

European Perspective and Legal Framework of Death Penalty

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Abstract:

Purpose and Originality: The purpose of this research is to find out what is European union doing for the abolition of the death

Method: We used analytical and descriptive method and collected data mainly from EU's online official sources on legal framework of the death penalty and organized them in chronological order as they entered in to legislation in the following chapters.

Results: Based on the theoretical explanation of the issue of the death penalty and with outlining of basic international and European treaties on the death penalty, we concluded that the EU in the issue of the death penalty creates its own contracts and demarches and through their action plans and public statements is trying to regulate and gradually eliminate the death penalty from legislation of individual states.

Society: In the 21st century the death penalty is quite often used but also abused and it is important as far as it is possible to enlighten the public with this issue

Limitations / further research: It is close to impossible to gather direct sources especially from the states where this issue is of highest importance and the resources they are providing are distorted.

Keywords: human rights, punishment, criminal policy, death penalty, abolition, European Union.

1 Introduction

During the past death penalty has been a common practice in many countries. Even though countries used it to varying degrees there was always controversy around the subject of death penalty. After a reduced use of death penalty, many countries stopped executing criminals altogether and others made conscious choice to continue their executions.

We think that the subject of death penalty is attractive and interesting both from political and legal standpoint as well as ethic, moral and philosophic point of view. Simultaneously, the death penalty is an exceptionally controversial topic which is one of the main reasons why we have chosen this subject.

In 2015 a major increase in death penalty execution was recorded in comparison with previous years despite the fact that number of international and non-governmental organisations fight for the abolition of death penalty.

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This increase is concerning mainly due to the fact that there is an annual increase in number of countries which repealed the capital punishment from their legislative and joined the worldwide fight for the abolition of death penalty.

Despite the fact that many nations and states abolished the death penalty and declare the conviction that the capital punishment belongs to the past, there is still a considerable amount of states where the death penalty is still exercised and practised to this day. The reason for concern in this case is the fact, that throughout the world many historically dated methods of execution are performed. These methods of inhuman character include beheading, hanging or being stoned to death. Besides these methods, some states, including USA, incorporates modern technology and scientific knowledge into execution and perform death penalty in the form of electrocution or lethal injection.

In historic context, the death penalty was important for society, whether as a symbol of warning and deterrence or for achieving the sense of justice and restitution. However, in the present, modern society, we have reached the stage, when moral and ethic values should mean more than a sense of empty justice, not to mention the possibilities of real restitution of the convict either in the form of therapy or medication. The penal and judicial systems are not immaculate and it is already deplorable enough to condemn an innocent person to imprisonment, but to execute such person simply should not be possible.

In the opening of this thesis we examine the criminal policy and its legal definition. What is the function of criminal policy in society and what are its options and limitations. We also define punishment within the criminal policy and try to explain its importance for the society as a form of protection and for functioning of the state as such. We define the methods of punishment where we reach the important subject for us, the death penalty. What is the death penalty, what is its definition within criminal policy and what are its consequences. Why does the society intermittently open up the death about the possible establishment of the death penalty.

In the following segment we examine the documents and treaties important for international support of the human rights and the abolition of death penalty, how the legal definition of death penalty developed over time and we also mention treaties of purely regional character, which hold importance for EU exclusively and its position towards the death penalty.

This leads us to ask the question: “What is EU currently doing to ensure the worldwide abolition of the death penalty?”

2 Method

2.1 Criminal policy

In modern society, it is necessary to protect democratic and moral values, as well as the rights and the legitimate interests of individuals and legal entities, and last but not least, the establishment of a constitutional state. For this to happen criminal policy as part of the public policy was established. With the help of criminal policy, state is trying to create a system,

which would lead to the effective protection of interests of the public and to prevent encroachment of the social coexistence. It is generally considered that the level of protection of fundamental human and civil rights and freedoms, which the state is willing and able to ensure is declared in its definition of criminal policy. Criminal policy of the states is influenced by several factors among which we may mention the economic advancement of the state, social environment, cultural traditions and the most important protection of the human rights.

Criminal policy of the state is given expression especially in its criminal legislation, the substantive and procedural systems, arrangement of bodies and institutions providing the application of criminal laws and the practical work of these bodies. For this paper we understand policy primarily as activity that leads to setting goals and forms of action in public affairs; we then understand criminal policy as an activity intended to create and use the means of criminal law.

