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## Capital punishment: a theoretical and cooperative analysis

### Introduction

The discussion about the legitimacy and legality of the death penalty crosses social, cultural, religious and historical fields, and, more importantly for the present article, it has both a great influence on, and connection with, the field of law studies.

In the present day, despite, for example, the United Nations' condemnation of the death penalty,<sup>1</sup> there are still a lot of countries that retain the provision of capital punishment in their legislation, and although it has been discussed for decades, there is still space and even necessity to expose the lack of both legal and moral justifications for the death penalty.

Some countries, such as Germany<sup>2</sup> and the United Kingdom,<sup>3</sup> have already completely abolished the death penalty. Others, such as the Russian Federation,<sup>4</sup> do not apply the death penalty in practice, although it is still present in their legislation. There are also

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1 The Resolution 62/149, adopted by a majority of 104 United Nations member states in favor, on 18 December 2007, called for a worldwide moratorium on executions. V. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/62/149](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/149) [access: 20.05.2015].

2 Germany banned the Death Penalty in its current Constitution, which came into effect on 23 May 1949. The Penal Code was formally amended in 1951 and capital punishment was replaced with life imprisonment.

3 In the United Kingdom capital punishment was only truly abolished in 1998, when the House of Lords' amendment to the Crime and Disorder Act 1998, forbade the death penalty for the crimes of treason and piracy with violence. Also, with the ratification of the 6<sup>th</sup> and the 13<sup>th</sup> Protocol of the European Convention on Human Rights, the United Kingdom reaffirmed the rejection of the death penalty.

4 The last execution in Russia was carried out in 1996. And in November 2009, the Russian Constitutional Court ruled capital punishment as unconstitutional. The Constitutional Court of the Russian Federation, Decision no. 1344-O-R/2009, Nov. 19, 2009. The decision extended indefinitely the 13-year-old moratorium on the death penalty. V. <http://www.reuters.com/article/2009/11/19/idUSLJ330478> [access: 2.02.2015].

some countries, such as Brazil,<sup>5</sup> that abolished capital punishment for common/civil crimes, only maintaining it for military offenses.

On the other hand, some countries still have and apply the death penalty, including the United States of America<sup>6</sup> and China, two of the richest, most powerful and, in certain aspects, developed countries, which together with more than 57 nations, form the group of States wherein a person can still lose their life due to the power of a legal, institutionalized penalty. As was mentioned above, a wide range of factors influence this legislation: social, cultural, religious and historical circumstances have a great influence. When it comes to the study of law, in order to be able to thoroughly discuss and form an opinion on the matter of the death penalty, it is indispensable to understand its justification by the most important theories of punishment. Therefore, the present article aims firstly to analyze how the death penalty is applied worldwide, and subsequently discuss the theories of punishment and how they relate to the death penalty.

### **Capital punishment in the world**

Discussion concerning the legitimacy of the death penalty has grown in recent decades: not only is its legitimacy being questioned, but also its morality and utility. Lately, there has been an increase in international efforts to abolish the death penalty and, to this end treaties, decisions and resolutions have been made, all aiming at a moratorium on executions, and ultimately at a complete abolition of the death penalty. An important example is the Optional Protocol no. 2 of the International Covenant on Civil and Political Rights,<sup>7</sup> from December 1989, which states in Article 1:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

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<sup>5</sup> In Brazil, the death penalty was abolished for common crimes in 1889, being applied for the last time in 1876. However, it still exists in the Military Criminal Code, Article 55.

<sup>6</sup> As a Federation, The United States of America has different legislation regarding the death penalty. Some States still have it while others do not. As for the States that have it, they total 32: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. V. <http://www.ibtimes.com/death-penalty-us-which-states-still-practice-capital-punishment-what-methods-they-use-1785124> [access: 2.02.2015].

