

## Death penalty – res publica?

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From time to time all European countries, including the Czech Republic, experience debates about legitimacy of death penalty. Such debates are not incidental. The most serious crimes – violent crimes including the most serious ones - murders – have naturally always stood in the centre of attention of the media. Every time, when the Czech public is shaken by a brutal murder, a question repeatedly comes forth: Shouldn't death penalty be restored again? Politicians, lawyers, journalists as well as wide public again and again enter the exciting debate, but the result is known beforehand: death penalty is prohibited by constitution and by international commitments of the Czech Republic.

The research of CVVM executed in October 2005<sup>1</sup> also focused on the issue of death penalty. At the same time, the research monitored in greater detail the reasons of the Czech public for or against capital punishment. At first, all respondents were asked: "Do you think that death penalty should or should not exist in the Czech Republic?" The structure of the acquired results is introduced in the following table.

Table: Death penalty in the Czech Republic (in %)

Should definitely exist	27
Should rather exist	30
Should rather not exist	20
Should definitely not exist	10
Does not know	13

Source: CVVM

As it is obvious from the results of the recent research recorded in the table, almost three-fifth majority (57 %) of the Czech public favour the existence of death penalty, whereas three out of ten citizens stand against it and 13 % of the questioned hesitate between the two opinions.

Supporters of capital punishment (n=608)<sup>2</sup> most frequently argued that it is an adequate and just punishment for severe crimes (33 %), that it would have an exemplary and preventive role (17 %), that the canon an eye for an eye, a tooth for tooth should be applied (16 %), that it would eliminate the most severe criminals and prevent them from repeating their crimes (15 %) or that it would lead to a reduction of high criminality (13 %). The argument that criminals occupy space in prisons and the state has to provide for them has been repeatedly mentioned (4 %).<sup>3</sup>

Among the main counter-arguments stated by the opponents of the absolute punishment (n=321)<sup>4</sup> is first of all the possibility of miscarriage of justice, which cannot be amended in case of its execution (45 %), lack of humaneness or the fact, that no one including the society has the right to kill (34 %). 10 % of the questioned regard other punishments as sufficient and 2 %

<sup>1</sup> The field research was executed from 10 to 17 October 2005 on a representative sample of 1075 respondents.

<sup>2</sup> Open question: "Why do you think the death penalty should exist?"

<sup>3</sup> The total of 100 % is completed by other, less frequent answers.

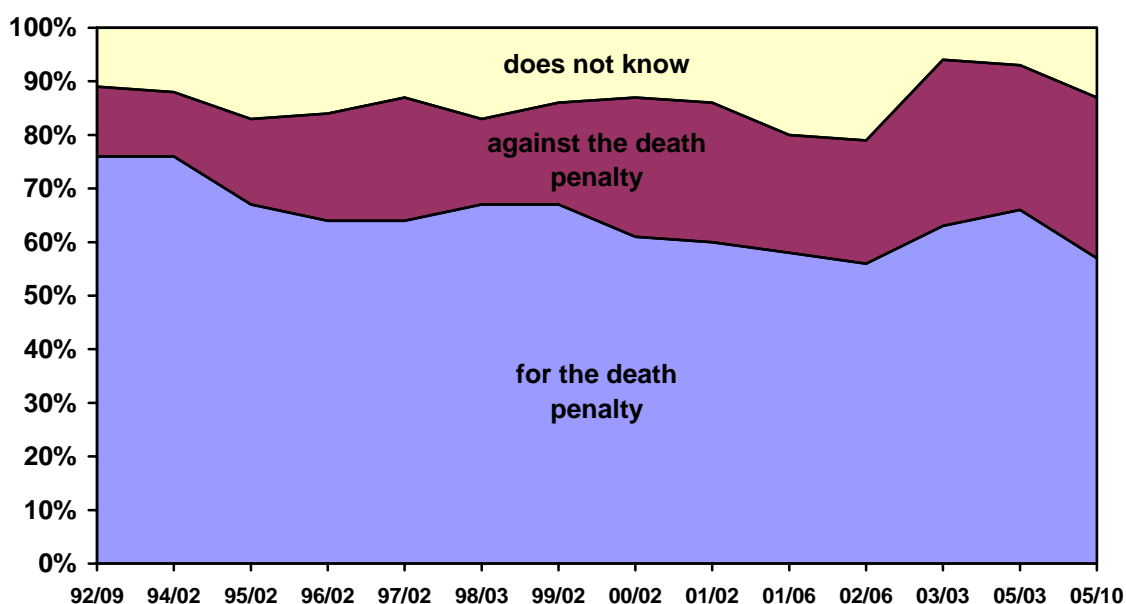
<sup>4</sup> Open question: "Why do you think the death penalty should not exist?"

