

Abolition of the death penalty: why and how¹

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Q1.

Please tell us about yourself and your current job. What is the very reason why you are extremely dedicated on this specific issue of the abolition of death penalty? Please let us know your story and passion towards this issue.

I joined the Council of Europe in 1999. Since 2017, I have been heading the Coordination and International Cooperation Division in the Council of Europe's Directorate General of Human Rights and Rule of Law. In this capacity, I am responsible amongst other matters for the Organisation's work on supporting abolition to the death penalty worldwide. Before that, I held responsibilities in the field of cooperation, supporting member states to fulfil their obligations in human rights and rule of law areas. Previously, I had worked for the United Nations as a Human Rights Officer for the Special Rapporteur for the former Yugoslavia, Tadeusz Mazowiecki, and as a Research Officer at the International Criminal Tribunal for the former Yugoslavia. I hold a master's degree in comparative public law from the Panthéon-Sorbonne University and was called to the Paris Bar in 1992. I am a Parisian of Yugoslav origin. Apart from my work, I have written two novels and a collection of short stories, not yet published.

I cannot remember when I first became aware of the fact that such a thing as the death penalty could exist in my country, France. However, I recall that, as a teenager, I felt that such a punishment was terribly inhumane and unjust. Indeed, how could the state decide on the life and death of a person? How could the state behave in the same manner as the criminal it was supposed to punish for his acts? Already at that time, I had a deep sense of justice and believed in two things: 1. the state should give the example as to what should be proper behaviour; 2. the state was stronger than the individual and it had the responsibility to show restraint when exercising power and providing justice.

I still remember the presidential campaign of 1981, in which the candidate for the Socialist Party, François Mitterrand, included abolition of the death penalty in his electoral programme even though at the time, 62% of the French population was in favour of capital punishment. There was a very famous TV show, *Cartes sur Table*, during which he said loud and clear that he would abolish the death penalty if he were elected. Many people were in shock because they thought that this was an incredible risk he was taking, knowing the position of the majority on this very sensitive question at the time. Nonetheless, François Mitterrand was elected on 10 May 1981. Parisians, including my family, went out to celebrate his victory, ignoring the huge storm, which had hit the capital. On 17 September that same year, his Justice Minister, Robert Badinter, a lawyer who devoted his life to the cause of abolition, made an unforgettable speech at the National Assembly, which led to the adoption of the law abolishing the death penalty by 363 votes in favour of and 117 against abolition. Both men showed exceptional political leadership and courage, ignoring public opinion for the sake of humanity and justice.

This was an incredible moment for France, which preceded by few weeks another fundamental development for its democracy, when it accepted the right to individual application before the European Court of Human Rights. Again, this happened thanks to the political will and action of Mitterrand and Badinter.

¹ All views expressed in this publication are personal and do not necessarily represent the official views of the Council of Europe.

Perhaps because of my origins, I have always felt a European, and it seemed only natural for me to join the Council of Europe after I had qualified as a lawyer and launched my professional career at the UN. The Council of Europe is, above all, about preventing human rights violations, protecting and promoting them. This is achieved though looking collectively for solutions to common problems. Of course, human rights challenges do not stop at European borders, and this is the reason why I strongly believe in dialogue with countries which still keep the death penalty in their law and practice - such as two of the Council of Europe observer states, Japan and the United States, as well as two of the countries covered by the policy of the Council of Europe towards neighbouring regions, Morocco and Tunisia - to encourage them to follow the path towards abolition taken by an increasing number of countries in the world.

For over twenty years, the case of Belarus has been a particular concern for me, and I have devoted a lot of my time and energy trying to achieve abolition of the death penalty there (together with many others, including very courageous Belarus NGOs, which, at the time this text is written, have been closed down by the authorities and whose members are either imprisoned or in exile). It is important to recall that Belarus' special guest status in the Parliamentary Assembly of the Council of Europe (PACE) was frozen as a result of the 1996 Referendum, which allowed Alexander Lukashenko to stay in power beyond the two mandates provided by the Constitution. In the same referendum there was a question as to whether or not the death penalty should be abolished. At the time, more than 80% of the voters voted for capital punishment to stay. At that time, the only alternative was 15 years' imprisonment. Since then, life imprisonment has been introduced into the Criminal Code.

Belarus is the typical example where the authorities use public opinion as a curtain to hide a lack of political will. Lukashenko is openly a proponent of capital punishment. There is also hypocrisy as regards the alleged concern for the victims. There are actually no policies in place to take care of the specific needs of a victim of a crime. The only support is provided by civil society.

