

SIG TUR AD ASTRA

III

EDITORS
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Collection
of student papers
on **Hungarian**
and **Croatian**
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Eötvös Loránd University / Faculty of Law / Department of the History of Hungarian State and Law / 2019

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Patrik SZABÓ: The Philosophical and Legal Perspectives of Capital Punishment

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1. Introduction

Throughout the legal history death penalty has always had a central role. During the ancient times it was used as a usual way of punishment (*poena ordinaria*) and this conception did not change until the era of enlightenment, during which the most influential philosophers and legal thinkers unexceptionally dealt with the institution of capital punishment. Due to their works the conception of death penalty basically began to change in the 18th century. Unfortunately, this development came to a halt because of the World War I, but after 1945 mainly in Western Europe it, arm in arm with the acceptance of human rights, led to the appearance of the abolitionist movements. Partly as a result of their campaign, more and more European governments made a decision to finally ban the application of death penalty. Nevertheless, the road that led to the abolition of death penalty was stoned by heavy political, ethical, philosophical and legal debates that – especially focusing on the Hungarian regulation of capital punishment – this essay aims to summarize.

2. Philosophical background

2.1. The ancient philosophers

Certainly, death penalty used to be an orthodox tool of sanctioning in several ancient societies before the ancient Greek and Roman but as a result of the conception of the enlightenment the thoughts of the antique Greek philosophers influenced the thinkers of the 19th the most.

The first school to be mentioned is the one, named after its master: Pythagoras, who lived around the 6th century B.C.¹ According to his followers, all perpetrators should

¹ RUSSEL, Bertrand: A nyugati filozófia története [A history of Western Philosophy]. Budapest, 1996, Göncöl Kiadó, p. 44.

get equal punishment to the crime they committed.² The members of this school basically supported the idea of the so-called *lex talionis*, which means that the offender must suffer the same inconveniences he caused to the offended. As a consequence of this mentality, the only way they found just, was to execute someone, who committed manslaughter, because according to them, this was the only way to punish someone proportionally.

One of the well-known leaders of the sophist school was Protagoras who supposedly lived in the 5th century B.C.³ According to his ideas the punishment of those who committed a crime has to be future-oriented and its main point is to avoid committing another crime. This means, that the ancient sophistical thinker found both special and general prevention to be an essential aim of punishment, because he taught: punishment is only beneficial if it prevents both the former offender and the other members of society to commit a crime.⁴

The thoughts of Protagoras are quite similar to Plato's. Plato who mainly operated in the 4th century B.C. worded in his iconic work: *The Republic*, that the optimal state should be ruled by a philosopher king. In his same work he claimed, that the monarch in case of necessity should be allowed to rule by ignoring the law because it cannot always ensure the proper answer to a new problem. Therefore, he insisted that the monarch should deliberate in each case, whether he wanted capital punishment to be applied or not. Of course Plato saw the weak points of his reasoning. He insisted that a philosopher king can only be wise, selfless and driven by virtue thus it is almost impossible that the jurisdiction made by him could turn into despotism.

However, Plato alike the sophists thought that the point of law was to teach and punish. He found the optimal punishment to be preventive. Moreover, he asserted that punishment had to be remedial, which basically means that it also has to aim to try to reintegrate the offender to the normal social life, except it is impossible because he is obviously incorrigible.⁵ In the latter case, Plato stated, that the offender had to be eliminated from the society, under which he probably meant the application of capital

² TÓTH J., Zoltán: Halálbüntetés Pro és Contra [Death penalty pro and contra]. Budapest, HVG-ORAC, 2012, p. 17.

³ POSTER, Carol: Protagoras. <https://www.iep.utm.edu/protagor/#H1> [Access on April 27, 2018]

⁴ TÓTH J., Zoltán: A halálbüntetés az ókorban [Death penalty in the ancient times]. *Jogelméleti Szemle*, 2004/4, p. 8.

⁵ *Ibid.*, pp. 14–15.

punishment. It can be a point of interest that he claimed death penalty to be unconditionally used in case of treason or committing a crime against God or the state. He only aimed to make some sorts of manslaughter or its attempt followed by an execution. Among these varieties of murder was when someone as a child or a slave managed or tried to kill one of his parents or his lords.⁶

His disciple, Aristotle mainly shared his opinion about above-mentioned, but he even added that punishment had to be proportional, which means that the offender has to suffer the same drawback he caused to the offended. On the other hand, Aristotle insisted that apart from the correction or elimination of criminals, the most determining goal of punishment was to make the offender deprived from the illegal and unjust advantage he gained by committing a crime.

