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**Prohibition of torture as a non-derogable human right:
interrelation with the right to life and death penalty**

Abstract: Torture is a form of action which inflicted by human beings that is prohibited by law. Pain, which sanctioned under the name of torture and other inhuman or degrading treatment or action intentionally inflicted by one person upon another one leave some permanent scars or damage both physically and psychologically. It has crucial importance to emphasize that these forms of ill-treatment can't and shouldn't legitimize with lawful purposes or acts by state agents. However, the practice of torture is clearly in contradiction with legislation. Even in the fight against terrorism government authorities have to try drawing an exact line between proper and improper methods of interrogation and treatment of detainees. Right to life and freedom from torture are regarded the most significant of all human rights. The existence of other human rights are based on the effective guarantee of these rights. Freedom from torture is regarded as "absolute" or "non-derogable", means that a state cannot infringe and derogate the legitimate protection of this right even in special circumstances. The main goal of this article is to identify the contradiction between torture and other inhuman acts by state agents and protection of basic human rights and emphasize the importance of the right to life and freedom from torture. The study also highlights application of death penalty in some countries and its interrelation with torture and ECtHR cases in this regard.

Keywords: freedom from torture; Aristoteles; death penalty; European Court of Human Rights; United Nations Convention on Torture; derogation in time of emergency; torture on "death row".

The problem of protection of human rights and freedoms is as complex today as in different periods of history. The real guarantee and protection of human rights and freedoms exists only where there is an equal dimension - equality of human rights of all human beings. The idea of natural equality of people in relation to all kinds of behavior in public life was first put forward by the Sophists [21]. The Sophists saw human being as the criterion of all existing values. Afterwards, these ideas were developed in Aristotle's conceptions on equal and distributive justice. According to Aristotle, both distributive and equitable justice, as well as the real guarantee of human rights and freedoms as a whole, is only possible in the presence of the "polis" (i.e administrative city-state in ancient Greece) [2, p.48]. Aristotle notes that under the name of the "polis", it should be understood not as just a state, but a state governed by the rule of law (i.e Rechtsstaat) [2, p.49]. Because it is absurd to talk about the real existence and provision of rights in a state where the government is based on despotism. Within a state governed by the rule of law, the state, based on the principles of the rule of law enshrined in the constitution ensures the effective realization and protection of the rights and freedoms of the individual enshrined in regional and international documents [23,

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p.410]. When it comes to the interrelation between right not to be subjected to torture and the death penalty, it should be noted that the death penalty is a denial of the most fundamental human rights, because the death penalty deprives people of their right to life. Among the rights and freedoms of man and of the citizen, natural rights are inalienable, indivisible, interrelated and interdependent rights that are formed from birth, protected by the state and have the highest legal force [24, p.18]. Personal rights and freedoms include the right to life, the right not to be subjected to torture or ill-treatment or punishment, right to inviolability of private life and freedom of conscience [24, p.12]. These rights serve as a guarantee that a person can continue to exist as an individual in a society. Undoubtedly, the right to life is at the forefront of these rights. The death penalty and the right to life have been controversial for States for years and they have failed to reach consensus. First of all, it should be noted that every human being exists materially and spiritually. Material existence is characterized by its physical or bodily integrity. So what does it mean?

Physical integrity characterises the existence of a person as a physical, biological and real human being. The right to life exists only in the presence of a person's physical integrity [24, p.67-68]. The concept of integrity or wholeness that we are talking about also applies to other human rights. Right to life without physical integrity does not exist and in order to other rights also meaningless without the right to life.

The content of the right to life can be formulated as follows:

- Not to be intentionally deprived of life by the authorities of the State in whose territory the person is located;
- Protection by state authorities in case of imminent death;
- The right to be protected in life-threatening situations when requesting protection from the state;
- The state's definition of homicide in its national legislation as an act prohibited by law and punishable by law;
- The state's positive commitment not only to those at large, but also to prisoners;
- The application of all abovementioned provisions without any forms of discrimination against individuals [24, p. 69].