P. Rock describes criminal policy (as cited Soľoníková, 2011) as an organized process, during which ideas of public actors and specialists are transformed into practical precautions executed in the system of criminal policy.

G. Kaiser defines criminal policy (as cited Soľoníková, 2011) as "criminal part of the social protection of legal goods", which uses mainly norms, principles and means of criminal law.

2.2 Punishment

Generally it can be stated that each society creates a certain set of sanctions in response to undesirable behavior, for violation of established norms and values of the said society. With the development of the law a similar system is created, the criminal justice system, which determines what socially harmful acts are crimes, while also establishes penalties for committing these crimes. Generally, with the punishment a compliance is enforced with certain social norms (Brooks, 2012).

Punishment is thus a particular tool of state enforcement, serving to protect society and at the same time, along with political and economic tools important for the proper performance of the functions of the state. Primarily punishment should meet the requirement of an effective and appropriate response to the crime committed.

„Punishment can be defined as a legal consequence of the crime, expressing a negative assessment of the offender and the offense, acting as a tool of achieving the purpose of criminal law, executed exclusively by criminal court, whose performance is enforceable by state power" (Kuchta, J. Schelle, K., 1982, p. 17).

In modern societies there are several kinds of penalties: imprisonment, house arrest, community service, forfeiture, fines, confiscation of assets, prohibition of activities, residence ban, loss of honorary titles and awards, loss of military rank and expulsion, but in some countries, in addition to the mentioned even today, there is also the death penalty, which can be executed in several possible forms.

2.3 Death penalty

The death penalty is irreversible and absolute punishment and in terms of both theory and practice is the highest form of punishment because there is no greater punishment than the death penalty.

The death penalty is usually applied in cases of the most serious crimes, but unfortunately many people in the world face the death penalty for absurd crimes such as political or religious beliefs - even for atheism, sexual orientation, etc., and often the execution of particularly brutal methods such as beheading, stoning, beating, hanging etc.

Death penalty is one of the possible punishments for the offender which was formed in the hundreds of years old development of the penal system and which has its place in the system of criminal penalties until today even though the first abolition of the death penalty happened in ancient Rome. „In this often very complex system of criminal sanctions, death penalty played undoubtedly specific role as the maximum punishment or absolute punishment now referred to as exceptional punishment“ (Kuchta, J. Schelle, K., 1982, p. 22). Thus, it is known because of its finality – after the execution of the death penalty it is not possible for potential remedies in (the) case of a conviction of an innocent man, in the case of judicial error which often ends up as judicial murder

In many countries of the world during the 19th and 20th centuries death penalty has become totally or partially banned, or at least in practice not performed punishment of perpetrators of serious crimes. As stated by Kuchta and Schelle (1982) „It is generally recognized that, especially in unconsolidated societies criminal legislation can not abandon the death penalty if it does not wish to weaken their efficiency. It is through the death penalty that superiority of the state over its individuals can be best manifested“ (p.24).

"The question of the death penalty today is among the issues of criminal policy, as evidenced by the non-uniformed attitude of the countries worldwide. Generally it can be said that capital punishment meets with the rejection of large part of professionals, while rest of the society often favors the death penalty" (Navrátilová, J., 2010, p.256). In some states it even leads to its reintroduction, or to frequent debates over this possibility. Typically, if someone commits extremely brutal and violent crime, it revives a public debate whether it would be appropriate to reintroduce the death penalty as a legal means to punish these offenders.

2.4 International perception of the death penalty

The death penalty is in the attention of many international organizations and its legislation had to be established in international treaties. From the beginning these acts of international law were for recommendation purposes only and states governed by them at their discretion, but today they are mostly, for States acceding to them, mandatory.

Universal declaration of human rights is the most known document governing human rights and is a creation of the United Nations (UN), adopted by its General Assembly on December 10, 1948 in Paris.

The declaration does not directly modifies the death penalty, but contains important articles concerning the right to life and the refusal of the granting of cruel punishments.

Article no.3 claim that: „Everyone has the right to life, liberty and security of person“ (The Universal Declaration of Human Rights, 1948). Then Article no. 5 claim: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.“ (The Universal Declaration of Human Rights, 1948). Although the declaration does not explicitly mention the death penalty, it was an important step forward for its further international legislation.

Regarding the actual abolition of the death penalty there are these four most important international agreements

The first is the International Covenant on Civil and Political Rights, which, together with the International Covenant on Economic, Social and Cultural Rights follows the Universal Declaration of Human Rights.

