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The Death Penalty: Transforming Law into a Means of Revenge

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On behalf of the International Commission Against the Death Penalty, I wish to greet all of you and to thank the organizers for inviting our Commission to this very significant meeting. Our Commission was established on October 7, 2010, at the initiative of Mr. José Luis Rodríguez Zapatero, when he was Prime Minister of Spain, and is supported by 18 countries¹ and an efficient secretariat. It consists of 14 members², including an honorary member, who are well-known for their work on human rights. It is chaired by Federico Mayor, former Director-General of UNESCO. Its objectives are to promote the abolition *de jure* of the death penalty and, until this is achieved, to promote the establishment of a global moratorium.

To this end, the Commission calls for the suspension of executions, undertakes missions to select countries, makes statements and appeals related to the death penalty, participates in relevant meetings, like the present meeting, and thus tries to contribute to the cause.

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Human rights are the most significant issue of our times. Yet two discrepant tendencies characterize our times in this respect: on the one hand, the efforts to protect

¹ Algeria, Argentina, Belgium, Dominican Republic, France, Italy, Kazakhstan, Mexico, Mongolia, Norway, Philippines, Portugal, South Africa, Spain, Switzerland, Togo, Turkey, and the United Kingdom.

² 1 former Director General of UNESCO (Federico Mayor, Spain)

2 former Presidents (Ruth Dreifuss, Switzerland; Gloria Macapagal-Arroyo, Philippines)

2 former Prime Ministers (Giuliano Amato, Italy; Michèle Duvivier Pierre-Louis, Haiti)

3 former Ministers (Robert Badinter, France; Mohammed Bedjaoui, Algeria; Ibrahim Najjar, Lebanon)

1 former UN High Commissioner for Human Rights (Louise Arbour, Canada)

1 internationally recognised academic in Philosophy/Human Rights (Ioanna Kuçuradi, Turkey)

1 former President of Human Rights Commission of Pakistan (Asma Jahangir, Pakistan)

1 former US Governor (Bill Richardson, former Governor of New Mexico)

1 former Judge of the European Court for Human Rights and currently a Judge and Vice President of the Gulating High Court for Western Norway (Hanne Sophie Greve)

1 honorary member, former Prime Minister of Spain (José Luis Rodríguez Zapatero)

human rights increase every day — the number of instruments for the protection of human rights increase every year —, but on the other hand, new flagrant violations of human rights are added to the old ones all over the world: terrorism and poverty play key roles in this increase.

But in connection with the death penalty there has been a noteworthy change during the past 20 years, thanks to the men and women who have devoted their lives to this aim. In Europe, for the first time, in the Charter of Fundamental Rights of the European Union (2000) we see a total rejection of the death penalty, without the compromises of the earlier instruments.

If from the right to life is understood the demand “not to touch or violate the physical and mental integrity of a person”, then it is not difficult to see that both the death penalty and torture violate this right.

Yet, if we look at our main human rights instruments, we are faced with a strange fact: A state that applies the death penalty violates the right to life, but not article 6 of the International Covenant on Civil and Political Rights, which, after stating that “every human being has the inherent right to life ...”, adds that “no one shall be a r b i t r a r i l y deprived of his life” and continues as follows: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes and in accordance with the law in force ...” This is an obvious bargaining on the right to life and is in discordance with the following article 7 on torture, which states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or p u n i s h m e n t by any State Party to the present Covenant”. In this article there is no compromise. The death penalty is an i n h u m a n punishment. This is perhaps the reason why, at present, an attempt is being made to connect the death penalty to torture. This is legal acrobatics in the fight for the abolition of the death penalty. Even the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, is not totally free from this bargaining (art. 2, par.1).

What I said for art. 6 of the International Covenant on Civil and Political Rights is also true for art. 11 of the ASEAN Human Rights Declaration (2012), which likewise states that “every person has an inherent right to life, which shall be protected by law. No person shall be deprived of life *s a v e* in accordance with law”. If an execution is in accordance with law, does it cease to be killing, i.e., a violation of the right to life?

It does not. Yet art. 6 of the International Covenant on Civil and Political Rights makes it possible for a number of States that want to keep the death penalty, after the voting of its moratorium in the U.N., to give *notes verbales* to the Secretary-General of the U.N., claiming that the death penalty is not an issue of human rights but an issue of criminal law. For a State to choose its criminal law is a domestic affair – it is “an inalienable right of a State”, to use the expression used in the *note verbale*. Ergo: the U.N. may not interfere and impose a moratorium.

We have to go to the core of the matter and make obvious why the death penalty is the most serious violation of the right to life, which cannot be justified in any way by positive law – i.e., by laws formulated not by taking as their base human rights, but other, mostly cultural, norms and considerations. The Charter of Fundamental Rights of the European Union, adopted in the year 2000, in spite of the fact that it repeats various problematic points of the previous instruments, can constitute a legal basis for further developments. (Article 1 of this Charter states that “Human dignity is inviolable. It must be respected and protected” and article 2, on the right to life, states that “Everyone has the right to life. No one shall be condemned to the death penalty or executed”.)

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In light of these considerations, I shall first give a very short inventory of the global situation and subsequently a few reasons why the death penalty should be globally

abolished. These will be ethical reasons, beside certain pragmatic reasons which are usually given by those who defend the abolition of the death penalty.

In Europe: There is still one State that keeps capital punishment in its law and in practise: Belarus. Two persons were executed this year. The Russian Federation, though it keeps capital punishment in its law, is abolitionist in practise. The last execution was in 1999.

In the Americas: Among 35 States, 15 have abolished the death penalty for all crimes, 4 for ordinary crimes³, 2 abolished it in practise⁴ and 14 States retain the death penalty⁵.