It is wrong to formulate the right to life as an existing law with the exception of the death penalty. As can be seen from the content of the right to life, this right is a broader concept than the denial of a person's death. One of the decisions of the European Court of Human Rights (*Angelova and Iliev v. Bulgaria*), in accordance with Article 2, obliges states to establish mechanisms to protect individuals not only from others, but also from themselves [5]. However, unfortunately, it should be noted that the ideas discussed in some countries are still foreign and outlandish. In India, for example, the caste (social stratification) still exists. In the modern world, there are states where not only the death penalty, but also slavery has not completely abolished yet. There are more than 140,000 slaves in Mauritania, and one in 15 children in Haiti is a slave [26]. Historically, this tradition was widespread in the ancient slave states, when the masters had a say on the lives of their slaves. So that, despite the fact that society has reached the current level of development, it is seen that there are still states where the institution of slavery has not completely abolished. From this point of view, the real guarantee of the right to life and other human rights and freedoms seem really utopian to some states.

The right to life is enshrined in Article 2 of the ECHR. It is clear from the content of Article 2 that a person's right to life is protected in all cases, except in cases where the state has imposed the death penalty by a court decision [19]. At the same time, Protocol No. 6 "Concerning the Abolition of the Death Penalty" adopted in 1983 was adopted. The protocol provides for the abolition of the death penalty for the Contracting Parties. It is clear from the analysis of Article 2 of the Protocol that the death penalty may be imposed only in a state of war or in a situation in which war is inevitable [25]. In 2002, Protocol No. 13 was adopted to abolish the death penalty in all cases. Also, Article 6 of the 1966 Covenant on Civil and Political Rights (ICCPR) enshrines the right to life as a natural and inalienable inherent personal right [15]. Here, too, the right to life may be excluded in cases of application of the death penalty. However, the Covenant also states that the death penalty cannot be imposed on persons under the age of 18 and on pregnant women [15]. The right to life also includes the protection of prisoners. In *Renolde v. France* case, the European Court of Human Rights stated in its decision that the State should take special measures for those at risk of suicide [10]. In this case, the applicant accused the authorities of the State of failing to take action to protect his brother's life. The court granted the appeal [10]. Court stated similar thoughts in another case although application was declared inadmissible [14]. Besides this, the Court stated in one of its judgments that if persons testified went missing or found dead after being taken there, or if detainees were later found dead and the authorities could not substantiate the matter, the state authorities bears direct responsibility for the violation [5].

All of these abovementioned cases can be considered as violations of not only the right to life, but also the right not to be subjected to torture (i.e. prohibition of torture). Suppose that a person who claims not to be guilty pleads guilty and is physically injured (beaten, etc.) at the place of detention. In this case, there is a suspicion that the interrogated person was subjected to physical violence and harm, even torture. Consequently, a person who "confesses" his or her guilt under physical or psychological pressure may be sentenced to life imprisonment or death in the state where the death penalty is applied. In order to prove such cases, it would be advisable to use video or audio recording technology tools during the interrogation.

In the Case of *Salman v. Turkey*, the Court had stated in §100 that "If death occurs in custody in connection with even minor injuries, there is a heightened burden on the Government authorities to provide a satisfactory explanation and in this context, the authorities bear the responsibility to ensure that they keep detailed and accurate records concerning the person's detention for they must account convincingly for any injuries" [12].

There are plenty of cases in Strasbourg Court regarding the situation we are talking about. For instance, in *Aydin v. Turkey* case applicant alleged that she was raped in police custody [6]. Court had found the violation of the Article 3 of the Convention and added: [6] "...rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence..."

