THE CONSTITUTIONALIST FUNERAL OF THE AMERICAN DEATH PENALTY

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Abstract: *Although the constitutionality of the death penalty has become the subject of wide consensus, the constitutionality of the form and the proceedings with which capital punishment is engaged remains in dispute. In this article, I make several steps backwards, thus examining the constitutionality of the death penalty in itself. I address this issue from a new perspective. I present the traditional American evolution of judiciary constitutional thinking on capital punishment, and accordingly traditional constitutional arguments against the death penalty. Then, I flag sweeping comparative and international legal moves towards the abolition of the death penalty bearing in mind the problematic political compromise imbedded in Article 6 of the International Covenant on Civil and Political Rights of 1966, which sharply protects the right to life as an inherent right, as well as prohibits violation of this right in an arbitrary manner, on the one hand, and acknowledges the existence of other countries that allow for the imposition of death penalty, though by limiting it to the most serious crimes, on the other hand. Finally, I offer a new angle of reading, understanding and interpretation of the Constitution of the United States, based on a novel philosophical thesis that I name: "constitutionalism." I suggest thus a new order of basic legal thought based upon the pyramid of norms, seeking to place atop constitutionalism theory as the supreme governor of every democratic society. I argue that under a constitutionalist regime there are two absolute constitutional rights; these are the right to life and the right to dignity. Consequently, I assert the unconstitutionality of capital punishment. However, reading the Constitution of the United States within the frame of this model, it is clear that the unconstitutionality of the death penalty is the only outcome. In a world where the concept of human rights is supreme, I have more than one reason to believe that the death of the capital punishment is much closer than ever before.*

Key Words: *Death Penalty; Dignity; Human Rights; Right to Life.*

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AMERİKAN ÖLÜM CEZASININ ANAYASALCI CENAZESİ

Özet: *Her ne kadar idam cezasının anayasallığı geniş kapsamlı bir görüş birliğine sahipse de, şekil ve işlemlerin anayasallığı üzerinde anlaşmazlıklar devam etmektedir. Bu makalede, birkaç adım geri gelerek ölüm cezasının kendisinin anayasallığını incelemeye çalışıyorum. Bu konuya yeni bir açıdan yaklaşıyorum. İdam cezası ile ilgili geleneksel Amerikan anayasal düşüncesinin evrimini ve arkasından ölüm cezasına karşı geleneksel anayasal argümanları sunuyorum. 1966 Sivil ve Siyasi Haklar Uluslararası Akti 6. maddesinde yer alan siyasi uzlaşma problematiğini göz önünde bulundurarak ölüm cezasının yasaklanmasına yönelik uluslararası yasal hareketleri karşılaştırmalı bir şekilde ele alıyorum. Söz konusu akit, yaşam hakkını katı bir şekilde koruyan, aynı zamanda bu hakka yönelik tüm eylemleri yasaklayan, fakat aynı zamanda idam cezasının bazı ülkelerdeki varlığını kabul eden, ancak bunu sadece çok ciddi suçlarla sınırlayan bir belgedir. Amerikan anayasasının farklı bir açıdan okunmasını, anlaşılmasını ve yorumlanmasını önerirken, bunun "anayasalcılık" denilen felsefeye dayanarak yapılmasını savunuyorum. Böylece, her demokratik toplumdaki en üst yönetim olan anayasalcılık teorisinin tepesine koyma çabası ile, normlar piramidi üzerine kurulu yeni bir temel yasal düşünce düzeni ortaya koyuyorum. Anayasal bir rejimde iki mutlak anayasal hak olduğunu, bu hakların yaşam ve haysiyet olduğunu savunuyorum. Sonuçta, idam cezasının anayasal olmadığını ortaya koyuyorum. Ancak, Amerikan Anayasasını bu model çerçevesinde okuyunca, ortaya tek bir sonuç çıkıyor, o da; ölüm cezasının anayasal olmadığı. İnsan hakları kavramının en yüce noktada olduğu dünyamızda, idam cezasının ölümünün şimdiye kadar hiç olmadığı kadar yakın olduğunu savunmak için bir nedenim daha bulunuyor.*

Anahtar Kelimeler: *Ölüm cezası, haysiyet, insan hakları, yaşam hakkı*

This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness… We must forever conduct our struggle on the high plane of dignity and discipline

[Martin Luther King, Jr., "I Have A Dream"]

I. Prologue

Invoking natural law as the origin of the basic rights of human beings, Martin Luther King addressed:

> …"unjust law is no law at all"… A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that

> is out of harmony with the moral law…. Any unjust law is a human law that is not rooted in eternal law and natural law, any law that uplifts human personality is just. Any law that degrades human personality is unjust.[1]

The notion of human rights is evident in many facets of legal discussion, especially in constitutional law.[2] Referring confidently to the notions of human rights, just law and moral values – as well as the concept of "all people were created"[3] – Martin Luther King relied on a substantial philosophical concept of the natural origin of human rights and of the need to protect this set of rights.[4] These concepts cut directly to the core of the legal thought.[5] It is, however, a biblical theme, as evidenced by the statement: "When God created man, he made him in the likeness of God."[6]

Most documents on human rights refer to an abstract power as the source of all human rights and thus the legitimacy of its protection. This assertion of an abstract power purports to ground premises of hypothetical theory on the ideal notion of human rights, where only "Good" could exist. That said, "… You may freely eat of every tree of the garden, but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat you shall die."[7] In modern times

1 Martin Luther King, "Letter from Birmingham Jail," 26 (4) *U.C. Davis Law Review,* no. 835, (1993), p. 840 On the philosophical concept of human rights, *see*: George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), pp. 11-42, 35.

2 This is also true of Criminal Law; *i.e.* Substantive Criminal Law, Evidence Law and Criminal Procedures. It is also true of legal philosophy studies.

3 Martin Luther King, Jr., "I Have A Dream," in *Martin Luther King***:** *The Peaceful Warrior*, ed. Ed Clayton, (New York: Pocket Books, 1968).

4 See e.g. The English Bill of Rights of 1689; The Declaration of Independence of the United States of America of 1776; The Constitution of the United States of 1787; The Basic-Law for the Federal Republic of Germany (Promulgated by the Parliamentary Council on 23 May 1949, last amended 1990); The French Declaration of the Rights of Man and of Citizen of 1789; The French Constitution of 1958; The Canadian Charter of Rights and Freedoms of 1982; The Israeli Basic-Law: Human Dignity and Liberty of 1992; The Constitution of the Republic of South Africa of 1996.