The Council of Europe has had a dialogue with the authorities in Belarus and has supported civil society initiatives for over two decades. All the arguments in favour of abolition have been repeated over and over again. The single response received from the authorities has been: "we cannot go against the will of public opinion". One of the unfortunate consequences of the 9 August 2020 elections is that it has prevented further work to support concrete steps towards abolition. However, I remain committed to contributing to the abolition of the death penalty in Belarus so that, after the necessary democratic reforms, it can ultimately join the Council of Europe where it belongs.

Q2.

Most of European States successfully abolished the capital punishment. However, this system did exist in these countries before. What do you think were the turning points or critical events that put the abolition of death penalty on the political agenda in Europe? What made States to abolish the system?

Today, the abolition of the death penalty is one of the fundamental values of the Council of Europe. It has been outlawed in almost all of its member states and no execution has taken place in the geographical sphere of the Council of Europe for nearly a quarter of a century. This was, however, not always the case and the abolition of the death penalty has been a long battle until it became part of the European acquis.

The OSCE has identified six factors that have had an influence in abolition processes across numerous states: the political leadership, the role of civil society organisations, the role of religious groups and of victims' families, the development of public opinion and the impact of international interventions. Legal professionals undoubtedly have also an important role to play, by not requesting the death penalty (for prosecutors) and not sentencing to death (for judges).

The death-penalty free zone that is Europe today – with the exception of Belarus – looked different more than 70 years ago. At that time, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life guaranteed by Article 2 of the European Convention on Human rights, which provided for the possibility of imposing a death sentence following a conviction for a crime for which this penalty was provided by law. At that time, a number of (important) member states still included the death penalty in their criminal codes and also applied it. It was notably the case of France, my own country, Turkey and the United Kingdom. However, from the late 1960s, a consensus began to emerge in Europe that the death penalty seemed to serve no purpose in a civilised society governed by the rule of law and respecting human rights. The Parliamentary Assembly of the Council of Europe played a leading role in the move towards abolition at the initiative of Sweden.

Sweden was one of the few European states that had stayed out of the two world wars and to have avoided the experience of dictatorship. Its society had also thrived without any need for capital punishment. It was therefore natural that the Swedish delegation at the Parliamentary Assembly believed that its model of a death penalty free society could fit the whole of Europe. The Rapporteur who was appointed, Bertil Lidgard, belonged to the conservative group, which was a great advantage to convince his colleagues from the right side of the political spectrum, expected to be the most opposed to abolition of the death penalty. Unfortunately, until 1980, it was impossible to build a European consensus on abolition of the death penalty, the discussions having taken a psychological and emotional turn rather than keeping their political nature.

The turning point happened during a historical debate at the Parliamentary Assembly which concluded with the adoption of Resolution 727 saying that the death penalty was inhumane. One of the highlights of this debate was the observation made by the Assembly President, Hans de Koster, that he was probably the only person in the hemicycle ever to have been condemned to death. As the leader of a Dutch resistance group during WWII, he had been convicted in absentia by a Nazi court during the occupation of the Netherlands. He was not executed because he had managed to remain hidden until the end of the war. The miracle of his physical presence during the debate was weightier than any other argument could have been against the death penalty.

It was important to put the standards in line with this political momentum. Rather than amend Article 2 of the European Convention on Human Rights, the Committee of Ministers decided to draw an additional protocol to the Convention. This was Protocol No 6, adopted in 1983, which stated that “the death penalty shall be abolished” (Article 1). This is the first legally binding instrument providing for the unconditional abolition of the death penalty in peacetime. This text has been ratified by 46 of the 47 member states, the remaining state, the Russian Federation, being committed to ratification.

In 2002, the Council of Europe went further by adopting Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances, in other words also in time of war or of imminent threat of war. Reservations to and derogations from the Protocol are not possible. The Protocol entered into force on 1 July 2003. It has to date been signed and ratified by 44 member states (Armenia has signed it but not yet ratified, while Azerbaijan and the Russian Federation have not yet signed it).

In the meantime, with the fall of the Berlin Wall, there was an unprecedented interest from countries of Central and Eastern Europe to join the Council of Europe. This was a great opportunity to achieve the building of the "common European house" but on the other hand, it was essential, from a legal standpoint, that the basic principles on which the Council of Europe was built should be respected. At the same time, one could not expect states, which had never enjoyed the respect of human rights, to bridge the gap from authoritarian/totalitarian rule to democracy in just a few years.