<sup>7</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

There are also several resolutions of The United Nations General Assembly calling for a moratorium on executions and for a complete abolition of the death penalty.<sup>8</sup> It is also fundamental to highlight: a) the work of the UN Economic and Social Council, which adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty<sup>9</sup> (resolution 1984/50 of 25 May 1984); and b) the contribution of both the UN Human Rights Committee<sup>10</sup> and of the UN Human Rights Council.<sup>11</sup>

In a 2003 landmark decision, the Human Rights Committee held that Canada was obliged to ensure that the death penalty would not be carried out on a proposed deportee. For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out.

Regardless of all the international efforts to reduce and ultimately abolish the death penalty, there are countries that still have it in their criminal codes and legislation. One of the harshest death penalty applications – if not *the* harshest – belongs to China. In fact, three quarters of executions worldwide are carried out in Asia. China alone accounts for 90% of all executions in Asia and executes more people than all the other countries combined. The country executed approximately 1800 people in 2008, but precise numbers are unavailable because of secrecy rules.<sup>12</sup>

In the People's Republic of China there are more than fifty crimes punishable by death. Murder, terrorism, rape, drug trafficking, treason, economic crimes and even burglary are punishable by capital punishment. The methods of execution are both lethal injection and

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8 V. for example, Resolution 62/149, "Moratorium on the use of the death penalty," adopted by the General Assembly on 18 December 2007; Resolution 67/176, "Moratorium on the use of the death penalty" adopted by the General Assembly on 20 December 2012; Moratorium on the use of the death penalty.

9 These set out the most basic guarantees to be observed in all death penalty cases and were endorsed by the UN General Assembly in 1984 by consensus.

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11 It is important to highlight that such a decision had earlier been made by European Court of Human Rights (cf. 1/1989/161/217: *Söring vs. UK*) and it is now extended to life imprisonment without parole. Cf. 04: *Kafkaris vs. Cyprus*, 12.02.2008 (GK) – 21906/ and 9.07.2013 – 66069/09, 130/10 3896/10 (*Vinter u.a. vs. UK*).

12 V. <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2008/asia> [access: 15.11.2014].

shooting. Besides China, the United States of America is another example of a country that still applies the death penalty. Being a Federation, this type of legislation changes from state to state, but currently there are still 31 states that apply the death penalty.<sup>13</sup>

Some studies indicate that capital punishment in the United States is connected with the race of the victim and of the criminal. In 96% of states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both.<sup>14</sup> A study in California found that those who killed white people were over 3 times more likely to be sentenced to death than those who killed black people, and over 4 times more likely than those who killed Latinos.<sup>15</sup> Capital punishment proves to be not only racially biased, but it can also be socially discriminatory.<sup>16</sup>

As for the Muslim world, the practice of capital punishment is still common and most Muslim countries allow its use, including: Egypt, Jordan, Syria, Lebanon, Pakistan, Oman, Qatar, The United Arab Emirates, Iran, Iraq and Saudi Arabia.<sup>17</sup> Crimes in Islamic law are divided into 3 basic categories: Hudud,<sup>18</sup> Qisas<sup>19</sup> and Tazir<sup>20</sup> offenses. Capital punishment is a sanction theoretically available for any of these categories.<sup>21</sup> In Saudi Arabia, for example, the death penalty can be used for adultery, highway robbery, apostasy, sorcery and heresy, among others.<sup>22</sup>

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13 31 states still have the death penalty: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. V. <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2009/americas> [access: 11.12.2015].

14 Professor Baldus report to the ABA, 1998.

15 G.L. Pierce, M.L. Radelet, *The impact of legally inappropriate factors on death sentencing for California homicides 1990-1999*, "Santa Clara Law Review" 2005, no. 46, <http://www.ccfaj.org/documents/reports/dp/expert/radelet.pdf> [access: 4.01.2015].

16 H. Chehata, *A penological critique of christian and islamic justifications of capital punishment*, School of Law, Brunel University, October 2006.

17 V. <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> [access: 16.01.2016].

18 Hudud Crimes are offences for which there are fixed punishments The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death). V. <http://www.oxfordislamicstudies.com/article/opr/t125/e757> [access: 3.01.2015].