5 Patrick Hayden, *The Philosophy of Human Rights,* (New York: Paragon House, 2001; John Rawls, *A Theory of* Justice (U.S.: Harvard University Press, 1999); The Universal Declaration of Human Rights of 1948; The Declaration on the Rights on Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms of 1998; The European Convention for Protection of Human Rights and Fundamental Freedoms of 1950; The European Union Charter of Fundamental Rights of 2000; The American Declaration of the Rights and Duties of Man of 1948; The American Convention on Human Rights of 1969; The African Charter on Human and People's Rights of 1981; The Cairo Declaration on Human Rights in Islam of 1990; The Arab Charter on Human Rights of 1994; Ian Brownlie and Guy Goodwin-Gill, *Basic Documents on Human Rights* (Oxford: Oxford University Press, 2002).

6 Genesis Book, 5. The Magna Carta (The Great Charter) of 1215 also refers to God. *See more*: Resolution on Capital Punishment of 1977 (The General Board of the American Baptist Church); Statement on Capital Punishment of 1957 (The Church of the Brethren); Statement on Capital Punishment of 1978 (The Committee on Social Development and World Peace, by the U.S. Catholic Conference); Concerning Capital Punishment (Christian Church, 1973); Resolution on Capital Punishment of 1959 (The Union of American Hebrew Congregations).

7 *Id.*, at 2. *Note*: The use of the word "die" has different meaning to that with which we are familiar. By saying "you shall die" God means "Because you have… eaten of the tree of which I commanded to you, 'You shall

– namely, the materialist world – this biblical maxim was reshaped by philosophers, who proposed the imposition of certain duties on states, as entities of organizing power, for the sake of protecting human rights.[8]

Criminal law is one of the legal fields most likely to violate human rights for the sake of *e.g.* a legitimate interest in "revealing the truth." Nonetheless, as I have expressed elsewhere:[9]

> The "Truth" is much more valuable than we imagine, and it is far from being captured, it might be even more valuable than the truth that already was found. The "Absolute Truth" is a priceless treasure, a biblical theme, and it is Eve's evil willing to reveal it. The "absolute truth" is a diamond, well sharpener and well sharpened. A truth which needs to be approved by others cannot be "absolute truth." For "absolute truth," not even the consensus of all the cosmos will add any unique value, just as its universal rejection will not detract any of its unique value. Unfortunately, we have hitherto not been granted anything like this absolute truth, as announced by Khalil Gubran: "Say not, "I have found the truth," but rather, "I have found a truth." Carrying this treasure of priceless maxims, I try to pave my way through the American Constitution, arguing for the absoluteness of the right to life and the right to dignity.

II. Introduction

In one of his famous lines on the conceptual meaning of death, Franz Kafka wrote:[10]

> To die would mean nothing else than to surrender a nothing to the nothing, but that would be impossible to conceive, for how could a person, even only as a nothing, consciously surrender himself to the nothing, and not merely to an empty nothing but rather to a roaring nothing whose nothingness consists only in its incomprehensibility.

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not eat of it,' cursed is the ground because of you; in toil you shall eat of it all the days of your life; thorns and thistles it shall bring forth you; and shall eat the plants of the field." (*See*: *Id.*, at 4). Therefore, though God punished them, God did not deprive them of their life.

8 *See e.g.* John Rawls, *A Theory of* Justice…, p. 118; Louis Henkin, *Constitutions and the Elements of Constitutionalism* (Columbia University: Center for the Study of Human Rights, November 1992).

9 Mohammed Saif-Alden Wattad, "Did God say, 'You Shall Not Eat of Any Tree of the Garden'?: *Rethinking the "Fruits of the Poisonous Tree" in Israeli Constitutional Law*," Oxford U Comparative L Forum (2005), http://ouclf.iuscomp.org/articles/wattad.shtml. Genesis Book, 3, 4; H. L. A. Hart, "Between Utility and Rights," *Columbia Law Review,* 79 (1979); Kahlil Gibran, *The Prophet* (U.S. Alfred A. Knopf, Inc., 1923), 54.

10 Franz Kafka - December 4, 1913, http://www.kafka-franz.com/kafka-Biography.htm

The American People have experienced a very complicated history, for which human rights has been a constant characteristic throughout, *e.g.* religious and ethnic issues. Step by step, they have built a constitutional regime that they can be proud of. Successfully, the Bill of Rights of 1789 was adopted within the Constitution, and a level of enlightenment was achieved. The American history has become a saga of "Good and Bad." The American People aspired to become "a more perfect union."[11] Luther King's famous speech – "I have a dream" – played a very purposive and principal role in this saga.[12] Luther King did not "dream" about equality, though this was the touchstone notion of his address. But, he dreamt about human dignity as a converse concept of humiliation. It was the biblical idea: "When God created man, he made him in the likeness of God."[13] Holding this dream, Luther King awakened the American People to a new era, where human beings should be treated as ends but not means. Case by case, the path toward Luther King's dream was paved. Adopting the Bill of Rights in 1791 in the Constitution was strictly the first step. Addressing the Due Process Clause and the Equal Protection Clause[14] as a large loophole for recognizing fundamental human rights, which are not expressly protected by the Constitution, was the major constitutional evolution.

Yet, what could have been a major development in constitutional law and criminal law has not come to pass. Keeping loyal to several "Bad" outmoded practices the protection of human rights seems to be defective; *i.e.* the ongoing validity of the death penalty.[15]

The trouble was not only that the "will of the People" was denied. That said, "[W]e hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are

11 The Preamble of the Constitution of the United States.

12 Martin Luther King, "Letter from Birmingham …

13 Genesis Book, 5, *Supra* note 6.

14 Section 1 of the Fourteenth Amendment of the Constitution of the United States. The ideas is of "Due Process" and "Equal Protection" are substantive concepts of every legal jurisprudence, although formally acknowledged by Anglo-American systems. Underlying these notions is the premise to guarantee the accused rights in trial. The "Due Process" principle states that the government must respect all of the legal rights that are owed to a person according to the law; it holds the government subservient to the law of the land, protecting individual persons from the state. The notion of "Equal Protection" attempts to secure the state's professed commitment to the proposition that "all men are created equal" by empowering the judiciary to enforce that principle against the state; it grants equal protection, not necessary equal rights.

