

Right to Life vs. Capital Punishment in Extradition Proceedings: a Legal Aspect

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Abstract— Many states that have abolished capital punishment domestically also prohibit extradition when the fugitive may face the death penalty, unless the requesting State undertake not to impose this penalty or at least gives enough assurances that this penalty will not be imposed on the fugitive. This article deals with the “battle” that exists between the human rights from one side and the capital punishment and extradition from the other side. Nowadays it is a fact that states are willing to respect the basic and inviolable human rights, so they refuse extradition in cases where the fugitive can be faced the “death row phenomenon”, especially because the courts have an opinion that the requested state is responsible if the fugitive will be imposed with death penalty or if there is a substantial ground that he will be subjected to torture or other ill-treatment. The major question on which one single answer cannot be given is: in which situations institutions and courts must look on the human rights of the fugitive with a purpose and duty to protect those rights and when the punishment that is given represents an equal response to the committed offence by the fugitive offender.

Keywords – extradition, human rights, death penalty, international conventions, right to life, abolition, offence and extradition treaty.

1 INTRODUCTION

In recent years, the practice of abolition of death penalty has entered the realm of international human rights law. International human rights tribunals have ruled that extradition in capital cases violates treaty norms that essentially prohibit cruel, inhuman and degrading treatment or punishment [1]. In support of this movement, article 19 of the Charter of Fundamental Rights of the European Union states: “No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

Currently around 150 of the 193 Member States of the United Nations have abolished the death penalty or introduced a moratorium, either in law or in practice. Since General Assembly resolution 62/149 in December 2007, Argentina, Burundi, Gabon, Latvia, Uzbekistan and Togo have abolished the death penalty for all crimes. In the United States of America, the States of New Jersey, New Mexico, Illinois and Connecticut have abolished the death penalty and the State of Oregon has introduced a moratorium. The Dominican Republic, which prohibited the death penalty in 1924, adopted a new constitution in January 2010 which guarantees the right to life and reconfirms the prohibition of the death penalty [2].

Regarding the above mentioned it is obvious that the death penalty represents an obstacle for extradition, because the most of the democratic states which act as requested state will refuse to extradite a fugitive offender on which death penalty may be imposed if extradited and that would violate the right to life which is considered to be one of the most inviolable and guaranteed human rights.

Most of the human rights treaties prohibit extradition when it is foreseeable that the death penalty will be imposed in the State that is requesting extradition [3]. Some prohibit States from extraditing persons when it is foreseeable that those persons will face the death penalty in the State requesting extradition, such that the imposition of the sentence amounts to torture, inhuman or degrading treatment or punishment, although there is a lack of uniformity over what treatment meets its definition.

Right to life i.e. article 2 from the European Convention on Human Rights (hereinafter referred as ECHR) is frequently described as one of the Convention’s most fundamental provision enshrining a basic value of democratic societies. Not surprisingly article 2 is a complicated provision both in terms of its structure and the open-endedness of its language [4]. As it is written, this article represents the “greatest opponent” of death penalty and major obstacle in extradition matters.

2. Theoretical aspect of death penalty in International law

Death penalty represents the most severe punishment under International Law for committed serious offences which are punishable by capital punishment. In the last decades when the trend for safeguard of human rights have raised, many states have abolished the death penalty and some of them kept for the most severe crimes as genocide and war crimes. Regarding the death penalty, the United Nations Secretary-General Ban Ki Moon in one of his speeches said: “The taking of life is too absolute, too irreversible, for one human being be inflict it on another, even when backed by legal process”.

The strange thing is the fact that the death penalty is not prohibited by the International Covenant on Civil and Political Rights (ICCPR), but there are a number of instruments in force with fewer states parties that do abolish capital punishment [5]. Similarly, international customary law does not prohibit the death penalty, but custom is rapidly changing towards a position in favour of worldwide abolitions. For example the additional protocols to the ECHR prohibit the death penalty on every level and for every committed crime.

Article 6 of the ICCPR states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty,

sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

In general, it can be observed that only the ECHR, but no other source of Human Rights, state that the death penalty is illegal and has to be abolished and therefore, international law does not prohibit it. This can be found under Protocol 6 which states that the Council of Europe incorporates the abolishing of the death penalty because most European States have taken measures to do so before. The first article of the protocol is already the article which explicitly states that the death penalty is to be abolished.