19 Qisas is the Law of Equality/Retaliation.

20 Tazir are the type of offences for which there are discretionary punishments.

21 V. above: H. Chehata, *op. cit.*

22 E. Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, "William & Mary Journal of Women and the Law" 2005, no. 507, <http://scholarship.law.wm.edu/wmjowl/vol11/iss3/9> [access: 16.12.2014].

The execution methods also vary, but among them are stoning, hanging, shooting and beheading. In theory, Islam permits the use of the death penalty,<sup>23</sup> but even this permission could not legitimize the death penalty being used as a tool for social and political oppression.<sup>24</sup> Indeed, the death penalty can be used as a cruel tool of racism, as has been shown in the United States of America, and it can also be a means of oppression, censorship and authoritarianism.

In the Americas, since 2003, when Cuba stopped carrying out executions,<sup>25</sup> the USA has been the only country to execute prisoners, except for one case in St Kitts and Nevis, in 2008.<sup>26</sup> Nevertheless, in Central America there are countries that still retain the death penalty in their legislation, such as Jamaica and Dominique. These countries consistently opposed the international initiatives for a worldwide abolition and it seems that they will continue to do so. In this regard, Amnesty International issued a report that contains both a background analysis of the Death Penalty in the region and recommendations for establishing a moratorium on executions.<sup>27</sup>

As for South America, most countries are abolitionists, but some still retain capital punishment for special crimes, such as military offenses.<sup>28</sup> In Brazil, for example, the death penalty has been abolished for common crimes, though it is still included in the Military Penal Code, in articles 55 and 56, which assert that the death penalty will be execution by shooting. However, in order to apply this law, the country would have to be in a state of war. For common crimes, the last execution was in 1876, and since the Proclamation of the Republic, in 1989, it has not been used.

In Europe, the great majority of countries have abolished the death penalty, except for Belarus, which still has capital punishment for common crimes in its legislation. Currently, the abolition of the death penalty is included in the European Convention of Hu-

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23 The Qur'dn mandates that that everyone has a right to life, unless a court of law demands killing: *Nor take life – which Allah has made sacred – except for just cause.*

24 H. Chechata, *op. cit.*, supra n. 45.

25 V. <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2009/americas> [access: 20.11.2014].

26 V. <http://www.theguardian.com/world/2008/dec/23/capital-punishment-human-rights-caribbean> [access: 20.11.2014].

27 V. <http://www.amnesty.org/ar/library/asset/AMR05/001/2012/en/e17a43ad-54d7-4ea2-b93a-9c4d0b4821c1/amr050012012en.pdf> [access: 20.11.2014].

28 Special crimes are those committed under exceptional circumstances, such as crimes committed in war time. Peru, Chile, Bolivia (with the promulgation of the Bolivian Constitution, in 2004, its been argued that the death penalty was tacitly excluded, once it goes against the constitution) and Brazil are examples of this type of legislation, in South America. In the Asian world, Kazakhstan provides another example.

man Rights, more specifically on its Protocol no. 6<sup>29</sup> and Protocol no. 13.<sup>30</sup> Also, within the European Union, the Charter of Fundamental Rights of the European Union, in its Article 2 guarantees the right to life, stating that “no one shall be condemned to the death penalty, or executed.”

## Theories of Punishment

The abolition of the death penalty is an ambition that has strong foundations in human and fundamental rights. Yet the legitimization of such a harsh and final punishment relies on theories and facts that aim to justify it. In the next part of this article, we shall analyze the retributive and the utilitarian theories of punishment, especially in the aspects that concern the possible justification of the death penalty.