2.2. The Enlightenment

The era of Enlightenment began in the Western European countries in the 18th century. The ideas of Enlightenment which first stroke a root in England and France, were fundamentally inspired by the antique civilization and for this reason, as the study is also going to prove, the upper mentioned theories of the ancient philosophers became a part of the enlightened thinkers' thesis.

Hugo Grotius the forerunner of the Enlightenment and the well-known lawyer of the 18th century made a distinction between three standards of law: 1) the divine law; 2) natural law, and 3) positive law. According to him, the standard of the divine law contains only those norms that can only be enforced by God, therefore capital punishment – as opposed to the medieval concept – can only be defined within the frames of the latter two.⁷

Answering the question: which aspects the applier of law shall take into consideration before taking any sanctions, Grotius claimed that the judge had to examine whether the delinquent deserved punishment or his action had to be sanctioned.⁸ Moreover, a judge has to know which sanction is the most effective and proper. To be able

⁶ *Ibid.*, p. 16.

⁷ *Ibid.*, p. 54.

⁸ *Ibid.*, p. 57.

to define the latter criteria, the judge has to consider the advantage he hopes as a result of taking the sanction which can only be a positive and beneficial goal. Regarding his thoughts about the significance of prevention, the influence of Plato is obvious because Grotius reckoned that criminals beyond recovery were incapable of enjoying life because they had no sense of justice, therefore their life was misery, consequently the best the society could do for them is to execute these people.⁹

Montesquieu, the famous French jurisconsult, emphasized several meaningful problems in connection with death penalty. He was among the first to state that tyrannous procedures can be quite counterproductive because the stricter the punishment the less effective it is and as a consequence the more insecure the legal and the social system is, which consequently means that the strictness of the punishment is not in direct proportion to the level of prevention and the decrease in the number of crimes.¹⁰ Even though, Montesquieu did not claim the abolishment of capital punishment, he contrariwise worded that it was acceptable in cases of crimes committed against life, "corporal soundness" and wealth, when no punishment of property can be applied.

Despite, Rousseau and John Locke came from different countries and were not the contemporaries of each other, both of them asserted the social contract into the centre of their theories.¹¹ The fundamental similarities between their concepts were that both of them insisted that criminals, especially murderers make nothing of the social contract and place themselves above the law. Even though the members of the society could not transfer to the state their right to take away the life of other people, because this right is not granted for any of them, in case of the need for the society's own protection, the state has the right to apply death penalty because this is the only way the community of the citizens can be sheltered from actions that are harmful to it.

Holbach, the French encyclopaedist was one of the first to state that criminals are produced by the society. He also raised his voice against qualified capital punishment, because he found cruelty of these procedures absolutely unnecessary if the convict died

⁹ *Ibid.*, p. 59.

¹⁰ *Ibid.*, p. 74.

¹¹ *Ibid.*, p. 66.

anyway. He also alleged that death penalty does not have more deterring effect than any other way of punishment, but it creates sympathy towards the one who were executed.¹²

2.3. Cesare Beccaria

Cesare Beccaria was an Italian jurist, criminologist, philosopher, and politician, who mainly operated in the 18th century.¹³ In his main work: "On Crimes and Punishments" (*Dei delitti e delle pene*) he summarized his theories on the principles of criminology and criminal law.

Among others, Beccaria consistently emphasized the significance of the *nullum crimen sine lege* and *nulla poena sine lege* principles, the presumption of innocence and the requirement of publicity.¹⁴ Alike Plato, he reckoned that the point of punishment was prevention that had to be necessary and proportional, which means that an effective but the most benign way of punishment has to be taken.¹⁵ One of the reasons Beccaria can be called a pioneer for is that he was the first to declare that the deterring effect of a sanction depends not on the sort or the dignity but its inevitability,¹⁶ under which he meant the probability that sanction would be realised in case of breaking the law.