Abolition of the death penalty was clearly part of this dilemma. All the states knocking at the door of the Organisation still had the death penalty in their criminal codes, and some were applying it as well. Because it would have been difficult to require abolition by national parliaments at once, where it was uncertain that the requisite majority would be reached, the Council of Europe found a compromise, requiring these states to introduce a moratorium on executions. This solution worked well but required close follow-up and monitoring.

It should be said that the abolition of the death penalty has been achieved through a top-down approach in most Council of Europe member states. The experience of Central and Eastern countries has been diverse. In some cases, abolition was undertaken with enthusiasm, in others, with indifference. In a few cases, such as in Albania and Ukraine, there was resistance. In Ukraine, executions were carried out until 1997, that is two years after it joined the Council of Europe. The Council of Europe had threatened that it would suspend Ukraine's membership and eventually, it was the Constitutional Court of Ukraine which saved the day in December 1999, by ruling the death penalty to be unconstitutional.

The Constitutional Court of Russia has also played a role in achieving de facto abolition. In 1999, it issued a temporary stay on any executions, ruling that no death sentence could be passed until all regions of country have jury trials, since according to the Constitution, a death sentence may be pronounced only by a jury trial, which were not yet implemented in some regions of the country. In 2006, the Duma extended both the implementation of jury trials in the sole remaining region (Chechnya) and the moratorium on the death penalty by three years, until early 2010. Shortly before the end of this moratorium, in 2009, the Constitutional Court extended the national moratorium "until the ratification of Protocol No 6 to the European Convention on Human Rights". The Court also ruled that the introduction of jury trials in Chechnya was not a valid precept for lifting the moratorium. Ratification of Protocol No 6 and of Protocol No 13 are still pending but the de facto abolition of the death penalty in the Russian Federation is unquestionable.

Although public opinion was not in every case clearly in favour of abolition, it did not result in any major objections once abolition was introduced. One has to note that on the occasion of particularly gruesome crimes, very few – usually from the extreme right – are those who ask for the re-introduction of the death penalty.

Indeed, public opinion is volatile. Its response as to whether it is in favour or not of the death penalty will depend on the way the question is asked, on the moment when it is asked. The answer is likely to be different if it is asked after a gruesome crime has been committed. Also, there are questions which are never asked: are you in favour of torture? Are you in favour of women having the right to vote? So, why ask the public if it is in favour or against the death penalty? Invariably, this leads to political instrumentalisation.

The risk of any serious initiatives towards the re-introduction of the death penalty in any Council of Europe member state is considered to be low. In reality, one can see that when the issue of re-introduction is used by the authorities, it is solely for internal purposes as a topic to distract from real difficulties, such as economic crises.

However, one should not let one's guard down because dormant support for the death penalty may still exist in some member states and it is important to dry out from the outset the ground for populist calls for reintroduction. For this reason, it is important to raise the awareness of youth in abolitionist countries to make them conscious of the atrocious characteristics of the death penalty, so as to avoid the creation of any fertile environment for arguments on its reintroduction.

The question of the abolition of the death penalty remains high on the Council of Europe's political agenda. Since 2001, the Committee of Ministers has held regular exchanges of views on the abolition of the death penalty in all member States as well as its observer or candidate States. The PACE has a rapporteur on abolition of the death penalty who reports regularly to it.

For the Council of Europe, abolition does not stop at Europe's borders. This is the reason why the Heads of State or Government called for universal abolition at the Council of Europe's Second Summit in 1997. Universal abolition can only be achieved by joining efforts with other international organisations, and this has been a key element of the Council of Europe's strategy for outlawing this cruel punishment in the minority of countries that still retain it. The UN, the OSCE and the EU are major partners in this respect. The Council of Europe supports the biennial United Nations General Assembly resolution calling for a worldwide moratorium on the use of death penalty. Also, the Council of Europe and the European Union have teamed up to encourage all countries to abolish death penalty and join the global Alliance for Torture-Free Trade. In addition, in June 2021, the Committee of Ministers adopted a Recommendation "on measures against the trade of goods used for the death penalty, torture and other inhuman or degrading treatment and punishment" (Recommendation CM/Rec(2021)2). This demonstrates once again the commitment of the 47 member states against using the death penalty and torture.