In Africa: Among 54 States, 17 have abolished the death penalty for all crimes, 20 are abolitionist in practise and 17 retain the death penalty⁶.

And in Asia: Among 48 States, 13 have abolished death penalty for all crimes, 2 for ordinary crimes, 8 are abolitionist in practise and 25 States retain the death penalty⁷.

As we see, the highest number of countries that retain the death penalty is in Asia. Of those countries, 5 are ASEAN countries.

The death penalty is mostly imposed on criminals who have committed a murder, i.e., certain human beings are condemned to death because they caused the death of other human beings, because they killed other human beings. If this is the case, to condemn someone to death is to commit exactly the same act which we consider to be a crime. Is this not transforming law into a means of revenge? Still, it is done in many

³ Brazil, Chile, El Salvador, Peru

⁴ Grenada (no execution since 1978, though it voted against the moratorium) and Suriname (no execution since 1972, though it abstained in the 2011 voting of the moratorium).

⁵ Antigua and Barbuda, Bahamas, Barbados, Belize, Cuba, Dominica, Guatemala, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago and the United States of America.

⁶ Botswana, Chad, Comoros, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guinea, Lesotho, Libya, Nigeria, Somalia, South Sudan, Sudan, Uganda and Zimbabwe.

⁷ China, Democratic Republic of Korea, Japan, Afghanistan, Bangladesh, India, Iran, Pakistan, Indonesia, Malaysia, Singapore, Thailand, Vietnam, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, the State of Palestine, Syria, United Emirates and Yemen.

countries, either for the “satisfaction” of the relatives of the victims, or because there is the belief that this is a way to reduce criminality.

Yet human rights are first of all ethical principles, and for this reason they have to constitute the basis of all law. Otherwise it is possible to violate human rights without violating the relevant law. It is even possible to commit a crime by using law, as is the case with the death penalty.

Anyone who is aware of that, i.e., anyone who does not confuse punishment with revenge, as well as anyone who is aware of what defines human dignity⁸ — be he or she a prosecutor, a judge, a member of the parliament who votes for a death penalty, or a president of State, whose signature determines whether a person will be executed or not — will reject taking part in the killing of a human being, even if this human being is a murderer. He or she will do so, because doing so rejects what he or she is against, i.e., killing. This is an ethical reason for being against capital punishment, which leads us to the defence of *de jure* abolition of this punishment.

In a meeting organised by OSCE (Organization for Security and Co-operation in Europe) this year in March, one of the questions addressed was “whether the death penalty is respectful of the inherent dignity of the human person”. In connection with this question, I would say the following: Those who torture or are in favour of torture, those who defend the death penalty or who sign the decision to put someone to death, and those who use their vote in favour of using the death penalty against a criminal, with different justifications, are not respectful of human dignity, much less of t h e i r o w n human dignity which they share with the criminal. We protect or damage human dignity — our own human dignity — by what we do and not by what we suffer.

Another question discussed in that meeting was “whether it is possible to impose the death penalty without causing severe physical pain or suffering”. We have to be aware

⁸ For the concept of human dignity, see: Ioanna Kuçuradi, *Human Rights: Concepts and Problems*, LIT, Münster 2013, pp. 99-104.

that this question has to do with the way of implementing the death penalty — which is, of course, important and well-minded — but not with the death penalty itself. If it is possible to impose the death penalty without causing severe physical pain, should we retain it?

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Now let us take a look also at certain attempts to justify the death penalty, as well as its abolition.

One of the pragmatic yet ethical objections to the death penalty is the probability of executing an innocent. Though DNA tests now reduce it, this probability always exists.

Another such objection, made by keeping in mind practises in certain countries, is that capital punishment is discriminatory, i.e., it is mostly imposed on members of disadvantaged groups of a society. Though true, this claim does not contribute much to the cause. Those who favour the capital punishment could insist, for the sake of equal treatment, on imposing this punishment also on members of advantaged groups!

Coming now to the defence of the death penalty: Perhaps the most widespread claim among those who are in favour of the death penalty is that it deters people from committing murder and certain other crimes.

There is empirical research⁹ which challenges this claim, the latest being the 2012 study conducted by the National Research Council of the National Academy of Sciences of the U.S.A.¹⁰ According to this study, “nothing is known about how potential murderers actually perceive their risk of punishment” and “the lack of

⁹ Archer, Dane, Rosemary Gartner and Marc Beitel (1983), “Homocide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis”, *Journal of Criminal Law and Criminology* 74 (3), 991-1013; Neumayer, Eric (2003), “Good policy can lower violent crime: evidence from a cross-national panel on homicide rates 1980-97 [on line], London:LSE Research on line.

¹⁰ See: New York Times (editorial), April 27, 2012, “The Myth of Deterrence”.

evidence about the deterrent effect of capital punishment — whether it is positive, negative or zero — should not be constructed as favouring one argument over another.”

This conclusion of the report makes me think that if we want the worldwide abolition of the death penalty, we have to do more to promote its ethical justifications.

If we also take into consideration that the most serious problem which the defenders of the abolition of the death penalty are confronted with in countries where it exists, is the difficulty to persuade the relatives of the victims, who, in order to be “satisfied”, to have “an eye for an eye and a tooth for a tooth”, then we have to look also for ways beyond law.

This is why my suggestions would be:

- a) To revise our relevant instruments — they are not holy scripts — so as to close the door to the possibility of defending the death penalty as an issue of domestic criminal law, at least not to repeat in the new instruments the inconsistencies of the old ones, and
- b) to better promote the ethical education of human rights in general and, within its framework, the abolition of the death penalty at all levels of education and in the media. Especially in countries that still implement the death penalty, we need to promote a change in the minds.