The practice of extraditing individuals on the condition that they will not be subjected to the death penalty originates in the mid-nineteenth century, when states began abolishing capital punishment in their domestic legal systems [6]. The 1872 extradition treaty between Spain and Brazil provided that if the requesting state did not guarantee that the suspect would not be subject to capital punishment, then the state could deny extradition. A similar provision appears in the 1873 treaty between Portugal and Switzerland and in the 1892 extradition treaty between Portugal and England. The 1908 treaty between the United States and Portugal was accompanied by an exchange of notes to the same effect [7]. Several model multilateral extradition treaties also include similar references to restrictions on extradition in cases where the death penalty may be imposed. The first draft multilateral extradition treaty of this sort was adopted in Montevideo in 1889 and it served as a model for subsequent initiatives.

Article 11 of the European Convention on Extradition declares that, when an offence is punishable by death under the law of the requesting party, but the requested party has prohibited (or does not normally practice) capital punishment, "*extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out*" [8].

In relation to the above mentioned, it is obvious that not only the fact that the death penalty means a flagrant deny of the right to life and a serious breaches of the inviolable human rights

which are also known as *ius cogens*, but also the way of imposing the death penalty i.e choosing the way how to die a fugitive offender represents a violation of article 3 of the ECHR because the way of imposing the death penalty can lead to torture, degrading punishment and other ill-treatment.

Many nations have abolished the death penalty calling on the preserve of human rights and protection of possible violations of the inviolable human rights. Spain abandoned the death penalty in 1995, stating that "the death penalty has no place in the general penal system of advanced civilized societies..." Similarly, Switzerland abolished the death penalty because it constituted "a flagrant violation of the right to life and dignity..."

Thus, it is obvious that the death penalty is a human rights issue and those states which have ratified international conventions that prohibit the death penalty will not extradite a fugitive offender to a state where he might be subjected to capital punishment, because that act of extradition may implicate international responsibilities to the state that allowed such extradition.

3. International efforts to abolish the death penalty which threatens the right to life

The primary goal of most of the international community regarding the death penalty is abolition. Efforts to abolish the death penalty have been conducted through multilateral organizations, such as the United Nations and regional organizations such as the European Union. These efforts have realized a great degree of success. The number of countries that have stopped imposing the death penalty has grown and today the number has risen to 140 - nearly two-thirds of countries around the world [9].

Abolition of death penalty has many advantages according to the practice of international law. First of all, sentencing someone to death denies them the right to life and this is enshrined in the Universal Declaration of Human Rights. Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated [10]. Countries who execute commonly cite the death penalty as a way to deter people from committing crime. This claim has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than imprisonment.

On European soil, there are several international conventions which prohibit the death penalty. The first and the most significant in the ECHR which in article 2 states: "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*". Additional Protocol no.13 to the ECHR calls for the total abolition of the death penalty in all circumstances [11]. The protocol has been ratified by 44 state of the Council of Europe and signed by 45 others [12].

The Council of Europe and the European Union have made abolition of the death penalty a condition of membership. This has encouraged several nations to eliminate their death penalties in order to gain membership.

4. When the death penalty threatens the right to life

For an increasing number of countries the death penalty is a critical human rights issue. In 1997, the UN High Commission for Human Rights approved a resolution that the “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights” [13]. That resolution was strengthened in subsequent resolutions by a call for a restriction of offences for which the death penalty can be imposed and for a moratorium on all executions, leading eventually to abolition.

Tension between death penalty and right to life as inviolable human rights or known as *ius cogens* is evident especially in extradition cases. Nowadays, because the human rights movement had such a great effect to all humanity, the level of protection of human rights has been raised. This means that state which acts as a requested state in extradition matters will not allow extradition of a fugitive on whom death penalty may be imposed. In the moment when the death penalty threatens the right to life, states usually are refusing extradition on that ground. The major problems appear when United States are seeking extradition of a fugitive. In these occasions, states are not willing to grant extradition to a state which practices the death penalty. Because of this and the concern about mistakes in capital cases United States are facing with a re-evaluation of the death penalty. Supreme Court Justices, legislators, conservative political leaders and commentators have all expressed deep concerns about revelations of innocent people on death row in recent years [14]. From a human rights perspective, the danger of executing an innocent person has played a key role in the abolition of the death penalty in other countries.

Whilst the limitation of the imposition of the death penalty to the serious crimes is an established principle of international law, it lacks definition and agreement. In 1984, the Economic and Social Council published the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, which stipulated that the most serious crimes should not go beyond intentional crimes with lethal or other extremely grave consequences [15]. While these Safeguards are not legally binding, they were endorsed by UN General Assembly, indicating strong international support.

As it was stated before, many states refuse to extradite fugitives to retentionist states in the absence of assurances that the death penalty will not be sought. This practice derives from two separate, but related developments. First, international tribunals and national courts have issued a series of decisions condemning the extradition of suspects from abolitionist states to retentionist states. Second, inter-governmental organizations such as the European Union and individual such as Mexico have long opposed the death penalty as a matter of principle [16]. The EU, Mexico and many other abolitionist nations have made abolition of the death penalty one of the key items on their foreign policy agenda.