argue that death penalty does not have a deterrent effect and does not contribute to the reduction of criminality.<sup>5</sup>

A more detailed analysis pointed out that the existence of death penalty has a relatively higher support among men, people who do not profess any church or religion and KSCM and ČSSD supporters. On the contrary, a relatively smaller support was detected among young people under the age of thirty, among University graduates, Catholics and KDU-ČSL supporters. Among these, the capital punishment opponents (62 %) actually outweighed its supporters (30 %).

Since 1992, the public opinion on death penalty has been repeatedly the subject of our interest. The results are introduced in Diagram 1.

Diagram: Death penalty supporters versus death penalty opponents – time line 2005



Source: CVVM (IVVM)

It is evident from Diagram 1 that the support of reintroducing death penalty has been decreasing in the long run – ten years ago it was advocated by almost 80 percent of people. In the course of the nineties, number of capital punishment supporters gradually decreased and number of its opponents mostly increased. In the following period, the proportion of supporters and opponents of the capital punishment fluctuated around the level reached during the turn of the millennium. In comparison with the last research, executed in March 2005, the number of people who would welcome the reintroduction of the death penalty relatively markedly decreased (by nine percentage points). The current number of capital punishment supporters is not different from the result recorded in 2001 and 2002, whereas the number of its opponents is relatively higher.

<sup>5</sup> The total of 100 % is completed by other, less frequent answers.

We have clarified the opinion of the Czech public on the problem of death penalty. However, is it really possible to reintroduce death penalty? What are the arguments for and arguments against it? Why does Europe refuse executions of criminals, unlike for example the United States?

As it was already said, death penalty (abolished in the Czech Republic in 1990 and replaced by lifelong penalty) is repeatedly discussed by laymen as well as experts. The general public tends to regard the absolute punishment (and severe suppression in general) as the best way of preventing and eliminating crime. Majority of politicians know that the most extreme sanction cannot be approved. It seems, however, that the desire for easy and populist solutions will never be easily overcome (the issue of death penalty was reflected for the last time after the parliamentary elections in the neighbouring Poland). The formal and legal reasons already push such ideas aside: the Czech Republic has adopted the Bill of Rights, which states in its sixth article that the death penalty is inadmissible. Furthermore, the Czech Republic acceded to the Convention on the Protection of Human Rights and Liberties and signed its supplementary protocol number 6 about the prohibition of death penalty. Death penalty is therefore excluded not only by our Constitution but also by our international legal obligations, which are based on the standards of the European law, and the compliance with them is an elementary condition for our continuing existence within the European structures. It is obvious, however, that these facts give a little evidence, whether the capital punishment has any political or ethical reason and even less, whether it is completely de-legitimised in the public eyes.

The argument about death penalty – and of course in a wider context about the sense of punishment as such – is probably “a never ending story,” beginnings of which can be traced back to the times of the origins of modern theory of law, that is, almost three hundred years ago. The sense of punishment is the evergreen of criminal policy and philosophy of law in general.

The discussions searching the substance of criminal policy of a modern state deal, in simple terms, with fundamental conflict of interest of two attitudes: The positivistic approach, which prevailed up to the seventies of the past century, saw the significance of punishment almost unconditionally in the “re-education” of the culprit. The other, let us call it traditional approach, prefers suppressive function of the punishment to its corrective role. This traditional view is based on the belief that the punishment is justified by the crime committed by the criminal, and the effect of the punishment is basically insignificant. It does not matter whether the punishment will correct or cure the criminals or make them succumb: it is sufficient that they did what they did. The punishment is regarded as a response of the authority to the evil that was committed. It is a designation of the fact that every person *sui juris* is a full fledged being with a sense of responsibility and it is based on a precondition that people must be responsible for what they do under any circumstances. Let us add that the “positivistic” trend culminated in the sixties and seventies during the era of the so-called building of the welfare state. Recently there is an evident tendency to an opposite approach that I have just described – the corrective role of the punishment recedes in favour of the suppressive role.