It was also noted "under the meaning of Article 3, it should be understood that acts under the Article 3 may doesn't happen open to public. The absence of publicity does not necessarily prevent a given punishment from falling into that category and it may well suffice that the victim is humiliated or tortured in his own eyes, even if not in the eyes of others" in the Guide to the Implementation of the Article 3 of the ECHR [20]. Case of *Dikme v. Turkey*, Case of *Aksoy v. Turkey* are also

another similar cases about “confessing” which applicants were suffered and subjected to torture intentionally by agents of the State in the performance of their duties [4]. However, *Akkoç v. Turkey* case is a bit different from abovementioned ones. Because in this case, the applicant had exposed to not only physical torture, but also mental suffering due to threatening his family and children [3]. Court had found the violation of alleged rights and also noted in its assesment that “...this type of treatment left the applicant with long-term symptoms of anxiety and insecurity, diagnosed as post-traumatic stress disorder (PTSD) and requiring treatment by medication” [3].

The European Committee for the Prevention of Torture (CPT) underlines that in the experience of the CPT, there have been mass of cases about non-admissibility of evidence which obtained under the torture or related treatments [16]. In its 6th and 9th General Reports (which were published in 1996 and 1999 respectively), Committee stated that the period immediately following the deprivation of liberty is when the risk of intimidation and physical ill-treatment is at its greatest and the risk of being deliberately ill-treated is higher in police establishments rather than in other places of detention within a state [17].

The Strasbourg Court has also stated in its decision in *Tomasi v. France* case that “the prohibition on resort to ill-treatment during interrogations and interviews, together with the prohibition on use of any evidence obtained by resort to such behaviour, remains absolute” [13].

The interrelation between death penalty and torture is also seems at the methods of execution. So that, the application of the death penalty violates not only the right to life, but also other rights related to the right to life, in particular the right not to be subjected to torture. In some countries (such as Iran, China and etc.) that use the death penalty, there are cases of painful execution (hanging, rajm, etc.) [1]. Such cases should be considered as physical type of torture and violation of the right not to be subjected to torture. Generally, most Asian countries where the death penalty is not abolished, there is little period between the death penalty and the execution. However, in the United States, it takes an average of 10 years or more from the death penalty to execution [1]. This means that during this period, the person suffers moral suffering, that is, torture. The period between the death penalty verdict and execution called “death row”. There is a research is conducted about the detrimental effects of “death row” in the USA. According to the results, “death row” - isolated conditions under which death row inmates were confined on death row produced widespread feelings of abandonment and it leads to “death of personality” before “death of body” [22, p.4, p.110]. In Case of *People v. Anderson*, California Supreme Court has decided that imposition of the death penalty violates Article 6 of the Constition of the USA which is concerned prohibition of cruel or unusual punishment and also particularly underlined the cruelty of the delay in carrying out the death penalty [9]. The same decision was also taken in the Case of *District Attorney for the Suffolk District v. Watson* in Massachusetts, USA [7].

In order to these, sometimes prohibition of torture is also categorised as one of the non-derogable human rights even in time of emergency like right to life [19]. It shows the excessive importance of this right. It also means ECHR and EctHR (the Court) approach the right to be not to subjected to torture as an absolute right. According to the Article 15§2 of the ECHR, “no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision” [19]. It means these rights continue to apply during any time of war or public emergency, irrespective of any derogations made by a State.

In general, the international normative-legal basis of prohibition of torture is the 1984 Convention on the Prohibition of Torture. The “UN Convention against Torture and Other Cruel, Inhu-

man or Degrading Treatment or Punishment”, defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” [28].

Principally, torture can be physical, psychological and sexual (as a sub-category of physical torture) [24, p.84]. For example, a person may be subjected to nail removal or “falanga” during physical torture (e.g. Greek case), or psychological pressure about damaging his or her family may be used during psychological torture [27].