Considering capital punishment, he mainly specified and completed his above-mentioned thesis. He argued that the legislature had to make a distinction between different kind of murders, and only after this diversification it was possible to assign a punishment to the crime. He even wanted sanctions to be milder, faster and more surely realised because in conjunction with a more efficient mapping of criminality he claimed it to be a guarantee for the inevitability of the punishment. According to him, executions were completely clueless and absolutely not deterring,¹⁷ because they only let people fulfil their sadist desires and on the contrary to its goal it only made the audience sympathize

¹² *Ibid.*, p. 81.

¹³ Internet Encyclopedia of Philosophy: Cesare Beccaria. <https://www.iep.utm.edu/beccaria/> [Acces April 27, 2018]

¹⁴ *Ibid.*, p. 90.

¹⁵ *Ibid.*, pp. 95–96.

¹⁶ BECCARIA, Cesare: An Essay on Crimes and Punishments http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf [Acces April 27, 2018]

¹⁷ PACZOLAY, Péter: A Dei delitti e delle pene államelméleti kérdései [Questions in connection with the theory of state in Dei delitti e delle pene]. In: TÓTH J., Zoltán: 250 éves a Dei delitti e delle pene [Dei delitti e delle pene is 250 years old]. Budapest, 2015, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, p. 54.

with the convict, which feeling was stronger than the deterring effect of the procedure.¹⁸ As a consequence, he was almost completely against death penalty because, apart from the above-mentioned arguments, he, just like Rousseau and John Locke, did not find it conform to the social contract. Therefore, he recommended using lifelong penal service instead, because it harmonized with the social contract, did not endangered the society so much and made people more horrified, which meant a higher level of general prevention.

Drawing the conclusion, the most significant enlightened thinkers were quite influenced by the ancient philosophers, especially Plato. These thinkers were the first to question the point of death penalty and suggested new methods of punishment. Due to their reformer ideas, they not only had an effect on criminal sciences of their homeland but the whole continent including Hungary.

3. The history of capital punishment in Hungary

3.1. The Reform Era

Even though the Hungarian Jacobins took sides in the question of death penalty, the first person of public who indeed had an effect on this debate was Bertalan Szemere. Szemere summed up his arguments against death penalty in his well-known work: „On Punishment and especially on capital punishment”. On the one hand, he was against the previously mentioned legal institution because of natural law arguments, according to which „life is inviolable, and it is a sin to kill”.¹⁹ On the other hand, he disapproved death penalty because of practical considerations. Szemere, just like the above-mentioned philosophers, stated that this way of punishment was completely useless, incorrigible and had precarious effect.²⁰

After the suggestion in 1829 could not come into force, the Parliament discussed another Proposal of the Criminal Code in 1843 that was one of the most progressive ones. It was, among others, influenced by the ideas of Bertalan Szemere. The heaviest debate was about the abolition of death penalty, but the suggestion aiming to ensure equality

¹⁸ *Ibid.*, p. 101.

¹⁹ SZEMERE, Bertalan: A büntetésekről s különösebben a halálbüntetésről [On punishments especially on capital punishment]. p. 122. http://mtdaportal.extra.hu/books/a_buntetesrol_s_kulonosebben.pdf [Access April 27, 2018]

²⁰ HALMAI, Gábor – TÓTH GÁBOR, Attila: Emberi Jogok [Human Rights]. Budapest, 2003, Osiris Kiadó, p. 322

before the law and the basic rights of freedom, were not accepted by the Upper House because of political reasons, therefore the Hungarians had to wait until 1878, when the first Hungarian Criminal Code, the Csemegi Code got codified.

3.2. Act 5 of 1878 – The Csemegi Code

The Hungarian jurisprudence was absolutely ready for the construction of the codex. After the suppression of the Revolution and War of Independence of 1848, the Austrian Criminal Code came into force in Hungary, based on which the political retribution took place. The Code was followed by the "Provisional Judicial Regulations" in 1861.²¹ It made the Hungarians turn back to the Hungarian law before the civic conversion, and it made plenty of overdue legal institutions come into force again, thus it was considered even by the counsellors in Vienna as a shamble full of inconsistencies.²² As a consequence, the Hungarian courts began to use the well-known coursebook of Tivadar Pauler as a Code, that clearly implicated the need for a constant domestic Criminal Code, which Károly Csemegi managed to create on his own in 1878, and stepped into force as Act 5 of 1878 which got named after its creator Csemegi Code and was used as the Criminal Code of Hungary for 70 years.