Nowadays, majority of specialists regard death penalty as an unsuitable and unacceptable solution of the so complex phenomenon of violence and brutality in modern society. In other words: specialists find capital punishment fundamentally unacceptable. That is also one of the reasons, why the death

penalty is not executed in a majority of civilized and democratic countries – apart from states with a very different legal culture, USA and Japan.

What are the arguments of the death penalty supporters (retentionists)? At first it is necessary to say that the argument about its preventive function (threat to potential perpetrators) is absolutely groundless. No serious criminological researches proved that the existence of death penalty discourages potential murderers more than the possibility of long-term imprisonment. On the contrary, a number of specialized studies confirm that it is not the severity of the punishment, but the certainty of being penalized that discourages criminals from committing a crime. Criminals are not afraid of death, but of the absolute loss of freedom.

Abolishment of capital punishment therefore does not weaken the deterrent effect of penal codes and does not lead to an increased number of murders (or crime in general). The reasons are evident: in case of murders committed impulsively, in a sudden emotion (fear, mental disorder), the perpetrators do not think at all about the possible punishment – because they do not anticipate their criminal act. In case of planned murders the perpetrators are convinced of committing a “perfect crime” and they believe that they will not be caught – they basically do not fear any kind of punishment. In both groups, there is virtually no discouraging effect. Death punishment therefore cannot discourage more effectively than the threat of long-term imprisonment. Furthermore, death penalty is irreversible. It cannot be revised and as such is extremely inhumane. It is a “final solution,” which can never exclude the possibility of a miscarriage of justice. Judiciary system is created by people and people are fallible. Therefore there must always be a possibility to retrieve such errors. This abolitionist argument (if not any others) is strong enough not to be ignored. After all, 349 people were provably sentenced to death or executed in the USA from 1900 to 1985, despite their complex and precise system of appeal.

The need of satisfaction (at least) for the bereaved of the victims of murders and the need to express and reconcile the insult of justice are definitely more legitimate arguments for reintroducing death penalty. The perception of punishment as an institutionalised revenge, which makes the criminals fully responsible for the crime they committed and which is a natural and ethically legitimate sanction from the state, is essentially right (unlike the perception of death penalty as a “therapy” or “re-education” organised by the state), nevertheless there exists one exception, when it cannot be accepted and that is the case of death penalty.

Death is obviously an unreasonable punishment without a purpose. It is a definite act, which does not deter the criminal and does not protect the society. Moreover, it is debatable, whether the state has a right to deprive people of their indefeasible right for life and human dignity. The main contradiction of capital punishment is the fact that it serves as a protection of the society but at the same time it violates the democratic system of values, on which it has to be based, and whose significant part is natural dignity of human beings and their right for life. Whether we like it or not, it also applies to assassins, who sinned against the very essence of humanity, against the established set of rules. Violence, which is executed by impersonal, anonymous state machinery, can in the upshot dangerously trivialize and de facto symbolically legitimise the technology of murder as such. The major weakness of capital punishment is its

irreversibility, or inability of any possible revision. It presents the danger of a miscarriage of justice. Because of these reasons the European legal practice refused (often despite the disagreement of the public - voters) to continue using death penalty. In case of the most serious offences it uses a different instrument, which complies with the essential purpose of a punishment (to prevent further offences) and that is life imprisonment.

Nowadays, Serbia and Monte Negro are the only European countries, which have capital punishment. It was recently abolished in the Ukraine. Globally, most people are executed in China, Iran, Saudi Arabia – and of course in the USA, where roughly half of the states accepts the electric chair or hanging. In this connection we should point out one that the American approach has been determined by the specific development of their civilization. Local inhabitants have a significantly different, historically set approach to the protection of personal rights. They regard punishment mainly as a revenge or retribution, which has a sort of protective social character. European societies, on the contrary, tend to corrective and educational concept of punishment.

The causality between guilt and punishment derives from the deeply rooted notions about natural set of rules, about acceptable behaviour within this generally shared spontaneous system of values. If an individual behaves differently, revolts against the well-established constants of common "social interaction" and deliberately crosses some social rules (unjustifiably lays his hand on somebody else's property or life,) he or she becomes a criminal and – is punished. The punishment should restore order in a balanced state according to the spirit of "a tooth for a tooth, an eye for an eye," which is still the ethos of every criminal law. Generally accepted and in their basic outlines practically unchanging ethical norms were continuously transformed into a rule of law. In the twentieth century, this summary of binding rules – although in a modified form – serves as a tool of adequate retaliation for acts that surpass normal ("moral") behaviour. The fact that many citizens regard physical liquidation of murderers as a legitimate answer of the authority (state) to the committed crime is not fundamentally contemptible or incomprehensible: it affirms the idea about untouchable borders of human morality and the belief that people are responsible for their acts to the full and absolute extent. The society usually perceives death penalty as a rightful revenge for the most serious sin; a revenge, through which the murderers pay off and possibly partially redeem their misdeed.