15 This was an ancient English inheritance of the end of the fifteenth century. The American colonies had no uniform criminal law. The earliest recorded set of capital statutes on these shores are those of the Massachusetts Bay Colony from 1636. This early codification was titled "The Capital Laws of New-England." Hugo Adam Bedau, *The Death Penalty in America* (Chicago: Aldine Pub. Co., 1976), p. 5; Theodore Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown and Company, 1956), 424-454. In other words, this was the evil of the English "Bloody Code." This title was given by Arthur Koestler. Yet, it does not mean that the Colonial Americans were blindly following the tradition. See: Stuart Banner, *The Death Penalty: An American History* (Cambridge: Harvard University Press, 2002), p. 5.

Life, Liberty, and the pursuit of Happiness."[16] The trouble is the constitutional validity that the death penalty was granted.[17]

However, this issue has long been under discussion in the American jurisprudence, as set out henceforth. Though the constitutionality of the death penalty has become the subject of wide consensus, the constitutionality of the form and the proceedings with which capital punishment is engaged remains in dispute. In this article, I make several steps backwards, thus examining the constitutionality of the death penalty in itself. I address this issue from a new perspective. In Part III, I present the traditional American evolution of judiciary constitutional thinking on capital punishment, and accordingly traditional constitutional arguments against the death penalty. In Part IV, I flag sweeping comparative and international legal moves towards the abolition of the death penalty bearing in mind the problematic political compromise imbedded in Article 6 of the International Covenant on Civil and Political Rights of 1966 (hereinafter: ICCPR) - a multilateral treaty adopted by the United Nations General Assembly. It commits its parties to respect the civil and political rights of individuals which sharply protects the right to life as an inherent right, as well as prohibits violation of this right in an arbitrary manner, on the one hand, and acknowledges the existence of other countries that allow for the imposition of death penalty, though by limiting it to the most serious crimes, on the other hand. Finally, I offer a new angle of reading, understanding and interpretation of the Constitution of the United States, based on a novel philosophical thesis that I name: "constitutionalism." I suggest thus a new order of basic legal thought based upon the pyramid of norms, seeking to place atop constitutionalism theory as the supreme governor of every democratic society, within the simple classic meaning of a political model of governing. I argue that under a constitutionalist regime there are two absolute constitutional rights; these are the right to life and the right to dignity. Consequently, I assert the unconstitutionality of capital punishment. However, reading the Constitution of the United States within the frame of this model, it is clear that the unconstitutionality of the death penalty is the only outcome.

16 *See*: The Declaration of Independence, *supra* note 4.

17 *Note*: The first constitutional challenge for the validity of the death penalty was made through the Eighth Amendment of the Constitution of the United States, which prohibits "cruel and unusual punishment." Making this argument, the Supreme Court of the United States held that the intent of the Framers of the Constitution was to rule out, once and for all, the aggravations attendant on execution, *e.g.* drawing and quartering, pressing, or burning. These practices had all but totally disappeared by 1789 and they had never taken firm root here, anyway; but their express exclusion by Jefferson, Madison and other authors of the Bill of Rights was a service to the interest of a free and human people. Except when executing spies, traitors and deserters, who could be shot under martial law, the sole acceptable mode of execution in the Eighth Amendment was hanging. *See*: *Wilkerson* v. *Utah*, 99 U.S. 130, 135 (1878).

In a world where the concept of human rights is supreme, I have more than one reason to believe that the death of the capital punishment is much closer than ever before.[18] This belief was well expressed by Raymond Bye, in the twentieth century: "There is reason to believe that in the course of the present century the use of the death penalty will finally pass away."[19]

A new century is making its first steps forward. Neither Bye's belief nor Luther King's dream was fulfilled yet. I hope that my thesis will contribute to the efforts of these distinguished dreamers, thus holding the right to life and the right to dignity straight on towards the abolition of the death penalty, waiving away one of the last bad notions that the American People still carry from their outmoded dogma – which is the established doctrine held by ideology as a matter of authoritative and not to be disputed, doubted or diverged from.

III. The Traditional Constitutional Arguments Against The Death Penalty

Vladimir Soloviev, an articulate Russian philosopher, once argued:[20]

> Death penalty is the last important position which the barbarian criminal law (direct transformation of a savage custom) still upholds in contemporary life.

In this chapter, I present solely the traditional American debate on the constitutional aspects of the death penalty. This constitutional challenge was largely issued by the American Supreme Court through landmark cases, as well as by academics.[21] Nonetheless, something was missed in this long journey. The proof is that the death penalty still survives under the American normative umbrella.

The evolution of the constitutional debate on the death penalty[22] has its origin in

18 Stuart Banner, *The Death Penalty*..., p. 89.

19 Raymond Bye, "Recent History and Present Status of Capital Punishment in the United States," *Journal of Criminal Law, Criminology and Police Science,* vol. 17, no. 2 (Aug., 1926), 239, 245.

20 This notion was held in 1906, and published in English later in 2001. *See*: Vitaly Kvashis, "Death Penalty and Public Opinion", *Russian Social Science Review* no. 40 (1999), 75–89.

21 *See*: Daniel Suleiman, "Note: The Capital Punishment Exception: A case for Constitutionalizing the Substantive Criminal Law," *Columbia Law Review,* no. 426 (2004); *Coker* v. *Georgia*, 433 U.S. 584, 586 (1977); *Enmund* v. *Florida*, 458 U.S. 782, 787 (1982); *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002); Ray W. Irwin and Edna L. Jacobsen, eds., *A Columbia College Student in the Eighteenth Century: Essays by Daniel Tompkins* (New York: Columbia University Press, 1940), p. 23.

22 The 1760s and 1770s were the beginning of the rethinking of capital punishment. In the 1780s and 1790s, it became the subject that every individual thought about; a process of public debate was carried out; and news papers carried editorials and letters arguing for and against abolition. This uncontroversial subject, until the

1791, when the Eighth Amendment of the Constitution of the United States was ratified, providing that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23]

The phrase "cruel and unusual punishment" has been used in three distinct but related senses.[24] The first use is related to the principle of proportionality, namely that the harshest sentences had to be reserved for the worst crimes. The second understanding refers to punishment unauthorized by law and therefore outside the authority of a court to impose. And, the third meaning of this phrase prohibits certain means of painful punishing. Nevertheless, under none of these meanings would capital punishment have been considered cruel and unusual.[25] However, no one read the Eighth Amendment as abolishing all forms of death penalty. Other parts of the Constitution indicate that those who drafted and ratified it contemplated the continued existence of the death penalty. In other words, the Fifth Amendment requires indictment by grand jury before trial "for a capital, or otherwise infamous crimes," ensures that no defendant will "be subject for the same offense to be twice put in jeopardy of life," and forbids the government to deprive a person "of life, liberty, or property, without due process of law."[26]

In *Weems*,[27] a novel interpretation of the Eighth Amendment was adopted. An American official was convicted of falsifying a minor government record and sentenced to fifteen years' imprisonment with hard labor plus lifetime disqualification from many civil rights. Justice Joseph McKenna held that the sentence amounted to cruel and unusual punishment as it was so disproportional to the crime. *Weems* promoted two novel notions:[28] (1) ignoring the Framer's

1760s, became one of the major controversial themes. Some invoked the abolition of the death penalty (*e.g.* James Madison and DeWitt Clinton), while others sought the narrowing of the premises of capital punishment, by advocating the elimination of the death penalty for all crimes other than murder (*e.g.* Thomas Jefferson and Benjamin Franklin). Nevertheless, in the eighteenth century, no state promoted a complete abolition of the death penalty, but several did away with it for crimes short of murder. This was a revolutionary process, led, in particular, by public opinion.