### The Retributive Theory of Punishment

An essential characteristic of the retributive theory of punishment is that it conceives of punishment as harm, as suffering, as “retribution” for the evil caused by a crime. Therefore, the imposition of punishment is justified not because of a future purpose, but for the value of punishing the past. Punishment is a criminal’s “just deserts.”<sup>31</sup> And, at the same time, retribution, by its very definition,<sup>32</sup> represents the idea of institutionalized vengeance<sup>33</sup>. One might argue that this theory was sufficiently justified by its defenders, the most notorious being two German philosophers, Immanuel Kant<sup>34</sup> and Georg W.F. Hegel.<sup>35</sup>

Immanuel Kant was in favor of the death penalty, especially for the crime of murder, and he justified it on the ground of just retribution. His thoughts on the death penalty can be exemplified with the following passage, from his book *The Metaphysics of Morals*:

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29 Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty as Amended by Protocol no. II, Strasbourg 28.04.1983.

30 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, Vilnius, 3.05.2002.

31 The idea of just deserts is one of the most important aspects of retribution. It represents the belief of deserving punishment and what is a fair treatment for criminal offenders.

32 Retribution as Punishment inflicted on someone as vengeance for a wrong or criminal act: <http://www.oxforddictionaries.com/definition/english/retribution> [access: 18.05.2014].

33 The State, as the guardian of moral and justice, is the responsible of inflicting punishment.

34 I. Kant, *The metaphysics of morals* (1797), [in:] *Practical Philosophy*, ed. M.J. Gregor, Cambridge 1996, pp. 353–604, *The Cambridge Edition of the Works of Immanuel Kant*, Cambridge Books Online: <http://dx.doi.org/10.1017/CBO9780511813306.013> [access: 15.12.2015].

35 G.W.F. Hegel, *Philosophy of Right*, London 1979.

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any underserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself. Only the law of retribution can determine exactly the kind and degree of punishment.<sup>36</sup>

From the above remarks, it is fair to assume that for Kant just retribution requires the death penalty for the crime of murder. Nonetheless, we may take into account the fact that Kant lived between 1724 and 1804, and perhaps his ideas were more progressive than may seem to us nowadays.<sup>37</sup> Anyhow, the fact is that the death penalty is still a plausible punishment in the present day and the idea of retribution is central to that plausibility.

Both Kant's notion of just retribution and its role in the retributive theory of punishment are not isolated from other defenders of retribution that share the same basis and understandings. As a matter of fact, it is possible to establish the principle that represents the main aspects of a retributive theory of punishment, i.e. the following: "All and only those who commit legal offences may justly receive punishments so long as the punishments are in proportion to the seriousness of the respective crime."<sup>38</sup>

The above mentioned principle can also be extracted from Hart's Model of Retributivism.<sup>39</sup> and even though there is no absolute consensus on the definition of retributivism, the following premises are almost always present in retributive theories of punishment: a) A person may be punished if and only if he has voluntarily done something wrong; b) The punishment must match, or be equivalent to, the wickedness of the offence; c) The justification for punishing persons is that the return of suffering for moral evil voluntarily done is itself morally good.<sup>40</sup>

In this context of classification, we may refer to the above premises as the principle of responsibility, the principle of proportionality and the principle of just retribution, or just requit.<sup>41</sup> Looking closely at this scheme and the theory that it embodies, one can deduce that it excludes the consequences of punishment from analysis, only focusing

36 V. above: I. Kant, *op. cit.*

37 For example, Kant's rejection of torture-executions might be considered as progress in the context of his lifetime, when cruel executions still took place. This is the view of N.T. Potter, Jr., *Kant and Capital Punishment Today*, "The Journal of Value Inquiry" 2002, no. 36, pp. 267–282.

38 D.E. Sheid, *Kant's Retributivism*, "Ethics" 1983, vol. 93, no. 2, pp. 262–282.

39 H.L.A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law*, Oxford 1968.

40 *Ibidem*, p. 231.

41 H.A. Bedau, *Retribution and the Theory of Punishment*, "The Journal of Philosophy" 1978, vol. 75, no. 11, pp. 601–620.

on the immediate deprivation that shall be inflicted on the criminal,<sup>42</sup> the latter being a person who had voluntarily done something wrong.<sup>43</sup>

Perhaps the most evident principle that distinguishes the retributive theory from the other theories of punishment is the principle of just requit, which aims to justify penalties in themselves. As was mentioned before, penalties are not justified by some future good they may bring to society, through deterrence, or by some good brought to the victim by compensation, or even to the criminal through reformation. Similarly, penalties are justified only on the grounds that they are morally good in themselves, regardless of any future benefit or loss.