International Covenant on Civil and Political Rights was adopted by the UN in 1966 in New York and for the contracting parties is not a mere act of an advisory nature, but already fully binding legal regulation. Its contents are only civil and political rights, as the name suggests, and in the context of civil rights is already covered legislation relating to the death penalty.

Article no. 6 of this document claim: „Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life... In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime“ (International Covenant on Civil and Political Rights, 1966). The death penalty is prohibited for persons under 18 years of age and pregnant women and it is also prohibited for a situation that its execution means genocide in that case it can not be implemented under any circumstances. The following Article no. 7 claim: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation“ (International Covenant on Civil and Political Rights, 1966).

The second one is the Second Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter ICCPR), adopted by the General Assembly December 15, 1989 and effective as of July 11, 1991. This agreement is also the only one of global nature. It introduces the abolition of the death penalty but allows states to retain the option of imposing the death penalty in time of war, if they ask for such possibility in time of accession or ratification of the document. A party can become each Party of ICCPR (Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989).

2.5 European perception of the death penalty – European Union and the death penalty

The following contracts are not of international nature but strictly European and are supportive contracts for the European Union.

Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms has effect on European soil and was adopted by the Member States of the Council of Europe in Strasbourg on April 28, 1983 and entered into force on April 1, 1985. This protocol abolishes the death penalty but, like the Second Optional Protocol of the ICCPR, leaves the possibility of exception: In the following situation Article no. 2 claim: „A State can make provision in its law for the death penalty in respects of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the secretary General of the council of Europe the relevant provisions of that law“ (European Convention on Human Rights Sixth Protocol to the Convention, 1983). Articles no. 3 and no. 4 respectively claims that no derogation or reservation from the provisions of this Protocol shall be made. Article no. 5 then claim that any State may specify the territory or territories to which this Protocol shall apply and any later day may any State extend the application of this Protocol to any other territory specified in the declaration (European Convention on Human Rights Sixth Protocol to the Convention, 1983).

It continued with protocol no. 13 to the European Convention on Human Rights, which was adopted by the Member States of the Council of Europe May 3, 2002 in Vilnius and is valid from July 1, 2003 and is abolishing the death penalty in all circumstances (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, 2002).

In the founding documents of the EU, ie in primary law, until the Treaty of Lisbon we would find only very limited references to human rights protection. Since the protection of human rights were not among the original objectives and purposes, in which Community originated, we will hardly find any references to human rights in the founding documents (Šišková, N., 2008). Moreover, it is important to realize that since the beginning of the European integration efforts after the second world war the Council of Europe existed, for which, on the contrary, the protection of human rights has been the leading agenda.

The first significant shift on the issue of protection of human rights constituted the Single European Act in 1986 within which this commitment was contained in the preamble of this document. The biggest "boom" in the human rights policy of the EU are the 90th and 00th years. It is connected partly with changes in the international environment, but it also reflects the dynamics of the whole European integration.

In the Treaty on European Union (the Maastricht Treaty) was first mentioned some protection of the human rights contained directly in the text of the Treaty, but the issue of the death penalty has yet to be mention. Part of the Amsterdam revision is the Declaration on the abolition of the death penalty, which refers to the European Convention on Human Rights and Fundamental Freedoms. The statement notes that in the Member States, capital punishment has been ceased and the Union hereby encourages the Member States to its formal repeal.

In the year 2000 the Charter of Fundamental Rights of the European Union was drafted. Its original legal binding was however nonexistent, because it was attached to the Nice Treaty as

a non-binding political declaration. Thanks to Lisbon Treaty it later become the primary source of European Union law, however formally it is a separate document and not a part of Lisbon Treaty. Article 2 claim: Everyone has the right to life. No one shall be condemned to the death penalty, or executed (Charter of Fundamental Rights of the European Union, 2000). So here it is finally a legal regulation of absolute prohibition of the death penalty in all cases.

In the 2012 the EU's first Strategic Framework on the Human Rights and Democracy- sets out priorities was launched, principles and objectives designed to make better effectiveness and consistency of EU human right policy as a whole. With this new strategic frame work EU has confirmed its commitment to promote and protect all human rights. Guideline provides an agreed base for collective effort which includes EU Memberstates and EU institutions (European Union Strategic Framework and Action Plan on Human Rights and Democracy, 2012).