23 Stuart Banner, *The Death Penalty*..., 231. This formula originally appeared in the English Bill of Rights of 1689.

24 *Id.*, at 232-234.

25 Only a small fraction of the population considered capital punishment disproportionately severe for the gravest crimes; the death penalty was hardly unauthorized by statute; and a death by hanging was often not painful at all and was not intended to be painful.

26 Hence, lawyers began to attack aspects of capital punishment under the Eighth Amendment only when governments began to depart from tradition. *See e.g. Wilkerson* v. *Utah*, 99 U.S. 130 (1878); *State* v. *Burris*, 190 N.W. 38 (Iowa 1922); *State* v. *Butchek*, 253, 253 P. 367 (Ore. 1927); *State* v. *Stubblefield*, 58 S.W. 337 (Mo. 1900); *Territory* v. *Ketchum*, 65 P.169 (N.M. 1901); *Gibson* v. *Commonwealth*, 265 S.W. 339 (Ky. 1924); *Robards* v. *State*, 259 P. 166 (Okla. 1927); *Brookman* v. *Commonwealth*, 145 S.E. 358 (Va. 1928); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

27 *Weems* v. *United States*, 217 U.S. 349 (1910).

28 *See more*: In 1947, in very explicit terms, Justice Frank Murphy of the Supreme Court of the United States held that the Eighth Amendment ought to be understood with reference to current attitudes toward punishment. For as "a punishment that might be considered fair today, [it] may be considered cruel and unusual punishment

intent; and (2) investing judges with extraordinary discretion to review sentences for severity.[29] *Weems*, however, generated three largely cited cases, for which the Supreme Court of the United States shaped the basic architectural structure of the "cruel and unusual punishment" phrase.

In *Trop*,[30] the Supreme Court invalidated a section of the Nationality Act of 1940, on the strength of which a dishonorably discharged Army veteran had been held to have forfeited his citizenship for wartime desertion. The court tested the sentence not against historical precedents but against contemporary sensibilities. The peculiarity of this case is the holding that the phrase "cruel and unusual punishment" includes whatever Americans were prepared to call cruel and unusual at any time, not just what Americans of the late eighteenth century would have thought of as cruel and unusual.[31]

In a group of cases called *Furman*,[32] the Supreme Court declared the death penalty, "in these cases," unconstitutional,[33] as cruel and unusual punishment, thus holding that the application of the death penalty was discretionary, haphazard and discriminatory in that it was inflicted in a small number of the total possible cases and primarily on certain minority groups.[34] Nevertheless, what could have been a major development in constitutional law and criminal law, has not come to pass. The Supreme Court limited its holding to capital punishment as applied to Georgia and Texas.

tomorrow." He emphasized the concept that "more than any other provision in the Constitution, the cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. [We] have nothing to guide [us] in defining what is cruel and unusual punishment is apart of [our] conscience" (*Louisiana ex rel Francis* v. *Resweber*, 329 U.S. 459 (1947); Harold Burton Papers, box 171, LC).

29 Stuart Banner*, The Death Penalty*..., 236; Hugo Adam Bedau, *The Courts, the Constitution, and Capital Punishment* (Lexington, Mass.: Lexington Books, 1977), p. 32. In 1962, a similar question, under different circumstances, was brought to court, for which Robinson, a narcotic, was sentenced to a ninety-day jail term for being addicted to narcotics. Justice Potter Stewart held that it "would be a cruel and unusual punishment for the 'crime' of having a common cold." He emphasized that, though imprisonment of ninety days is not, in abstract, a punishment which is either cruel or unusual, but the Eighth Amendment also prohibits punishments that were too severe for the crime to which they were attached. *See*: *Robinson* v. *California*, 370 U.S. 660, 667 (1962). *Note*: Originally, the Eighth Amendment did not apply to the states, but only to the Federal Government. Later in the nineteenth century, the Supreme Court of the United States gradually found most of the Bill of Rights to be incorporated by the due process clause of the Fourteenth Amendment and thus applicable to the states as well. In *Robinson*, the Supreme Court of the United States expressly incorporated the Eighth Amendment to the Fourteenth Amendment, and thus it applies to the states; Larry Charles Berkson, *The Concept of Cruel and Unusual Punishment* (Lexington, Mass.: Lexington Books, 1975), pp. 71-73.

30 *Trop* v. *Dulles*, 356 U.S. 86 (1958).

31 Therefore, denationalization is unconstitutional because it exceeded the limits of civilized standards as of 1958.

32 In the middle of the twentieth century, strong voices were heard in favor of the abolition of the death penalty. It includes Supreme Court Justices, law professors and sociologists. *See*: *Williams* v. *New York*, 337 U.S. 241, 248 (1949). The law professor Herbert Packer reported in 1968 that "[T]he retributive position does not command much assent in intellectual circles." *See also*: Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), p. 10; Robert G. Caldwell, "Why Is the Death Penalty Retained?" *Annals of the American Academy of Political and Social Science* 284 (1952) p. 52.

33 *Furman* v. *Georgia*, 408 U.S. 238 (1972).

34 *See and compare*: *McGautha* v. *California* 402 U.S. 183 (1971).

But the Supreme Court quickly realized that it had entered uncertain territory, and thus in *Gregg*[35] rejected the argument that the death penalty violates the Constitution of the United States holding that it is not a form of punishment that can never be imposed, regardless of the circumstances of the offense, the charter of the offender and the procedure followed in reaching the decision to impose it.[36]

Following *Gregg*, there grew a large consensus that the death punishment does not invariably violate the Constitution of the United States. Whereas the form and the procedures could be unconstitutional, the essence of the death penalty is deemed indisputably constitutional.[37]

IV. Comparative & International Perspectives: "Isolating" The American Death Penalty

American law – in particular American constitutional law – does not exist in a vacuum. Arguing against capital punishment, the question becomes whether there is room for considering comparative law and practices of other legal systems and international law. Whereas the answer might be plain enough as to international law, given that international law is part of American law,[38] it is not as clear as to comparative law.[39] However, Professor George Fletcher once argued that "the most interesting and significant comparative studies are precisely those that tackle these incomparable items of legal theory and doctrine."[40] Given that the main concern of this article is the American death penalty, I provide only the basic guidelines of comparative and international studies.

