularly examined in the Assembly's Committee on Political Affairs and Democracy.

As the general rapporteur, the author recently criticized the latest execution of Aliaksandr Zhylnikou carried out in June 2019 and the latest decisions of the Belarusian courts on death sentences.

This is disappointing because it shows that, despite some abolitionist signals, the Belarusian judiciary continues to apply the death penalty and executions are carried out. Moreover, the executions in Belarus raise a number of concerns in the light of practices contrary to International law. Firstly, in the last few years, it has been revealed that several sentences have been carried out *in secret*. The authorities execute people sentenced to death without giving them prior notice or informing their families or their lawyers. Furthermore, *families are unable to recover the body of the executed family member or even to find out where he or she is buried*. The secrecy surrounding executions in Belarus is a particularly deplorable practice, which causes strong psychological suffering to the family members of the condemned.

Secondly, according to some human rights organisations, the *right to a fair trial of the convicts is not respected* during the criminal proceedings. Death sentences are passed at the end of unfair trials during which proof of guilt is provided by "confessions" drawn up after the use of *torture or in the absence of any defence counsel*. Thirdly, certain convicts were executed *despite the request of the United Nations Human Rights Committee* not to proceed with the execution during the examination of the case. Moreover, it should be borne in mind that *figures on the application of the death penalty are classified as a state secret* and therefore it is not always possible to know the actual figures.

All this is very problematic from the point of view of the Council of Europe. Therefore, the Council of Europe and its Parliamentary assembly through the voice of the general rapporteur use all the occasions to call again on the Belarus authorities not to proceed with any execution and introduce a *moratorium on the death penalty*, as a matter of urgency, and as a first step towards its full abolition. The establishment of a moratorium on executions is simply a matter of political will and does not require

extensive institutional reforms. In the long run, Belarus should consider abolishing *de facto* and *de jure* the death penalty.

Following the recent exchanges that the Assembly's Committee on Legal Affairs and Human Rights had with the Belarussian authorities, it would appear that the authorities are adopting an increasingly more open stance on the abolition of the death penalty, following the establishment of the working group on the death penalty in the Parliament and several consultations with international experts. The authorities said that they were considering a new referendum on the death penalty. However, policies should not be decided on the basis of opinion surveys, since even in some Western countries, a majority of the population could be in favour of the death penalty.

4. Conclusions

To conclude, the death penalty is *cruel, inhumane and degrading*. It is against human rights and is a symptom of a culture marked by violence. Moreover, there is no evidence that capital punishment deters crime. Regardless of the gravity of the offence and the public interest in imposing a proportionate sanction, European democratic standards prohibit the use of the death penalty in all circumstances.

The Parliamentary Assembly of the Council of Europe continues its fight against the death penalty inside and outside Europe, because the problem persists even within the Council of Europe and the states which collaborate closely with the Organization.

This struggle has a moral as well as a political basis, in the sense of protecting men and women, and encouraging rational policy. Punishment should never deprive convicts of the opportunity to improve. The effectiveness of deterrence supposes the possibility for the community, to protect everyone by mechanisms that do not make convicted more dangerous individuals.

Belarus is the only state on the continent of Europe that still carries out executions in its territory. Therefore, the goal to introduce a moratorium on the death penalty as soon as possible and to consider its full abolition in the future it is a zero priority for the Council of Europe. Such steps would certainly lead to the improvement of Belarus's relations with the Organization based in Strasbourg.

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