In July 2015 a new action plan was adopted for the period 2015-2019 based on the examination of the first plan and the policy guidelines of the High Representative of the Union for Foreign Affairs and Security Policy Frederici Mogherini. In both plans it is clearly defined that the EU will continue its long-standing campaign against the death penalty and also in the campaign against torture and cruel, inhuman and degrading treatment through political and human rights dialogues, support to partner countries and independent national prevention mechanisms.

Under these measures EU will be working in close cooperation with the UN, regional organisations and civil society, promote the ratification and implementation of its Optional Protocol (OPCAT), and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (European Union Action Plan on Human Rights and Democracy, 2015).

On the official website of the European Union- EUROPA all information about the attitude towards the death penalty is presented. The European Union holds a strong and principled position against the death penalty; its abolition is a key objective for the Union's human rights policy. Abolition is, of course, also a pre-condition for entry into the Union. Former EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission – Catherine Ashton declared: “Since 1983, when the European Parliament (EP) began adopting an annual report and resolution on human rights, this House (EP) has done more than any EU institution to focus on the issue. So while we may sometimes disagree about how best to champion the respect for human rights globally, we stand united in our aim: to see a freer world, where people's dignity is respected – wherever they may be from– and for the EU, and the External Action Service in particular, to play a key role in supporting people's struggle for their rights” (Ashton, C., 2012).

Member states of the European Union have identical opinion on the subject of the death penalty. European Unions argument about abolition of the death penalty is based on the basic dignity and the inviolability of the every human person.

2.6 European Union and Third world countries

Council of Ministers adopted the main lines of policy to this topic on the third of June 1998 in Luxemburg - Guidelines to EU policy Towards Third Countries on the death penalty (Schmidt, J. R., 2007, p. 126-127). This document is a key document for the European Union policy in the fight against death penalty. This document formulated the basic standpoint of the European Union, also expressed short and long term goals of the policy, assigned appropriate instruments for achieving these goals and determined the minimum standard. The document refers to the European Union activities in the framework of the United Nation and also in other international organizations, especially in organizations for regional development such as Council of Europe and the Organization for Security and Cooperation in Europe. European Union did clearly included abolition of the death penalty in this document, because abolition of the death penalty will positively contribute to the developing of human dignity and progressive development of human rights. Its goal is defined as a universal abolition of death penalty in the long term whilst European Union will try to convince the states, where death penalty still exist, that its implementation should be limited and in accordance with the minimum standards that were precisely stated in attached document.

2.7 European Union policy in respect to death penalty in Third world countries

We can divide instruments of this policy into two groups, general and individual. The general instruments are demarches and public declarations while individual instruments are special demarches in individual cases (Clapham, A., 2002, p. 628). General demarches of European Union have the task to raise awareness about death penalty in the dialogue with third world countries and call them for abolition of death penalty or at least for moratorium of death penalty. In the case that country insists on persistence of death penalty European Union will promote demarche, so that the punishment will be transparent and in compliance with the minimum standards. General demarche is directed to a third world country even in the case of inconsistency within the death penalty policy of this country, end of moratorium is coming or in the case of re-introduction of death penalty into legislative. Demarches or public declaration are also issued when country is taking steps towards abolition of the death penalty as an appreciation of that process (Clapham, A., 2002, p. 627-683).

The individual demarches are focused on the possible misuse of the death penalty, which violates minimum standards. European Union is also pointing out the problem of death penalty in many other ways. For example the actions which are not aimed directly to the third world countries are: the support of international organizations, taking appropriate steps for persuasion of countries to ratify and compile international standards related to death penalty, submission of this issue in international forums, cooperation with civil society which includes legal information and similar (Clapham, A., 2002, p. 627-683).