35 The *Furman* rule generated the enactment of a new statutory scheme in Georgia.

36 *Gregg* v. *Georgia*, 428 U.S. 153 (1976). For the concrete circumstances of this case, the Court held that the Georgia's system of sentencing focused the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant and provided a method for review, and thus the Georgia's statute did not violate the constitution.

37 The death penalty even survived the Due Process Clause [*See for instance*: *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963); *Walton* v. *Arkansas*, 371 U.S. 28 (1962)] and the Equal Protection Clause [*See*: *Giacco* v. *Pennsylvania*, 382 U.S. 399 (1966)]. At most, the hard cases were limited to formal and procedural questions, *e.g.* whether death penalty was imposed with due process or whether it was imposed in a discriminatory manner.

38 As provided by Article II, clause 2, of the Constitution of the United States, treaties supersede any position under the supreme law of the United States of America.

39 Arguing basically that each legal culture has its own legal tradition, from which different legal principles are derived.

40 George P. Fletcher, "Introduction from a Common Law Scholar's Point of View" in Albin Eser, George P. Fletcher, Karin Cornils, eds., *Justification and Excuse: Comparative Perspectives* (New York: Transnational Juris Pubs., Inc., 1987), p. 9.

Curiously, the United States of America is one of the rare countries in the entire western hemisphere and Europe that continues to implement the death penalty.[41] Throughout the mid-19th century to the early 21st century, a sweeping process of death penalty abolition was carried out in many countries in the world – mainly, western European countries, *inter alia* constitutional or statutory amendment[42] The Council of Europe, a strong opponent of the death penalty, discarded even its wartime exception to this policy. Hence, any country wishing to become or to remain a member of the Council of Europe was required to abolish the death penalty.[43] Europe and Latin-America had abolished, in general, the death penalty, or at least had not enforced it.

A nutshell inquiry into international law shows a parallel movement of abolition. Accurately articulated, the ICCPR prohibits "cruel, inhuman or degrading treatment or punishment."[44] That said, "All measures of abolition should be considered as progress in the enjoyment of the right to life."[45] Yet, the question concerning the ICCPR is not easy as it might be perceived from a simple glance at the manifest words of the ICCPR.

On the one hand, Article 6(1) of the ICCPR provides a clear protection to the right to life; it further considers the right to life as inherent. Article 6(1) also prohibits arbitrary deprivation of the right to life. To this extent, note that from Article 6(1) one may not clearly infer either the permissibility of imposing death penalty or the prohibition against it. To elaborate on Article 6(1), it notable that Article 6(2) recognizes the existence of countries that allow for the imposition of death penalty. However, for these instances Article 6(2) affixes a formula of clear political compromise, whereby in such countries death penalty can be attached only to the most serious crimes, *e.g.*, murder..

One may seriously argue that Article 6 embodies a conceptual contradiction. As I shall argue in depth later on, an inherent right – such as the right to dignity or the right to life – is by nature an absolute right. Providing that the right to life is inherent – as Article 6(1) states – it is my view then that permitting the imposition of death penalty implies a relative nature of the right. I view this that inherent rights cannot be relativists; they must be absolute in.

41 Victor L. Streib, *Death Penalty in a Nutshell* (St. Paul, Minn.: Thomson West, 2003), p. 274.

42 *Id.*, at 270.

43 *Id.*, at 271.

44 Article 7 of the International Covenant on Civil and Political Rights of 1966.

45 Victor L. Streib, *Death Penalty in*..., p. 275. This is how the United Nations of Human Rights Committee interpreted the provision, in 1982.

The question remains though, why would the ICCPR allow for such contradiction? The answer is probably attached to the international community's desire to reach a large consensus on the frame side of the ICCPR. In other words, adopting a political compromise formula that allows as many states as possible to sign the Covenant. It is not my position that political compromise is an impermissible methodology so far it concerns substantive serious question of the legal thinking. In the latter cases, I prefer seriousness and determination, thus drawing a clear and sharp line between that which is permissible and that which is impermissible. But this has not been the path that the ICCPR chose to follow. To some extent, I can express certain understanding towards the ICCPR's position, for if we are not in a position to abolish all forms of death penalty, then the least we can do is to limit its imposition by affixing certain constitutional safeguards both to the procedures leading up to imposing death penalty and to the forms of execution.

If we aim at taking international law seriously, as binding law on states, the international community must focus on the equality but not the quantity; it must also focus on the principle but not solely on the decoration. It is indeed true that the many states signing a treaty, the better it is, so far of concern the large frame. But once such situation requires detracting the very core meaning of the treaty, thus striking political compromises that leaves no essence to the treaty but the bias of political compromise, then we better sacrifice quantity for quality.

The existing formula of the ICCPR causes acute damages to international law and its implementation and enforcement under national jurisdictions, as well as complicates the interaction between national jurisdictions and the international jurisprudence. For instance, although the United States ratified the ICCPR in 1992, it included many reservations in its various provisions, including the stipulation that a particular provision shall be defined by punishments acceptable or unacceptable under the Fifth, the Eighth and the Fourteenth Amendments of the Constitution of the United States.[46]

To elaborate on the problematic grounds of Article 6 of the ICCPR, I shall further highlight one of the leading cases of the United Nations Human Rights Committees *Judge* v. *Cox*.[47] *Cox* involved the deportation of a person from a country which has abolished the death penalty to a country where he is under

46 *Id.*

47 CCPR/C/78/D/829/1998 UN Human Rights Committee (HRC), 13 August 2003, available at: http://www.unhcr.org/refworld/docid/404887ef3.html [last visited on 12 December 2009].

sentence of death. Accordingly, the question concerned the legality of such deportation in light of the possible paradox between articles 6(1) and 6(2) of the ICCPR. The Committee made it clear not only that the imposition of death penalty stands in contrast to the ICCPR[48] but also:[49]

> The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions… Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

The importance of the *Cox* case is reflected not only in its international consequences but especially in the new legal conclusions imbedded within. In *Cox*, it is notable that the Committee made a sharp determination against previous precedents that gave meaningful weight to the above-mentioned political compromise.[50] In *Cox*, the Committee made several steps forward in ruling that the deportation of a person from a country where death penalty is prohibited to a country where death penalty is permissible, without seeking assurances that the death penalty will not be applied prior to extraditing the person to the state where he faces capital punishment.