The Code encompassed death penalty, but it could only be used as a sanction in case of the most serious crimes. According to Article 278 and 126 of the Code these crimes were malicious murder and the attempt to murder the monarch. Nonetheless, the king could have mercy on criminals who had committed the above-mentioned crimes. It is important to note, that according to the Code, if the mitigating factors exceeded the aggravating factors, instead of capital punishment, the sanction of lifelong imprisonment had to be used.²³ The period of limitation for crimes threatened with death penalty was 20 years. This kind of punishment could only be used against persons who were older than 20 years old when they committed the crime, and hanging was the only way it could be

²¹ MEZEY, Barna: Magyar jogtörténet [Hungarian legal history]. Budapest, 2007, Osiris Kiadó, p. 327.

²² RADY, Marthyn: Customary Law in Hungary. Oxford, 2015, Oxford University Press, p. 228.

²³ TÓTH J., Zoltán: A halálbüntetés intézményének egyetemes és magyarországi jogtörténete [The universal and Hungarian legal history of capital punishment]. Budapest, 2010, Századvég Kiadó, p. 246.

implemented. Fortunately, this institution was not often used by the courts, because from 1881 to 1889 only two executions were implemented a year in average.²⁴

3.3. World War I and II

Considering death penalty, the turn of the century was a quite calm period because this kind of sanction was hardly ever used, and in most cases the king had mercy on those who deserved death according to the Criminal Code's rules. This peaceful period was interrupted by the preparation for World War I, which basically began in the 1910's, when court-martials got institutionalized and courts got allowed to establish martial law in case of the most serious crimes such as riot.

3.3.1. The Soviet Republic

In 1919 the Dictatorship of the Proletariat got declared and the time of The Soviet Republic of Hungary officially began. In the five months of the republic "Revolutionary Courthouses" were settled, which were made up of a president and two members, all of whom were nominated by the "Revolutionary Council of Government". These judges had no special qualification of law. The only requirement they had to fulfil was to be loyal to the ruling Party. The courthouses operated as instant trials that could apply capital punishment as a response to a wide range of crimes included in the Regulation of the "Revolutionary Council of Government" that added that in case of "urgent need" courthouses were even allowed to proceed in cases not mentioned in the Regulation. This meant in practice that death penalty could be used whenever and against whoever politicians wanted it to be used.

3.3.2. The Horthy era

The historical period between 1920 and 1944, as it is called by the Hungarians the Horthy era, brought numerous changes in connection with capital punishment. The era basically began with the impeachment of the Soviet. To accomplish this goal, a regulation of the Prime Minister declared that processes initiated during the previous regime and the

²⁴ *Ibid.*, p. 247.

verdicts made by the above-mentioned courthouses were invalid.²⁵ Moreover, the legal retribution basically began with the reestablishment of those courthouses. The only difference between the latter and the above-mentioned was that the courthouses of the Horthy era were made up of councils having five members, but they were also instant trials, obviously aiming to convict those who were related to the Soviet Republic.

However, processes of martial law became significant only in 1931, when Szilveszter Matuska carried out his assassination and blew up the viaduct at Biatorbágy while the train from Budapest to Vienna was crossing. Except one carriage the whole train fell off the bridge and 22 people died. The department of investigation found a letter, based on which they presumed that the attack was carried out in the name of an Eastern European communist conspiracy.²⁶ After the attack, the Hungarian government declared martial law, and tried to capture everyone related to the attack. Of course, the attack was a good pretention to escalate the fight against the left-wing parties. Therefore, the definition of acts against authorities got expanded and several citizens were executed.

The next important stage in the regulation of death penalty was Act 2 of 1939 on National Defence. The Act broadened the possibilities to apply death penalty because it declared the unrestricted right of the government to order instant trials, which the Act even authorized to extend the force of any of the laws referring to the time of war. According to the Act, capital punishment could be applied in case of any violence committed against the National Defence, which meant in practice, that someone could have been executed due to corruption of office.²⁷

3.3.3. The transition after World War II

The Horthy era collapsed on 16 October 1944 as the fascists took over control. Their ruling did not last too long, because it ended in the following year's March, after which the

²⁵ *Ibid.*, p. 263.