2.8 Amnesty International death penalty - 2015

Highest number of executions in 25 years

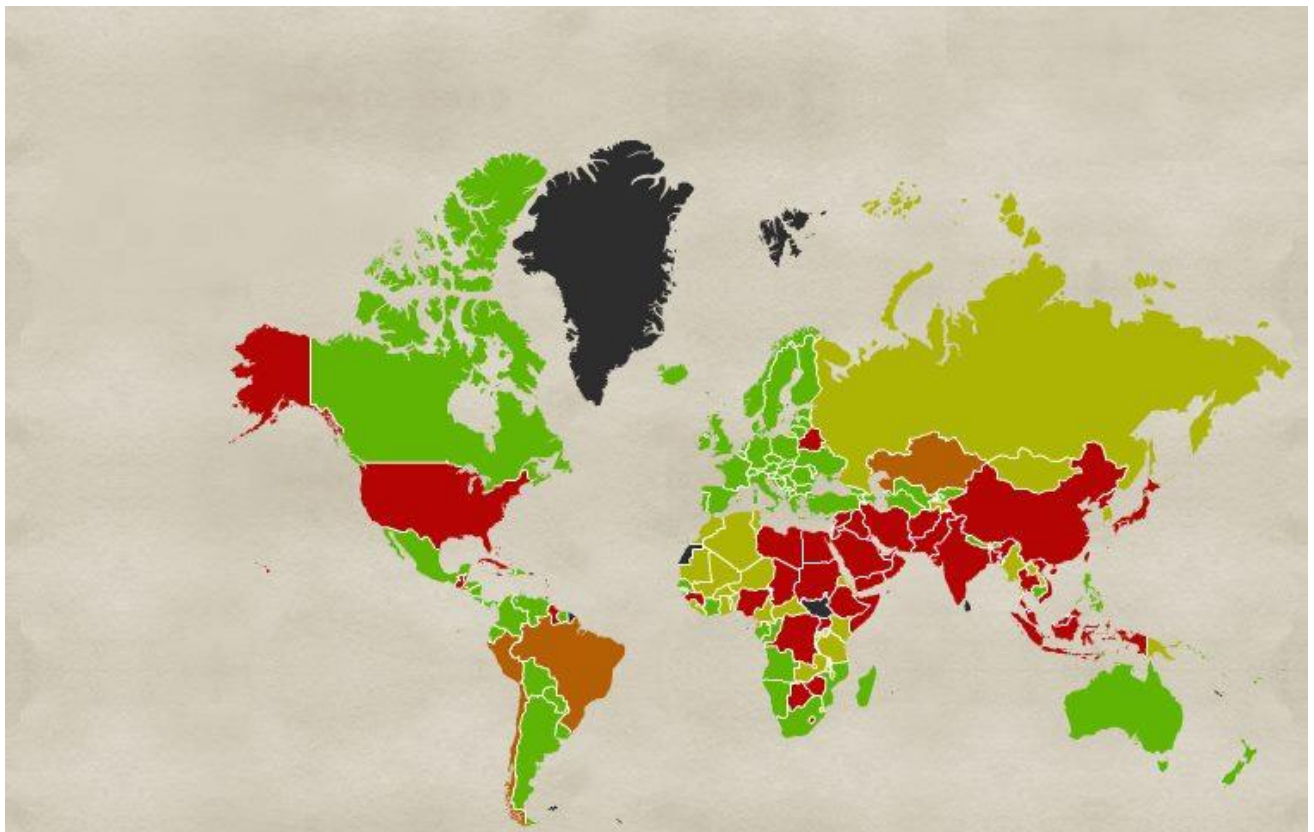
Amnesty International annual report recorded the highest number of death penalties in a quarter-century in 2015. Number rose by 54% compared to the year 2014 since 573 (1634 in

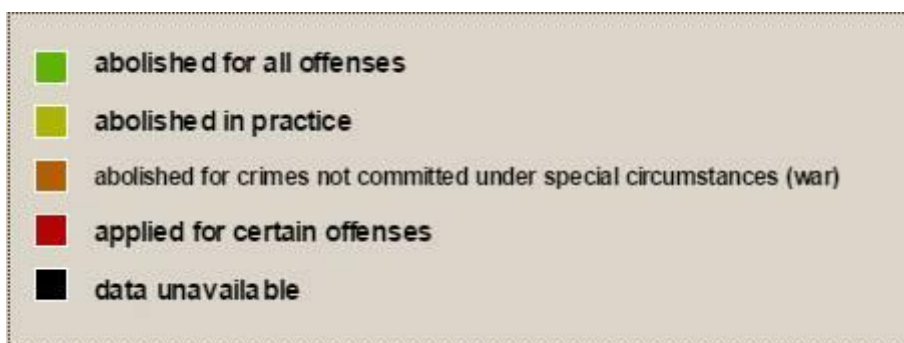
total) more confirmed executions happened. It is essential to mention that China is excluded from these numbers because their executions remain as a state secret. China is also considered to be at the top of the charts considering executions. Out of 1634 confirmed executions 89% happened in 3 countries: Iran, Pakistan and Saudi Arabia. During the year 2015 four countries expunged the death penalty from their law books for good (sothat): Madagascar, Fiji, Suriname and Congo. Today more than half of the world countries are no longer executing people (in practice), but the number of countries that executed people rose from 22 in 2014 to 25 in 2015. 6 countries resumed executions as opposed to the year 2014: Bangladesh, Chad, India, Indonesia, Oman and South Sudan. Mongolia adopted a new Criminal Code outlawing the death penalty for all crimes in December which will enter fully into law in September 2016. In confirmed executions Iran is the leader with the number of executions (is) 977, mainly for drug-related crimes.