For this judicial conclusion to be achieved the Committee had to adopt a new method of interpretation, whereby the ICCPR should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions. Such method of interpretation made it possible for the Committee to make a crucial ruling against death penalty in principle. Such interpretation paved the path before the Committee to announce that it recognizes a clear progress, both under international law and national jurisdictions, toward the abolition of the death penalty.

It is my view that the *Cox* holding was an urgent one and that the Committee made necessary steps in the right path; these steps had to be made even earlier. One shall not be confused of the political compromise provided in Article 6 of the ICCPR. Reading the Covenant words together with the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989

48 Article 6(1).

49 *Supra* note 47.

50 *Kindler v. Canada* [1991] 2 S.C.R. 779.

(hereinafter: the Second Protocol) shows clear negation for and condemnation of the death penalty, as well as a clear statement of the international community regarding the need to abolish death penalty, as provided already in the Preamble to the Protocol[51] and soon after in Article 1 to the Protocol:

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

Namely, not only that the Protocol calls passively for the abolition of the death penalty, but also does it demand taking, positively and actively, all necessary measures for the sake of achieving this goal. Abolishing death penalty therefore is not solely a fantasy of the international community, but rather a reachable goal.

So to speak of the death penalty, confronting the American law with other European legal systems and the international jurisprudence, it becomes clear that the notion of the American death penalty is highly rejected among European countries and by international law, though international treaties and documents are articulated frequently by the use of compromised language, solely for the so-called "political reasons." To this extent, the *Cox* ruling, including the Committee's reasoning, all the more so the German Federal High Court rejection of an American application for extradition – mainly because otherwise the accused would have been subject to capital punishment – best illustrate the isolation of the American death penalty around the world.[52]

Frankly, as I read the American constitutional cases of the past twenty years, in a general context, the holdings of the Supreme Court of the United States were addressed worldwide, namely to the international community and to foreign comparative jurisprudences, rather than solely to American domestic legal studies. If so, even if Americans are bound legally neither to constitutional alterations and modifications in foreign legal systems nor to international ideals, yet as once argued by Hon. Justice Ginsburg of the United States Supreme Court:

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51 "The States Parties to the present Protocol, Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966, Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable, Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life, Desirous to undertake hereby an international commitment to abolish the death penalty, Have agreed as follows:"

52 S StR 183/90 *LG [Landesgericht of Hessen] Frankfurt*, NJW 1991, 3104.

"If Americans want to be heard by other legal systems, they have mutually to pay attention to foreign legal evolvements."[53]

In this part of the Article, I sought to argue that comparative national and international legal systems show a clear trend toward abolishing death penalty, all the more so convey a sharp condemnation of the imposition of death penalty. To this extent, I sought to show that the American law in this regards has turned to be the last retentionist system in a sea of abolishists.

Having said that, a note of conscience ought to be provided. Intuitively speaking, as human being we may support death penalty for those people who caused the death of our dears; we feel that this is the only way for expressing our disgust toward those who take the lives of others. At the same time, we are so concerned about the human being's likeliness to make mistakes; for it might be that the truth that had already been reached is not the absolute truth, thus executing the innocent and letting the criminal free. This is the kind of self contemplation that the death penalty saga imposes on us. This is the sort of intuitive tension that exists deep in us regarding the pros and cons of the imposition of death penalty.

The best case I can offer here in order to mirror this tension – as well as the tension between international law, arguably as a law of political compromises, and national jurisdictions – is the longstanding debate concerning death penalty under the Indian legal jurisprudence. With this I feel confident to end this part of the Article.

Article 21 of the Constitution of India of 1949 guarantees the protection of life and personal liberty, thus stating that "no person shall be deprived of his life or personal liberty except according to procedures established by law." On the one hand, the protection of life implies a ban on taking life, including the prohibition death penalty. On the other hand, the closing words of Article 21 leaves no doubt that the Constitution of India does not perceive the right to life as an absolute one, thus allowing for the violation of this right if such infringements is committed in accordance with procedures established by law. The question therefore is a query of legal interpretation, of constitutional interpretation, of contemplating the pros and cons of death penalty as well as the constitutionality of the of the death

53 Hon. Justice Ruth Bader Ginsburg made this statement within a lecture that was held at the Columbia University School of Law in 2004, in an event carried out for the celebration of fifty years of the famous decision of *Brown* v. *Board of Education*, 347 U.S. 483 (1954). *See also*: Lecture by Hon. Chief Justice K. G. Balakrishnan of the Supreme Court of India, delivered on October 28th, 2008 at Northwestern University in Illinois: "The Role of Foreign Precedents in a Country's Legal System."

penalty as imbedded in the Indian Penal Code constitutionality[54] in light of Article 21 of the Constitution of India.

In the course of this discussion one shall bear in mind that India has already ratified the ICCPR in 1979, but voted against the United Nation General Assembly Resolution for a Moratorium on the Death Penalty in 2007, though did not sign the statement of dissociation initiated by Singapore. This note already raises the initial question as to whether India seeks to follow the above-mentioned national and international movement toward abolishing death penalty or wishes to remain in retentionist side of the spectrum, together with the United States of America.

Already in 1973, the Supreme Court of India upheld the constitutional validity of the death penalty.[55] However, mindful to the graveness of such punishment a new Code of Criminal Procedure was adopted, already in the same year, whereby judges must note "special reasons" when imposing death sentences and a mandatory pre-sentencing hearing must be held in the trial court, which shall assist judges in reaching their conclusions whether the facts indicated any "special reasons" to impose death penalty.[56] It was then in the *Bachan* case that the Supreme Court of India ruled – although not unanimously – that the death penalty can only be applied in the "rarest of rare case":[57]

> A Real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

Without delineating any clear guideline, if at all, as for the cases to be considered "rarest of rare", the Court again upheld the constitutionality of the death penalty but sought, this time, to limit the range of cases for which such punishment can be imposed.