²⁶ TARJÁN M., Tamás: Matuska Szilveszter felrobbantja a Biatorbágyi viaduktot [Szilveszter Matuska explodes the viaduct in Biatorbágy] http://www.rubicon.hu/magyar/oldalak/1931_szeptember_13_matuska_szilveszter_felrobbantja_a_biatorbagy_i_viaduktot/ [Acces April 27, 2018]

²⁷ TÓTH J., Zoltán: A halálbüntetés szabályozása a Horthy-korszakban és a II. világháború éveiben [The regulation of capital punishment during the Horthy era and World War II] *Jogtörténeti Szemle*, 2010/3, p. 54.

National Assembly tried to consolidate and democratize the country. The Smallholders' Party won the election and the government led by Zoltán Tildy began to operate.

Based on the order No. 81/1945 M. E. (of the Prime Minister) issued on 5 February 1945 establishing Courts of People, the court was to call the war criminals to an account, including the fascist and those who tried to baffle the peace talk or those who brutalized prisoners of war. The courts were made up of a council, the 5 members of which were delegated by the political parties of the Hungarian National Independence Front. Next to the council members, a professional judge also took part in the process, but he only had an advisory capacity. The council made its verdict – in which it could declare the culprit to be guilty – with single majority, against which the convict could only appeal to National Council of Lay Judges (Népbírók Országos Tanácsa) that was also politically biased.²⁸ This makes it completely obvious that the government used the sanction of death penalty as a tool to realise their political will, against which practically no one could do anything.

4. The socialist era

After the Hungarian Workers' Party gradually took over control in 1948 a completely new era of the Hungarian history began. This period of socialism lasted until the collapse of the Soviet Union in 1990, and the centre of it was the unity of power having a quite important effect both on the Hungarian constitutionalism and regulation of capital punishment.

4.1. Act 2 of 1950 on the General Part of the Criminal Code

After 1945 the government reckoned that a Code of a new approach is needed. Therefore, they created the General Part of the Criminal Code that changed the general part of the Csemegi Code. The ministerial justification of the Act recognized that capital punishment was principally wrong and once would be vanished from the legal system. However, the justification insisted that it was currently needed because of the society's state of development did not reach the level to let the legislature abolish death penalty. The limitation period of crimes threatened with death penalty was 15 years. This punishment could only be taken against those who were older than 20 years old when committing the

²⁸ TÓTH J., Zoltán: A halálbüntetés intézményének egyetemes és magyarországi jogtörténete [The universal and Hungarian legal history of capital punishment], p. 279.

crime, because the strictest punishment used against criminals who were older than 18 years old but younger than 20 was lifelong imprisonment, and in case of those children who were younger than 18 years old the highest limit of imprisonment was 5 years.²⁹ It is also important to note, that executions had to be implemented behind closed doors and they could only be carried out by hanging, but if this was not possible, the death penalty was executed by shooting.

4.2. Consequences of the Revolution and War of Independence in 1956

After the Revolution and War of Independence in 1956 expedited procedures became part of jurisdiction again. The conditions of these procedures were regulated by the Decree-law 4 of 1957 declaring that these procedures could only be initiated by the public prosecutor. After that the taking of evidence was needed but the process was previously conducted in front of a special judicial panel, the aim of which was to charge the supporters of the revolution.³⁰

The procedure of martial law also got transformed. The number of the members of the judicial panel was three, and one of them was a professional judge without whose agreement the panel could not pronounce death penalty because unanimous majority was needed to dismiss the application for mercy. If it happened, the convict still had the chance to appeal to the "Presidential Council". It can also be a point of interest that altogether seventy people were convicted in this procedure out of whom twenty-six got executed.³¹

To sum it up, jurisdiction after the revolution mainly aimed to take the supporters of the revolution to an account, that is why it made nothing of the constitutional principles and procedural guaranties and was subordinated to an undoubtable political will.

4.3. Act 5 of 1961

Act 5 of 1961, the Criminal Code included death penalty, but it was no absolute but rather a relative sanction because the court always had a choice not to use it. The ministerial

²⁹ *Ibid.*, pp. 290–291.

³⁰ *Ibid.*, p. 2931.