In less than three decades, an issue that was considered as a "non-starter" has now become a "must" for all European democracies. Only one country in Europe, Belarus, is not a member of the Council of Europe. This is for a number of reasons and notably because it has not yet abolished the death penalty. Any attempt to reintroduce the death penalty would be the red line not to be crossed by any state wishing to remain a Council of Europe member state².

² On the early history, information taken from "Abolishing the death penalty in Europe" by Allard Plate in *Europe: a human enterprise – 30 stories for 70 years of history 1949 – 2019*, Council of Europe, 2019.

Q3.

There are different approaches and understanding when it comes to the issue of death penalty from one region to another. What do you think are factors of these differences? Historical, cultural, religious, or something else?

The position of the Council of Europe's, as well as that of the European Union, is that abolition of the death penalty is only a question of political will, nothing else. Historical, cultural and religious differences are not relevant to explain the reasons why the death penalty is kept in certain countries. The fact that in 2020, no executions took place in 176 countries, representing 91% of UN member states is evidence to that. However, one should note the close relationship between dictatorial and totalitarian regimes and the use of the death penalty. Indeed, the highest number of executions in the world happen in Saudi Arabia, Iran and China (where the figures remain secret). Democracies, such as Japan and the United States, which use the death penalty are the exceptions rather than the rule.

Q4.

Not only cultural or ethical differences, there are also institutional differences in every country. For instance, it is extremely rare in Japan that the police will fire the gun when attempting to arrest or neutralize criminals. On the other hand, police officers in some countries are more prone to resort to guns, and it eventually leads to the death of the criminal. Facing to this difference, there could be an opinion that some of criminals of atrocious crimes are already deceased when being arrested. For those who think like this, it looks like the death penalty is replaced by the death of criminals upon arrest. What do you think about this standpoint?

The question of the possible use of lethal force by law enforcement forces as a de facto substitute for the death penalty is a very interesting one. The answer can be found in the case law of the European Court of Human Rights.

The right to life, protected under Article 2 of the European Convention on Human Rights is an absolute right which admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions. Having regard to its fundamental character, Article 2 of the Convention also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive part.

The direct consequence of this is that law-enforcement bodies have a duty to protect the right to life. This is different from the death penalty, which is a sentence for a crime. Thus, any use of force committed during an arrest will be compatible with European standards only when it is used to prevent escape or to prevent harm to the police officer or another person. It needs to be strictly necessary for these purposes. It is not therefore intentional killing in the way that the death penalty is. Where force is used deliberately to kill and not for these purposes, such as, for example, under a "shoot to kill policy", this would be a form of extra-judicial execution, contrary to Article 2 of the ECHR and akin to the death penalty.

Q5.

Even if a person thinks that, logically and theoretically speaking, the death penalty is not something right to do, there might be some emotional unconvinced feeling remained that an extremely atrocious crime (random mass killings, child abuses, etc.) can be compensated only by the life of perpetrators. If you were to face such emotional struggle, how would you talk to them?

The question should rather be: "how should the state face the emotional struggle of those who are particularly affected by an atrocious crime?", because only the state can deliver justice. What individuals feel or believe is irrelevant. Actually, there is no place for emotions when judging a crime, be it the most atrocious one.

The arguments against the death penalty are well-known. It is cruel, irreversible, discriminatory. It has no restorative effect on victims of crime. The death penalty is not dissuasive, it is ineffective, incompatible with fundamental rights, socially unnecessary and morally unacceptable. In some countries, the death penalty is used as a tool of political repression. Killing to punish perpetuates a cycle of senseless violence and creates new trauma. Not only has the death penalty no soothing effect on the relatives of the crimes' victims, but it spreads the suffering and the trauma to other people, such as the relatives of those sentenced to death and/or executed, the members of the jury and the legal professionals involved in the case. A state cannot claim to be delivering justice if it annihilates human dignity by using violence.

All crimes, including atrocious ones, such as terrorist crimes, should be confronted by law, only by law, without any naive optimism nor limpness. Even if the feelings of hatred and revenge are natural in certain circumstances, the only possible acceptable reaction when a crime has been committed is to wish for a fair trial and a punishment which does not violate human dignity. Ensuring a fair trial with the respect of the rights of the defence and those of the victims, with a proportionate sanction, is the state's responsibility. If the state does not respect the Rule of Law, it is no better than those it combats. What distinguishes civilization from barbarity, is the Rule of Law, the law which governs life in society, securing the fundamental rights that have been elaborated over centuries by democracies. The use of the death penalty is a primary, instinctive reaction. Human life is priceless. No one is entitled to suppress life from a human being, not even the state. Also, the death penalty does not kill the crime. Clearly, it has no deterrent effect. As Robert Badinter, said "a criminal, when he commits a crime, does not do it with the criminal code under his arm".