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54 *See*: The Indian Penal Code of 1860. Note that the Code provides for capital punishment for the following offences or for criminal conspiracy to commit any of the following offences (Section 120-B): Treason, for waging war against the Government of India (sec. 121); Abetment of munity actually committed (sec. 132); Perjury resulting in the conviction and death of an innocent person (sec. 194); Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (sec 195A); Murder (sec. 302) and murder committed by a life convict (sec. 303); Abetment of a suicide by a minor, insane person or intoxicated person (sec. 305); Attempted murder by a serving life convict (sec. 307(2)); Kidnapping for ransom (sec. 364A); and Dacoity (armed robbery or banditry) with murder (sec. 396). In favor of the death penalty, as well as arguing for the constitutional validity of the death penalty, see: S. M. N. Raina, "The Constitutionality and Propriety of Death Penalty in India," XI *Central India Law Quarterly* 240, 243 (1998). The death penalty is provided also under several special and local laws, such as: Terrorist and Disruptive Activities (Prevention) Act 1987 (sec. 3(2)(i)) and the Unlawful Activities (Prevention) Ordinance 2004.

55 *Jogmohan Singh* v. *State of Utlar Pradesh*, A.I.R. 1973 S.C. 947.

56 *See*: Santa Singh v. State of Punjab, (1976) 4 SCC 190.

57 *See*: *Bachan Singh et al.* v. *State of Punjab*, A.I.R. 1980 SC 898.

From that stage on, the Supreme Court of India has published several death penalty cases without tangling anymore with the principle constitutionality question of the death penalty as such, but focusing on the challenge of determining whether or not the ad-hoc case falls within the "rarest of the rare case" test.[58] In each case, the Court attempted, though not with much success, to develop a list of criteria that structures the "rarest of the rare" test. And, if until the *Bachan* case the water had already been mudded, then the post- *Bachan* cases have mudded the water further. The Court has manifestly admitted its failure in the 2006 *Dutta* case, thus stating: "No sentencing policy in clear cut terms has evolved by the Supreme Court. What should we do?"[59]

To conclude on this matter, calling the Indian legal system into the discussion leaves no doubt as to the sensitivity of the constitutional debate of the death penalty, the complexity of the paradox between our legal intuition against death penalty as enlightened human beings who struggle for the protection of human rights, all the more so the right to life, and our intuition for death penalty as a means of revenge against those who rudely granted themselves the liberty to take the lives of others without any justification or excuse. In addition, the Indian experience from this perspective highlights the tension between the desire to harmonize national laws with international law as well as with comparative national trends. And finally, the Indian study mirrors the experience of the ICCPR and its attempt to settle down the tension between complete abolition of the death penalty and minimizing the damage caused by other countries that retain capital punishment by imposing constitutional procedural limits on the imposition of death penalty.

India, like the international community, has been trying to hold, unsuccessfully though, the stick from both sides.[60] This cannot been done. A clear decision ought to be made either for or against death penalty. Each decision privileges certain values and endangers others. One of the resulting questions therefore, which values do we prefer to endanger? The answer can be of a political nature but can be also of a philosophical one. A politician I am not, but to the least a scholar I can serve, and therefore I shall now turn on to inquire into the philosophical facets of the constitutionality of the death penalty dilemma.

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58 *E.g.*, *State through Superintendent of Police, CBI/SIT* v. *Nalini et al.*, (1999) s SCC 253; *State of Rajasthan* v. *Kheraj Ram* (2003) 8 SCC 224.

59 *Aloke Nath Dutta et al.* v. *State of West Bengal* (MANU/SC/8774/2006).

60 *See*: Krishna Kumari, "Capital Punishment and Statutory Frame Work in India," http://works.bepress.com/krishnaareti/9/; S. Muralidhar, "Hang Them Now, Hang Them Not: India's Travails With The Death Penalty," *Journal of the Indian Law Institution,* no. 143 (1998).

V. Constitutionalism and the Secret Principles

A) "Constitutionalism": A Theory of Legal Thinking

Addressing the legitimacy question of the death penalty, arguments are divided into two defined categories; normative arguments and arguments of principles. On the one hand, normative arguments are derived from the basic principles of the law of punishment under criminal law, *i.e.*, the goals of punishment, thus acknowledging the deterrence principle explicitly and the retribution principle implicitly. Arguments of principles, on the other hand, are a proxy of constitutional and philosophical analysis on the meaning of human rights and on the legitimacy of state power to impose death penalty.

In this section I solely discuss the arguments of principles, aiming at figuring out how a constitutional document ought to be read, understood and interpreted. As to the normative arguments, it will be sufficient to address only the guidelines, to the extent they contribute to the constitutional aspects of this paper.

On the one hand, normative arguments carry the notion that death penalty is the only means to deter criminals from committing certain offences,[61] and the premise that criminals should be put to death because they deserve it. I cannot see how these arguments may substantially be proved or supported. The deterrence argument is based on a very speculative premise. Moreover, no sufficient substantial argument has been made to assert that what can be achieved by death penalty cannot be achieved by *e.g.* life imprisonment.[62] However, there is no evidence that the abolition of the death penalty causes an increase in criminal homicide.[63] As to the retribution premise, the strongest motivation for which people support death penalty, in my view, is not – and cannot be anymore – the dominate goal of criminal jurisprudence. However, both arguments, deterrence and retribution, are constitutionally and philosophically flawed, as I provide in the next section.[64]

On the other hand, arguments of principles require further study of philosophy and political theories on the existence of the state, its responsibilities, its power

61 Hugo Adam Bedau, *The Courts, the Constitution…*, pp. 45-58.

62 Roger E. Schwed, *Abolition and Capital Punishment* (New York: AMS Press, Inc., 1983), pp. 30-42.

63 Johan Thorsten Sellin, *Capital Punishment* (New York: Harper & Row, 1967), p. 124.

64 The basic legitimacy of criminal punishment is the constitutional meaning of guilt. That is, fair condemnation. We do not punish criminals in order to deter them, but rather because of the guilt of their unlawful act – not their feeling of guilt, but the guilt attributed to prohibited actions. *See also*: Mohammed Saif-Alden Wattad, "The Meaning of Guilt: Rethinking Apprendi," *New England Journal on Criminal & Civil Confinement* no. 33 (summer 2007) pp. 533-543.

and limits, and its premises of protecting and infringing human rights. Therefore, both arguments require a timeless theory. This is a philosophical-constitutional model that applies precisely in the same way to the present, the future and the past, regardless of the ad-hoc cultural and social interactions.

All philosophers recognize the distinction between pre-state nature, where persons act as individuals, and post-state conditions, where persons act as a society thus subjecting themselves to a political power called "state." Though philosophers may dispute upon the conditions with which individuals in pre-state nature interact between each other, they still agree that the incentive to the transition from this nature to statehood is an issue of cost and benefit analysis. The state provides a notion of collective "Good," which is different from the concept of individual "Good" that they have in the pre-state nature. This analysis is based on deep studies of the nature of human being behaviors, interactions and superiorities. Henceforth, I seek to stand on the threshold between both natures, thus aiming at understanding the meaning of "Good"[65] that exists in each situation, and the difference that it makes.