³¹ *Ibid.*, p. 296.

justification of the institution was quite similar to the one worded in connection with Act 2 of 1950, because the minister still insisted that death penalty is something wrong but needed. According to the Criminal Code capital punishment could only be used against those who were elder than 20 years old when they broke the law and committed a crime threatened with 10 to 15 years lasting imprisonment. Another important precondition of applying death penalty was that the goal of punishment could only be reached through executing the convict and the judge also had to examine whether the mitigating factors exceeded the aggravating factors or not. Moreover, the Code imposed death penalty for 31 crimes. Among these factual situations were crimes against humanity or the state, military offense and even eight of the common criminal offenses that – according to the legislature – were the most dangerous crimes. The number of crimes threatened with capital punishment got decreased by the Act 5 of 1971 to twenty-six that the next Criminal Code also regulated.³²

4.4. Act 4 of 1978

Act 4 of 1978 was in force until the current Criminal Code of Hungary (Act 100 of 2012) derogated it. The Code had a quite important role in the Hungarian legal history because, for the reason of the changing of system, the legislature had to make it fit to the completely new social and legal system in which the Hungarian Constitutional Court also played a very important role.

The Code threatened 26 crimes with capital punishment, and similarly to Act 5 of 1961 the ministerial justification worded almost the same about death penalty that could only be used against those who had already turned twenty years old at the time of the criminal offense. The limitation period was just the same as in the above-mentioned Act except in cases of war crimes and crimes against humanity. Even though, there were some similarities between the regulations of the two Acts, the following differences between them were more relevant. The new Criminal Code defined the 26 crimes threatened with death penalty in a more punctual and strict construction, so these definitions had to be more precisely interpreted than before, which made their sanctioning not as discretionary as before. Another important distinction was that the Code defined capital punishment as

³² *Ibid.*, p. 305.

an alternative punishment, but it did not concretise the sanction must have had to be used instead, which practically meant that the judge could almost reduce penalty without any restriction.

Considering the formal rules of capital punishment, it has to be noted that executions just as before had to be implemented behind closed doors, and it was executed by hanging or shooting. After the convict was sentenced to death, he had to spend the rest of his life on death row where he could meet his relatives and were allowed to make a valid written provisional will.

5. Abolition of death penalty

As previously mentioned, even in Hungary the first arguments to abolish death penalty got worded more than 200 years ago, but this progress peaked after the World War II in Western Europe and after the collapse of the Soviet Union in Eastern Europe.

5.1. Arguments against capital punishment

The first and almost most important argument against capital punishment is about its deterring effect that is heavily correlated to general and special prevention. The upper mentioned philosophers refuted the argument of the so-called retentionists, according to whom there was a direct proportion between the severity and the deterring effect of the sanction. On the other hand, the abolitionists argue, that the motive of killing is so hard that no one thinks about the sanction when committing a murder.³³

Moreover, it is out of question that death penalty is an inhuman way of punishing.³⁴ Firstly, because of the physical pain it causes and the implementation also carries the possibility of failure in case of which the convict has to suffer a lot before dying.³⁵ A great example for this was the case of Alva Campbell, an American citizen who was sentenced to death, but inside the death chamber the prison officers spent more than an hour to find a

³³ TÓTH J., Zoltán: A halálbüntetés története, filozófiája és kortárs jogelméleti kérdései. [History of capital punishment, its philosophy and contemporary question of legal theory]. https://www.ajk.elte.hu/file/AJKDI_TohtZoltan_tez.pdf [Access April 29, 2018]

³⁴ Társaság az Alapjogokért: A TASZ a halálbüntetésről. [TASZ on death penalty] <https://tasz.hu/files/tasz/imce/halalbunt2.pdf> [Access April 29, 2018]

³⁵ KRAMER, Matthew H.: The Ethics of Capital Punishment, Oxford, 2013, Oxford University Press, p. 213.

vein in which they could have injected the lethal fluid. The officers finally gave up.³⁶ In addition, the disapprovers of the institution claim, that death penalty is especially cruel because after being sentenced to death until being executed, the time for the convict ends because of the psychological situation full of anxiety and fear he gets into.

Another essential aspect of capital punishment to mention is the so-called "Justizmord" which means the phenomenon of executing people whom, as it turned out later, were completely innocent. This aspect is mainly related to the irreversibility of executing someone.³⁷ As it turned out, more than a hundred people were executed innocently only in the United States. But this number is only a part of the truth, the authorities will never be able to find out the exact data.