It is also interesting to note that the Japanese government uses the argument that, since there is no sign of decline in the number of atrocious crimes - such as mass murder and murder in the case of robbery - being committed, it is unavoidable to impose the death penalty on the offenders who have committed such crimes. This statement itself shows the absence of any deterrent effect of the death penalty. Indeed, if it had such an effect, wouldn't the rate of serious crimes be low in Japan?

Q6.

Likewise, it is logically understandable that executing the perpetrator does not alleviate the grief of victims' family and friends. However, it is not always the case that emotions can be dealt with in a logical manner, especially when an important person was killed by someone. Some cannot bear the fact that, if the death penalty does not exist, the perpetrator might be given another chance of living a normal life, whereas their loved one will never be back because of the perpetrator. In such an extreme case, it is highly possible that the family want the perpetrator to pay for what he/she has done with his/her life. How would you react to these emotions and opinions?

It is important to underline that the absence of capital punishment does not mean a lenient punishment. Serious crimes must be punished severely and most of the criminal legislation in the world provides for life imprisonment. Living with the weight of the atrocious crime committed is in itself a punishment for the perpetrator.

Eliminating the source of the crime by executing the criminal will not eliminate the grief felt by the relatives of the victims. Moreover, the death penalty can actually be an obstacle to discovering the truth.

Indeed, not a single justice system is immune from miscarriages of justice or other errors. When hard exculpatory evidence, such as DNA, is discovered, it is too late to exonerate the person who has already been executed. For example, as of 2011, 17 death row inmates in the United States were exonerated by DNA evidence found after their convictions.

With terrorism cases, families and friends of victims want to discover the truth. They would rather want life imprisonment for the perpetrators so that the convicted can be 'heard' in order to learn from it and further the fight against terrorism. This is what has been happening with the trial of "the 13 November 2015 attacks" in Paris, in the context of which not a single victim or relative has regretted that there is no death penalty to be imposed on the terrorists. Their only interest is to learn the truth to understand why such a horror happen so that it can be used to prevent further terrorist attacks.

Certainly, in the US, and in other countries as well, trials in which the death penalty might be an outcome have generally proven to be very lengthy and expensive. Instead of letting the victims' relatives and friends find closure, they are put through a long process focusing mainly on the punishment and not the truth. One should not overlook the fact that the funds allocated to death penalty trials could be used instead for other pending/unresolved cases where the truth has not yet been discovered.

Again, in the US, there have been many instances where the economic, social, racial and geographical biases proven to be applied in cases of death penalty has been an obstruction to the discovery of the truth and has led to many miscarriages of justice.

When witness reports are more used than hard evidence in death penalty trials, again, human mistakes lead the truth being obscured.

Relatives of victims of crimes suffer an indisputable loss, which the trial, grieving and support should help them to come to terms with. A severe sanction pronounced against the criminal is part of the process.

An important principle of restorative justice is that every person should have the right after a wrong committed to reintegrate into the society and better her/himself. Indeed, the perspective that a socially useful life remains possible for prisoners is an important objective of justice. The justice system should offer the possibility/opportunity of rehabilitation to perpetrators of offences and should provide reparation in order to restore balance and peace in the community and/or society.

Clearly, each individual is qualified for having another chance in life. Individuals who have carried out life punishments are accounted for to have improved their prior methods of living and have in general made beneficial commitments to the general public. The European Court of Human Rights has even recognized a "right to hope"

in the judgment *Vinter v. United Kingdom*. Therefore, the death penalty is incompatible with rehabilitation.

It should also be noted that every time a death row prisoner walks to his death by appointment there is a recrudescence of bad feelings among the prison population. Resentment against the institution, the wardens and the 'system' rises. The other prisoners (those not on death row) are marked by the death penalty and the psychological effects it has on people. Their rehabilitation becomes more complicated as a consequence, as they see first-hand what the death penalty does to both those enduring it and those carrying it out.

A society which takes care of victims of crimes and their relatives, which ensures a fair trial with a proportionate punishment and provides the opportunities for criminals to reform, change and start a new life, is a society where empathy and justice prevail over violence and revenge.