Article 3 of the ECHR also enshrines the prohibition of torture. This is the shortest of the articles of the Convention and does not consider it possible to make a reservation [19]. It states that States undertake to take precautionary measures against acts contrary to Article 3 and to investigate these matters thoroughly [19]. In this regard, the methods used by the state law enforcement agencies during the interrogation shall not contradict Article 3. One of the ECtHR decisions on Azerbaijan, stated that investigation about suspicion of implementation of torture had not been effectively fulfilled [8]. Speaking of the right not to be subjected to torture, the ECtHR decision in the case of Saadi v. Italy should be noted. In this case, a local court had found Saadi guilty and had sentenced him to 20 years in prison [11]. Saadi had been threatened with torture in Tunisia if he was deported, and the European Court of Human Rights had ruled that Saadi's deportation from France to Tunisia violated Article 3 of the Convention [11]. Principally, there is a “non-refoulement” principle in international law regarding extradition. Article 11 of the European Convention on Extradition explains this principle as follows: “the requested State may refuse extradition if there is a threat of the death penalty in the State of extradition or if the requesting State cannot provide sufficient assurances that the person will not be subject to the death penalty if extradited” [18].

In summation, the application of the death penalty not only deprives a person of his private life, but also causes him to suffer physically during the execution of his sentence and mental suffering until the execution of his sentence. When we look at the methods of execution in the modern world, we can say that only lethal injection method is not causes torture. However, in the United States, where this method is used, it takes a long time from the death penalty to the execution of the sentence, in which case the person is subjected to psychological torture.

Most of the retentionist countries (countries where the death penalty is held) are located in Asian countries, especially Sharia Law countries and China. The main reason why the death penalty cannot be abolished in these countries is religion (in Sharia law countries) and “political terror” (in China or Vietnam). In these countries, dozens or even hundreds of people are executed or sentenced to death each year for their religious beliefs and for their race or nationality. Every year in countries where human rights and freedoms are grossly violated, especially in Asian region, it is possible to observe the use of the death penalty or torture as a punishment by the State agents against certain political groups or races [1]. Thus, in more than 50 countries where the death penalty is maintained, it is clear that judges are in fact not completely independent when issuing decisions, and therefore the separation of powers is also formal.

Consequently, it should be noted that in a state governed by the rule of law, punishment serves a specific purpose - to correct or rehabilitate the offender, the death penalty, torture, inhuman

or degrading treatment or punishment are devoid of this feature as a punishment. Because in this case, the person is actually killed or physically suffered or mentally degraded, that is, his existence disappears in every sense of the word. In such circumstances, it is impossible to talk about the reformation effect of punishment.

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**Запрещение пыток как неотъемлемое право человека:
взаимосвязь с правом на жизнь и смертную казнь**

Аннотация: Пытки - это запрещенная законом форма действий со стороны людей. Боль, которая санкционируется под названием пыток и других бесчеловечных или унижающих достоинство видов обращения или действий, умышленно причиненных одним человеком другому, оставляет некоторые стойкие шрамы или повреждения как физически, так и психологически. Чрезвычайно важно подчеркнуть, что эти формы жестокого обращения не могут и не должны быть узаконены законными целями или действиями государственных агентов. Однако практика пыток явно противоречит законодательству. Даже в борьбе с терроризмом государственные органы должны стараться проводить четкую грань между надлежащими и ненадлежащими методами допроса и обращения с задержанными. Право на жизнь и свободу от пыток считаются наиболее важными из всех прав человека. Существование других прав человека основано на эффективной гарантии этих прав. Свобода от пыток считается «абсолютной» или «не допускающей отступлений»,

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что означает, что государство не может нарушать и умалять законную защиту этого права даже в особых обстоятельствах. Основная цель этой статьи - выявить противоречие между пытками и другими бесчеловечными действиями государственных служащих и защитой основных прав человека и подчеркнуть важность права на жизнь и свободу от пыток. В исследовании также освещаются случаи применения пыток и других связанных с ними действий в разных странах и дела ЕСПЧ в этом отношении. В исследовании также подчеркивается применение смертной казни в некоторых странах и ее взаимосвязь с пытками и делами ЕСПЧ в этом отношении.

Ключевые слова: свобода от пыток; Аристотель; смертная казнь; Европейский Суд по Правам Человека; Конвенция Организации Объединенных Наций Против Пыток; отступление от соблюдения обязательств в чрезвычайных ситуациях; пытки в камере смертников.

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