Last but not least, retentionist argue that death penalty is cheaper than financing lifelong imprisonment. In opposition, the abolitionists claim death penalty to be more expensive because of the whole system the state has to maintain to manage the implementation of the sanction. On the other hand, abolitionist believe that in a civilized country it doesn't matter how much does a life cost, because the state cannot take away any human life in the hope of economic advantages.

5.2. Abolition of death penalty in Hungary

After the changing of system, the transformation of the social, economic and legal system of Hungary began. As a result of this change the Abolitionist League started a campaign and turned to the Hungarian Constitutional Court demanding to declare that death penalty was unconstitutional.

5.2.1. Decision No. 23 of 1990 of the Constitutional Court

The competencies of the Constitutional Court were based on the institution of the so-called *actio popularis* that allowed the Hungarian citizens to hand in a constitutional

³⁶ Capital punishment deserves a quick death. *The New York Times*, 31 December 2017 <https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html> [Access April 29, 2018]

³⁷ Amnesty International: Death Penalty. <https://www.amnesty.org/en/what-we-do/death-penalty/> [Access April 29, 2018]

complaint and ask for the revision of the acts they claimed to be unconstitutional.³⁸ The Abolitionist League exercised this right of theirs and the Constitutional Court had to make a decision whether the death penalty fit to the freshly amended Constitution or not.

In its decision the Constitutional Court found death penalty unconstitutional and ordered the abolition of the referring parts of the Criminal Code. The Constitutional Court in the explanation of its decision No. 23/1990 expressed that there was a contradiction between the Article 54 (1) and 8 (4). The former declared: „In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights”; whereas the latter worded the following: „In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.” According to the argument of the Court, the Article 8 (4) was itself not enough to define capital punishment unconstitutional because of the "arbitrarily denied" phrase of Article 54 (1). Consequently, the task of the Court was to interpret the meaning of the previously cited phrase, what they did the following.

The Constitutional Court declared that apart from regarding the test of necessity and proportionality, capital punishment is against the prohibition to restrict the basic meaning and contents of fundamental rights, because it not only restricts but irreversibly terminates the right to human dignity and to life. The reason for this is that the right to human dignity and the right to life cannot be separated because it is impossible not to violate one without violating the other, because the right to human dignity can only have a meaning in the frames of life. Therefore, the Court invalidated the referring article of the Penal Code and requested the Parliament to remedy the constitutional incoherence.

5.2.2. The parallel explanation of László Sólyom

László Sólyom, the former President of the Constitutional Court worded his arguments in a "parallel explanation", which makes the explanation described above better understandable. Sólyom insisted that human dignity is an inherent right of human beings and therefore it cannot be separated from the right to life, because this unity makes

³⁸ MOLNÁR, Benedek – NÉMETH, Márton – TÓTH, Péter: *Mérlegen az Alaptörvény* [The Fundamental Law of Hungary on scales]. Budapest, 2013, HVG-ORAC, p. 209.

human beings different from any other living being such as plants and animals. Moreover, this right is absolute and a border of self-autonomy that neither any citizens nor the state is allowed to cross, which consequently means that it cannot be restricted at all.

The President of the Court emphasized several times in his explanation that the key point of this debate is how to interpret "arbitrary restriction". He claimed that there is a formal, procedural requirement according to which rights can only be restricted in a process and based on a goal prescribed by the law, but he stated that this kind of formal legality does not expel arbitrariness, thus there has to be a side of content. As a consequence, no distinction can be made between the restrictions of the rights to human dignity and life because any restriction of them terminates the basic meaning of the right, which is the right itself, therefore it is conceptually impossible to constitutionally restrict these rights, which means death penalty was completely unconstitutional.

6. Summary

To sum it up, capital punishment has been regulated differently throughout the history. From the ancient times to the 18th century it was a part of the daily life until the enlightened philosophers questioned its necessity and efficiency. The authoritarian regimes of the 20th century used it as a tool of political retribution, which apart from the above-mentioned aspects, explicitly showed the dangers of this legal institution. Fortunately, the European legislatures began to abolish death penalty in the second half of the 20th century and Hungary finally joined the community of abolitionist countries made up of 104 members.³⁹

³⁹ Death Penalty Information Centre: Abolitionist and retentionist countries. <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> [Access April 29, 2018]