The imposing of death penalty does not only violate the right to life, but also touches the right which proclaims prohibition of torture and other cruel and inhuman degrading treatment and punishment. The assertion that the death penalty constitutes torture or cruel, inhuman or degrading treatment is gaining ground. These human rights breaches may occur in the period following sentencing and before execution (which is known commonly in the United States as “death row phenomenon”).

The European Court of Human Rights was one of the first international tribunals to address the legality of extraditing fugitives to face the death penalty. In *Soering v. United Kingdom*, the Court held that the United Kingdom’s extradition of a German national to face capital murder charges in Virginia would violate its obligations under article 2 of the ECHR, which prohibits cruel, inhuman, or degrading treatment or punishment. The Court’s decision was based on its review of death row conditions and the anticipated time that Soering would have to spend on death row if sentenced to death. In compliance with the Soering decision, the UK sought and received assurances from the United States that the state of Virginia would not impose a death sentence.

Various methods of execution have also been identified as unacceptable at international law. For example, the Human Rights Committee has deemed the use of the gas chamber to constitute cruel, inhuman and degrading treatment. The Human Rights Committee has also found that public executions are...incompatible with human dignity [17].

5. Right to life as an absolute bar for extradition

Right to life is prescribed as inviolable and basic human right which is in the group of human rights that cannot be violated by any reason or by any act committed.

The human rights movement had a great impact after the World War II when the nations started to chart a new path towards the safeguard and proclamation of the human rights. The 1948 Universal Declaration of Human Rights (UDHR) in its article 3 prescribes that: “*Everyone has the right to life, liberty and security of person*”. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in article 2 states: “*1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*”

The text of the above cited article 2 demonstrates that paragraph 2 does not primarily define instances where it is permitted to kill an individual, but describes the situations where it is permitted to “use force” which may result, as an unintended outcome in the deprivation of life. The use of force, however, must be no more than absolutely necessary. The Court subjects deprivations of life to the most careful scrutiny particularly where deliberate lethal force is used – taking into account not only the action of those who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination [18].

The African Charter on Human and People’s Rights in article 4 guarantees that: “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right*” [19].

Regarding the above mentioned, it is clear that a definition of what this right means is truly necessary. The right to life means

that the state has an obligation to protect life. This means, generally, that the state must not take the lives of its citizens. Right to life also requires the state to take certain positive steps to protect the lives of people within its jurisdiction [20]. For example, the taking of life must be illegal under the state's law. Right to life also creates a more active obligation to protect life, especially where the public authority is aware of a real and imminent threat to someone's life, or where a person is under the care of a public authority.

States should not only refrain from the intentional and unlawful taking of life, but also take appropriate steps to safeguard the lives of those within their jurisdiction, in particular by putting in place effective criminal-law provisions backed up by law-enforcement machinery [21].

The Charter of Fundamental Rights does not explicitly prohibit the death penalty but since it is part of the EU, it can be taken for granted that the Charter cannot be used to justify extradition if the suspect will face capital punishment. This is because EU prohibits the death penalty completely and even denies accession of countries which still practice it.

The issue of the death penalty has clearly moved firmly into the human rights arena, and is no longer accepted as simply a national criminal justice policy issue. It has been argued that the exclusion of the death penalty by the international courts for the most heinous crimes imaginable suggests that there is now no crime serious enough to warrant the death penalty.

There is no doubt that when the right to life is in question in extradition proceedings and when there is a possibility a capital punishment to be imposed on the fugitive offender, the requested state will not grant extradition because it may face with charges that she violated the human rights of the fugitive. In this case, when capital punishment has been "put on table", the requested state will allow extradition only if the requesting state gives enough "strong" assurances that the death penalty will not be imposed on the fugitive offender.

6. Legal jurisprudence regarding the violation of the right to life in case of imposing a death penalty to the fugitive offender in the process of extradition

The Human Rights treaties are extended to prohibit the extradition of a person when there is some degree of likelihood that the fugitive will experience harmful treatment in the requesting State. If this harmful treatment were perpetrated by actors of the harboring State, it would constitute a violation of a non-derogable treaty right [22]. The European Court of Human Rights in some cases held that the extradition of a fugitive would expose him to the death row phenomenon which is violative of ECHR article 3, a non-derogable right. The Supreme Court of the Netherlands held that extraditing a fugitive when he may be sentenced to death was a violation of art. 1 Protocol 6 to the ECHR.