This discussion grows in importance when we analyze the most severe of punishments, capital punishment.<sup>44</sup> Firstly, we must discuss the idea of proportionality and its aspects, since it is a principle present in most legal systems in the world.<sup>45</sup> Taking into account the general concept of proportion: what would be a proportional penalty for murder? If, to go further into the retributive theory of punishment, we may ask what would be a “just requit” or, in other words, what amount of suffering would be enough for somebody that committed such crime?<sup>46</sup>

Well, according to retribution theories, death is definitely one of the options, if not the best one. It recalls the ancient *Lex Tallionis*: “An eye for an eye.” Clearly a tempting option for a lot of people, including lawmakers, as it appeals to the human emotion of vengeance. However, we should definitely not assume that death is the answer to death, because once we do that, we may as well assume that robbery is the answer to robbery and that rape is the answer to rape. This line of thinking must be rejected, once it threatens the principles and rights that the criminal law must respect, including, of course, the right to life. This the a basic human right, enshrined in the Universal Declaration of Human Rights<sup>47</sup> and solidified as a fundamental right in many constitutions in the world. The death penalty is the ultimate denial and violation of that right.

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42 M. Lessnoff, *Two Justifications of Punishment*, “The Philosophical Quarterly” 1971, vol. 21, no. 83, p. 141.

43 This is one of the points on which the retributive theory contrasts with the utilitarian theory of punishment.

44 Of course some people may argue that life imprisonment is “worse” than the death penalty, because makes people suffer for a longer time. But this author cannot agree with that argument, since capital punishment is the only penalty that is absolute and irreversible.

45 Even though it may be interpreted in different ways, proportionality is a concept familiar to any jurisdiction.

46 The death penalty may be carried out in various ways, including electrocution, hanging, fatal injections, and others. When we discuss the death penalty from the point of view of retribution, we must ask ourselves not only if the death penalty is deserved, but how it should be executed, how cruel should it be.

47 UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, Article 6.

## The Utilitarian Theory of Punishment

The utilitarian theory of punishment is another important theory that aims to justify punishment and, with relevance to the present article, to justify capital punishment. It differs from the retributive theory of punishment on the basis that the utilitarian theory justifies a penalty not as retribution for a crime, but as a way of preventing future crimes.

Therefore, as one of the most prominent exponents of the utilitarian theory of punishment, Jeremy Bentham, would say, punishment is an evil that can only be used if it prevents a greater evil.<sup>48</sup> The idea that punishment breaks or decreases the number of crimes is called deterrence, and it is one of the most important utilitarian arguments in favor of the death penalty.

According to both Bentham and Beccaria, there are three aspects of deterrence that influence the rate at which crimes are committed: a) celerity; b) certainty; c) severity. Therefore, if punishment for a crime is swift, certain and severe, rational people would be deterred from committing the crime, once they measure the graveness that will come to them if they continue with it. Adding to deterrence, we can consider incapacitation, meaning that if the State executes a criminal, it will definitely prevent this person from, for example, murdering again.<sup>49</sup>

In terms of the death penalty, both arguments can be proved wrong, or at least, cannot be proved right. Firstly, an argument against deterrence is that there has been no research, no data or statistics that proved the death penalty deters crimes.<sup>50</sup> Also, eminent criminologists have conducted research to examine whether the death penalty was a greater deterrent than other types of punishment, and their conclusion was that capital punishment is not more effective than imprisonment in deterring murder.<sup>51</sup>

Overall, it has never been proved that capital punishment is an effective deterrent against crimes. In that regard, there was a report released on April 18 by the National Research Council of the National Academies,<sup>52</sup> based on a review of more than three decades of research, and which concluded that studies claiming that the death penalty

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48 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1978), New York 1948.