Europe: Belarus remains the only country in the region to use the death penalty.

In 2015 no executions were recorded, at least two new death sentences were imposed. In 2016 Belarus has executed one person and condemned four more to death.

In 2015 almost 2000 people were sentenced to death and over 20 000 prisoners remain on death row at the end of the year 2015 (Amnesty International, 2016).





Picture: This map is representing attitude of the various states towards the death penalty (Amnesty International)

3 Results

With the analysis of international contracts between European Union and other organizations and States and the contracts concerning EU only, we can say that EU's policy about human rights and fundamental freedoms was present long before today, however the campaign towards global abolishment of the death penalty started recently. EU wants to expel the death penalty as a punishment for the crime and this cannot be explained in terms of economic gain because it is more likely that it will harm trade relations instead of improving them.

The EU considers that abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. Where relevant, the European Union will raise the issue of the death penalty in its dialogues and consultations with the third world countries. Elements in these contacts will include:

- The EU's call for universal abolition of the death penalty, or at least for a moratorium.
- Where its use is maintained, the EU will emphasize that states should only use the death penalty in line with the provisions contained in the minimum standards based on the provisions contained in international human rights law
- Where states insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met:
- Capital punishment may be imposed only for the most serious crimes; the death penalty should not be imposed for non-violent acts such as financial crimes, religious practice or expression of conscience.
- Capital punishment may not be imposed on:

- Persons below 18 years of age at the time of the commission of their crime
- Pregnant women or new mothers;
- Persons who have become insane.

Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. The death penalty should not be imposed as an act of political revenge.

EU uses general and individual instruments to abolish death penalty. General instruments are various demarches and public statements, which are addressed to the whole world and its role is to raise awareness about the death penalty and to conduct a dialog with the countries which uses the capital punishment. Individual instruments are specific demarches which are applied in factual (specific) cases.

We reviewed the current state of the abuse of the death penalty based on the Amnesty International report. In the year 2015 they recorded substantial increase in the executions despite the fact, that currently more than half of the worlds countries are no longer executing people. Almost 2000 people were sentenced to death and over 20 000 prisoners remain on death row at the end of the year 2015.

4 Conclusion

This paper has discussed the role of criminal policy in modern society, what the punishment is used for and why it is important for maintaining smooth functioning of the state and to keep society safe. We mention various degrees of the punishments which brings us the topic of this paper, the death penalty. What is the importance of the Human Rights and Fundamental Freedoms. We discussed what the European Union does to abolish the death penalty and why is it so important in a global measure. As it is written in the Universal Declaration of Human Rights: “Everyone has the right to life, liberty and security of person.”(Article 3). This is one of the most crucial statements concerning the death penalty.

The main question was “what is the European Union presently doing to abolish the death penalty globally and why?” The objectives of the EU concerning the death penalty abolition include: introducing a moratorium as a first step towards abolition; calling for the restrictions on death penalty where it is still used; the EU’s intervention on individual cases; allowing nongovernmental organizations to run campaigns for abolition of the capital punishment.

It should be noted that the EU is not the only actor in the campaign of the abolishment of the death penalty, international organizations like the Council of Europe, NGOs, other states and regional groups are also included and are actively promoting the human rights and abolishment of the death penalty

EU also is trying to make impact on other international organisation such as United Nations as it has special status in the UN meetings but it cannot act like one entity, instead its members states can decide to work together. EU had great contribution to the UN resolution on moratorium on the death penalty and its cooperation with the Council of Europe showed that abolition of death penalty is gradually accepted as an international standard. As a normative power EU is using mostly diplomatic and political instruments and incentives to exercise pressure on the addressed country and its government. These tools can be a promise of accession or association, institutionalisation through regional partnership and political dialogues at bilateral level.

As it is clear from the statistics of Amnesty International - despite successful efforts to reduce the number of countries carrying out the death penalty, the number of people executed increased in 2015 by more than 50 % and it is therefore very important to continue in the efforts to abolish the death penalty globally.

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