The rendition of fugitives (known as extradition) from the jurisdiction of one sovereign state to another has become increasingly complex because of potential threat of human right violations [23]. Traditional extradition law changed with the advent of human rights agreements which imposed affirmative obligations upon member nations [24].

The advent of human rights agreements resulted in several

significant limitations on extradition. In the context of capital punishment, various agreements stress the "right to life" in varying degrees of importance.

The European Court of Human Rights took an important step towards achieving this balance when it held that surrendering a death penalty fugitive to the United States without greater assurance against the imposition of capital punishment would violate the ECHR in the Soering case. Jen Soering a German national objected his extradition for capital murder, punishable by death and ultimately challenged the United Kingdom Secretary of State's decision to extradite him before the European Court [25]. This case marked a dramatic change in the landscape of extradition law, because before the Soering case, many European states operated under traditional extradition procedures with little regard for the requirements of human right agreements. The decision of the Court in Soering held that member states must prevent both real harm within their own jurisdiction, as well as prevent "all and any foreseeable consequences of extradition suffered outside their jurisdiction" [26].

In case *Judge v. Canada*, the Human Rights Committee found that Canada had violated article 6 (1) of the International Covenant on Civil and Political Rights by deporting Roger Judge to the United States to face a death sentence in 1998. Rodger Judge has been sentenced to death in Pennsylvania, but escaped from prison and fled to Canada. While there, he was convicted of two robberies and sentenced to ten years. In 1998, Canada deported him to the United States to serve his death sentence. The Committee concluded that an abolitionist country violates the right to life protected by article 6 when it deports a detainee to the United States without seeking assurances that the death penalty will not be carried out [27].

In *Kindler v. Canada*, the fugitive who was extradited by Canada to the United States claimed that the decision to extradite him violated several articles of the ICCPR including articles 6 and 7, since he was likely to be executed in the United States. According to the Committee if kindler "had been exposed through extradition from Canada, to a real risk of violation of article 6, paragraph 2 in the United States, that would have entailed a violation by Canada of its obligations under art.6 para.

In some cases where death penalty is in question in extradition proceedings and even when the requesting state will give assurances that the death penalty will not be imposed on the fugitive offender, it is not enough for the court to grant extradition. That was the situation in the case of *Pietro Venezia*. In June 1996, Italy's Constitutional Court denied extradition of Pietro Venezia to the United States despite assurances by U.S prosecutors that the death penalty would not be sought or imposed. Article 9 of the Treaty of Extradition between Italy and the United States entitles the sending state to request that extradition be conditional upon an undertaking that the death penalty will not be imposed.

The U.S government gave such assurances in the form of a *note verbale* on three separate occasions. The Constitutional Court, however, was not satisfied. In its decision, the Constitutional Court noted that the prohibition against the death penalty took on special significance in the constitution, as did all punishments that involved humanitarian principles. Under the Italian Constitution, the ideal of the right to life is preeminent and requires absolute protection [28].

One very "interesting and specific case" is the case of Ocalan v. Turkey. Namely, Abdullah Ocalan was a Turkish national serving a life sentence in a Turkish prison. Apprehended in Kenya in disputed circumstances in February 1999, he was flown to Turkey where he was sentenced to death in June 1999. In meantime, in 2002 Turkey has abolished the death penalty and the Ocalan's death sentence has been converted into life imprisonment [29]. In his case, the Court held that there had been no violation of article 10 (right to life) from the ECHR and article 3 (prohibition of torture) or article 14 (prohibition of discrimination), as the death penalty had been abolished and the applicant's sentence commuted to life imprisonment.

In the case of Ng v. Canada, the applicant was a British subject born in Hong Kong and arrested in Canada. The United States requested his extradition to stand trial in California on charges that included twelve counts of murder for which, if convicted; he faced a possible death sentence. The Committee held that there was no violation of article 6 or 7 from the ICCPR and that the execution by gas asphyxiation did not constitute a violation, because according to the Committee, *the execution of the sentence...must be carried out in such a way as to cause the least possible physical and mental suffering* [30].

7. Conclusion

Starting from the past decades, it has been proven that the safeguard of human rights and their meaning have raised in the consciousness of nations and institutions responsible for preservation of human rights.

From the analysis of the legal jurisprudence regarding the cases of extradition where the right to life has been threatened because of the possibility of imposing the death penalty, it can be clearly stated that the major problem represents extradition of fugitives to the United States especially when it appears as requesting state.

Right to life should be considered as an absolute and inviolable right and court and other institutions should protect this right from one side, but also this right should not be used in order to avoid punishment for committed crime.

Positive obligations flowing from article 2 of the ECHR should be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Where there is an allegation that the authorities have violated their positive obligation to protect the right to life, it must be established to the Court's satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

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