49 Cf. J.P. Gibbs, *Crime, Punishment and Deterrence*, New York 1975; C. Beccaria, *On Crimes and Punishments*, New York 1963 [hereinafter cited as Beccaria]; J. Bentham, *Principles of Penal Law* (1843), Adelaide 2014.

50 *Deterrence and the Death Penalty*, eds. D. Nagin, J. Pepper, Washington 2012; D. Vergano, *NRC: Death penalty effect research 'fundamentally flawed'*, "USA Today" April 18, 2012.

51 W.C. Bailey, R. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings*, Sociology & Criminology Faculty Publications, Paper 33, 1994, [http://engagedscholarship.csuohio.edu/clsoc\\_crim\\_facpub/33](http://engagedscholarship.csuohio.edu/clsoc_crim_facpub/33) [access: 2.11.2014].

52 V. above: *Deterrence and the Death Penalty*, *op. cit.*

has a deterrent effect on murder rates fundamentally flawed.<sup>53</sup> As a matter of fact, Beccaria himself saw the death penalty as both unnecessary and useless.<sup>54</sup>

As for the second utilitarian argument, i.e. incapacitation, some will argue that executed criminals will never commit a crime again, while at least some of the criminals that were sentenced to prison will murder again, after their release. Here we can also use research to show that the number of repeat murderers is not significant. James W. Marquart and Jonathan R. Sorensen conducted research<sup>55</sup> on 558 offenders that had their death penalty commuted to a prison sentence, or who had been released, after the Furman v. Georgia ruling.<sup>56</sup> The results indicates that convicts on parole do not represent an especially great threat to society, only one out of all the murderers researched committed a second murder while at liberty in society.

Of course, some defenders of the death penalty may still argue that this one murder, or that the few murderers that murder again are justification enough for capital punishment. But that would bring us back to the retributive theory of punishment, since its utility is hardly proved and even less guarantees the happiness of the majority.<sup>57</sup>

In such a way, the majority of arguments in favor of the death penalty can be refuted, both by logic and statistics. To kill as vengeance for a killing, an eye for an eye, is no better than killing in the first place. If we were to follow this type of thinking, we would go back centuries in terms of the evolution of criminal law. Likewise, maintaining that the death penalty is a way of preventing new crimes is an unsure argument, nowhere near strong enough to justify such punishment. Not to mention that the criminal justice

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53 V. the National Research Council's Report Brief, <http://www.deathpenaltyinfo.org/documents/NatResCouncil-Deterr.pdf> [access: 18.05.2014]. The mentioned report concluded: "The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide."

54 C. Beccaria, *op. cit.*

55 J.W. Marquart, J.R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, "Loyola of Los Angeles Law Review" 1989, no. 5, <http://digitalcommons.lmu.edu/llr/vol23/iss1/2> [access: 20.01.2015].

56 The Court decided that the death penalty as it had been applied in the United States until that time violated the prohibition against cruel and unusual punishment contained in Eighth Amendment of the United States Constitution. The importance of this decision relies not only on its outcome, but also on the fact that the Court reached its conclusion based on the evidence that the application of the penalty was unequal, often discretionary and haphazard. Some of the Justices in the majority noted that the death sentence has been disproportionately imposed and carried out on the poor, black, and the members of unpopular groups. *Furman v. Georgia*. 408 U.S. 238 (1972). no. 69-5003. Argued in January 17, 1972. Decided in June 29, 1972.

57 According to John Stuart Mill, "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain."

system, like any other system, can fail, with the risk of executing the innocent, and the fact that this does happen should be reason enough to abolish the death penalty.

## Conclusion

Certainly a reflection on the international and regional work on human rights during the last decades shows that there has been an increasing numbers of States that apply a moratorium on executions, with a turn towards complete abolition. Nonetheless, as shown in the current article, there are countries that still have and apply the death penalty. And they do so with different types of justifications, sometimes based on pure retribution, other times on a utility that, as argued in this article, cannot be proved.