In a civilized society crime must be inevitably followed by adequate punishment. The murderers cross not only law, but also elementary, even thought unwritten, norms of social existence and in fact force themselves out of the human society. A renowned British psychologist and top specialist in prison service Nicholas McGeorge aptly noted that: "I would be worried, if during a trial for murder, we would assess, whether the accused can be reformed, and that would affect the punishment." We fully agree with this idea. The court, by passing a judgement, should first of all mark the incriminate behaviour as a criminal act. It should express the measure of guilt without regard to the possibility of reforming the given criminal.

The punishment is simply an adequate answer of an individual court to a crime. For citizens it presents a comprehensible form of institutionalized retaliation, which makes criminals fully responsible for the evil they committed. Such a motivated punishment adequately proves the unquestionable offence of

justice. It is a satisfaction to which the victim and other members of the society have their indefeasible right. Its aim is to set the weight of justice swung by crime in a balanced state.

The aim of a punishment should not be some abstract "atonement" or "therapy." Punishment should not be regarded as a forced hospitalization subsidized by the state (let us remember the times, when prisons were euphemistically called correctional institutions). Its purpose cannot be a desirable transformation of a man in a picture currently demanded by the society, e.g. a socially "conformist" transformation. On the contrary, punishment should be regarded as a natural and morally justifiable sanction, while the severity of the sanction should be derived from political, ethical and cultural consensus in the society. The motive of the punishment – basically retrospectively focused – does not attempt to compensate for the evil (since the principle of compensation is a subject of civil, not a criminal law), but draws upon a certain established set of rules and relates to a specific system of authority, which was threatened by the crime.

To regard punishment from the point of view of intended effects (for example the so-called re-socialization) means to approach the criminals as people, who are not responsible for their actions, who are "ill" and socially negatively determined, and who therefore stand apart from the categories of good and evil. Such an approach, grounded on "scientific" or "objective" perception of a man's place in the society, can be understood as a contradiction of the value structure created for centuries by (not only) the western civilization, negating the fact that crime as such gives the punishment a sufficient legitimacy.

The key mission or even a fundamental subject matter of the existence of the state authority is a protection of the citizens against the inner and outer danger. In symbolic terms: the citizens willingly delegate part of their originally indivisible freedom to the state, which in turn pledges to maintain a protect "peace." The state takes over the role of an independent arbiter in the disputes among people. The state regulates these disputes by the means of legal instruments and reconciles them with its legal system by the means of lawful sanctions (basically, it harmonizes the disputes with a sort of materialized, generally shared and respected morality). The inability of the state to face crime can be traumatizing for the whole society, because the state breaks down in its most significant function – that is, in the duty to protect safety and property and to catch (in accord with valid norms) those individuals, who deliberately disrespect the rules of the game. Criminality is a phenomenon that individual citizens cannot cope with. Even the most liberal doctrines about management of public domains admit that in this respect, the state must remain strong to meet its fundamental obligations. Furthermore, the citizens must "understand" the punitive verdicts and accept them as just and adequate to the measure of their misconduct. The verdicts must be in accord with common sense and with common ethical conventions.

There is no doubt that legal "unconsciousness" thrives there, where traditional values are destructed, where people attempt to climb up the social ladder fast and without effort and where there is a consuming mentality with unwritten standards of lifestyle. Collective and therefore anonymous "reason" of a modern state machinery can lead to a situation, in which laws live as if by their own life and justice and its execution becomes a lifeless "superstructure," which is after all an artificial product of elites, which does not reflect properly the

subtle, deeply rooted ideas about justice and good. The growing alienation between laws (codified regulators of social interaction) and natural, common interpretation of justice, law, and injustice presents a threat of fatal undermining of faith in the state's authority, its institutions and its ability to maintain the elementary order of the society. The famous opening of scissors between effective legal system and traditional awareness about justice would be the worst that could befall the Czech society.