On the other hand, it is accepted that the criminal systems can fail. There were cases when someone was wrongfully sentenced to the death penalty,<sup>58</sup> and others that went even further, when innocent people were wrongly executed by the State.<sup>59</sup> These mistakes can never be amended and it would be naïve to believe that the system will not fail. Moreover, an ultimate case can be made against the death penalty: affirming that there is no morality whatsoever to the death penalty. There is no morality in executing the innocent, or the guilty.

Such a harsh punishment goes against fundamental and human rights, the dignity of the human being, and against the right to life, the most basic human right enshrined in the Universal Declaration of Human Rights<sup>60</sup> and reiterated as a fundamental right in many constitutions in the world. The death penalty is the ultimate denial and violation of that right. Capital punishment is a cruel and inhuman penalty and it is equivalent to any other type of killing, the difference residing only in the fact that it is an institutionalized murder, carried out by the State. And, liking it or not, as an institutionalized type of killing, it is vulnerable to the pressures of power, to the will of the powerful.

In conclusion, the arguments in favor of the death penalty should be rethought. To admit the legality and legitimacy of the death penalty is to accept that innocents will be executed, it is also to give the State a power that opposes our fundamental and human rights, which were fought for and developed over centuries. Be that as it may, attempts at justification can be proved wrong, retribution is only another word for vengeance and the utility of capital punishment has not yet been demonstrated. A complete abolition of the death penalty is the ultimate goal that has yet to be reached, and, contrary to the at-

58 V. <http://time.com/79572/more-innocent-people-on-death-row-than-estimated-study/> [access: 16.12.2014]; <http://www.scientificamerican.com/article/many-prisoners-on-death-row-are-wrongfully-convicted/> [access: 16.12.2014].

59 V. <http://www.deathpenaltyinfo.org/executed-possibly-innocent> [access: 15.12.2014]. Cf. the Lena Baker case as well: <http://www.theguardian.com/world/2005/aug/17/usa.garyyounge> [access: 15.12.2014].

60 UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, Article 6.

tempts at legitimization, the fight for abolition undeniably has strong theoretical, moral and legal justifications.

## Literature

- Bailey C., Peterson R., *Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings*, Sociology & Criminology Faculty Publications, Paper 33, 1994, [http://engagedscholarship.csuohio.edu/clsoc\\_crim\\_facpub/33](http://engagedscholarship.csuohio.edu/clsoc_crim_facpub/33) [access: 2.11.2014].
- Beccaria C., *On crimes and punishments*, transl. H. Paolucci, New York 1963.
- Bedau H.A., *Retribution and the Theory of Punishment*, "The Journal of Philosophy" 1978, vol. 75, no. 11.
- Bentham J., *An Introduction to the Principles of Morals and Legislation*, New York 1948.
- Deterrence and the Death Penalty*, eds. D. Nagin, J. Pepper, Washington 2012.
- Hart H.L.A., *Punishment and Responsibility. Essays in the Philosophy of Law*, Oxford 1968.
- Lessnoff M., *Two Justifications of Punishment*, "The Philosophical Quarterly" 1971, vol. 21, no. 83.
- Marquart J.W., Sorensen J.R., *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, "Loyola of Los Angeles Law Review" 1989, no. 5, <http://digitalcommons.lmu.edu/llr/vol23/iss1/2> [access: 20.01.2015].
- Potter N.T., Jr., *Kant and Capital Punishment Today*, "The Journal of Value Inquiry" 2002, no. 36.
- Sheid D.E., *Kant's Retributivism*, "Ethics" 1983, vol. 93, no. 2.

## SUMMARY

### Capital punishment: a theoretical and cooperative analysis

Among all the different types of penalties that exist in the various juridical systems around the world, capital punishment, also known as the death penalty, is one of the most controversial ones. The discussion about its legitimacy and legality crosses social, philosophical, cultural, religious and historical fields. The present article aims to first analyze how capital punishment is treated in different parts of the world, whether it is present or not, and to later on focus on the attempts to justify such a harsh punishment, by both the retributive and utilitarian theories of punishment.

Keywords: capital punishment, theories of punishment, utilitarianism, retributivism

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