Imagine a life of three men on an isolated island in the middle of the ocean. No concept of collective life exists. Each is concerned with his own interests, wealth and happiness. Potentially, each has absolute rights and freedoms – although in this situation such expressions are not required in the first place, for they might not have any meaning, or substantial meaning, under these circumstances. Nonetheless, mankind is a combination of good and evil. This is an inevitable outcome of a simple reading of the human manner through all stages of man's life.[66] Therefore, the absolute good each has is subject to certain risks imposed by other individuals, but also by nature.

The notion and political theory of establishing a state purports to provide the kind of security which individuals cannot achieve individually. The trouble is that such security demands certain limitations on the "Absolute Good" – limited but not abolished rights and freedoms. All for the purpose of protecting these rights and freedoms from any threat or risk. Under this political entity called "state," there is neutral Good, namely the Good which individuals choose regardless or in ignorance of their position in post-state life.

This transition process I call "Constitutionalism." Literally, constitutionalism is "constitutional government, or a belief in the practice of such a system;"[67]

65 On the meaning of "Good," *see*: John Rawls, *A Theory of* Justice…, pp. 347-396.

66 P. T. Geach, "Good and Evil," *Analysis*, vol. 17 (1956).

67 *Oxford Advanced Learner's Dictionary* (Oxford: Oxford University Press, 1995), p. 247.

"Constitutional" means "allowed by or limited by a constitution;"[68] and "Constitution" is "a system of laws and principles according to which a state or other organization is governed."[69] Constitutionalism, therefore, is a social fact. Under this dome, there is a special mechanism of interactions with which the Absolute Good is transformed from pre-state conditions to post-state nature, to become limited, but not abolished. The basic logic of this mechanism, which constitutes a state, should be the supreme guide of the state in treating human rights under statehood conditions. In order to understand this mechanism, we need first to understand to what extent Good could be limited in the post-state era. Constitutionalism establishes an umbrella that governs the whole meaning of the law, under which the state performs. This complicated question invites a discussion on the legitimacy of this umbrella called "constitutionalism."

In my view, constitutionalism is a process derived from the People as individuals, and for the People as a collective, union, nation and society. Under statehood, the state's main desire is to protect human rights (the establishment desire), and to avoid imposing any limitation on these rights unless so required for the sake of the establishment desire. Yet, whereas the state has the power to limit rights and freedoms, it does not have the power to deprive its citizens entirely from any right or freedom. The state is not allowed to abolish the right to speech,[70] but it has the power to limit this right for the sake of protecting other important and legitimate acknowledged rights and interests of the collective. However, there might be certain rights for which limitation means abolition of the right entirely. As far as I can imagine, these are the right to life and the right to dignity. These are the kind of "creatures" that either exist or do not.

But, conceivably one may ask from where the notion springs that rights and freedoms may only be limited but not abolished. In my view, this is the only plausible way to understand the People's consent in the pre-state nature as a condition to move to statehood conditions. Otherwise, it will be better for them, as individuals, to remain under pre-state conditions. This is true as to all rights, but in particular as to the right to life and the right to dignity. But still, why is that so?

In pre-state conditions, individuals are aware of the cost of the constitutionalism process, namely the limitation of their rights and freedoms. They give their

68 *Id.*

69 *Id.*

70 On the right to speech and the possible limitation of this right, see my contribution: Mohammed Saif-Alden Wattad, "The Meaning of Wrongdoing: A Crime of Disrespecting the Flag: Grounds for Preserving 'National Unity'?" *San Diego International Law Journal* no. 5 (2008).

assent for this limitation as they are promised by the political power[71] that limitation would not be imposed arbitrarily. This ability to give their consent is based on their ability to make free choices, regardless of the correctness of these choices. The ability to make free choices is derived from a combination between two inherent rights, namely the right to life and the right to dignity. Both demand that individuals shall be treated as ends but not as means, otherwise they are humiliated. Only when treated as ends, a person may make free choices, such as the choice to move to statehood conditions. In the absence of the absoluteness of these rights, individuals cannot make free choices. If so, why would they concede their rights to life and to dignity? They simply would not.

In addition, as simple as it may sound, persons, as individuals, have no incentive to concede these two inherent rights. In the transition process toward statehood, individuals do not know on which side of the barricade they will be. Giving this ignorance, the question is to what extent they may agree to limit the "Good" they had in pre-state conditions. Persons are rational creatures, both under pre-state conditions and in post-state life. They are aware of the fact that in statehood life they might be on the good side to the same extent as on the bad side. Limiting their rights and freedoms seems to be the only plausible cost they may agree upon, for the benefit of securing these rights and freedoms by the state. But, their life and dignity are too expensive to pay for such benefit, bearing the risk of being on the bad side. However, both rights together construct the human being shape, and in the absence of any of them a person loses this unique privilege. The unique value of being a human being, in distinction from animals or other creatures, is their inherent right not to be killed under any circumstances and thus not be humiliated.

Drawing this model, the president question is how to apply the constitutionalism theory under statehood conditions. How would constitutionalist mechanism work in practice?

Almost every state has a written formal document usually called "Constitution," or "Basic Law," which sets forth the forms and the institutions of government, including the principles governing relations between individuals and society. Though constitutions may have different forms, focuses and languages,[72] all hold the same theme of governing relations between the state and individuals, sometimes by imposing duties on the state, but sometimes by articulating a list of rights that individuals enjoy. However, the constitutionalist mechanism is not

71 Namely, the state.

72 Louis Henkin, *Constitutions and the Elements*...

limited to written constitutional regime. But rather, it applies to any democratic regime with which the "rule of Law" takes supreme place, namely the "rule of Law" as also the rule of unwritten principles,[73] and not as statutory principles.[74]

I suggest a pyramid model of norms for which the constitutionalism theory applies to every constitutional state, whether or not it has a written constitution or constitutional regime.[75] The constitutionalism theory is a social fact, and thus establishes the Ground Norm, positioned on top of the pyramid of norms. According to the Ground Norm, all governmental branches shall obey the "will of the People" being the sovereign power of the state.[76] This is the aspiration sought to be achieved according to the constitutionalism theory. The pyramid of norms, thus, is comprised of several layers. In the first layer from the top, it is the constitution. In the second layer, ordinary statutes are placed. In the third layer regulations, and so on. The higher we ascend in this pyramid the more powerful the norms become. However, a lower norm is subject to the higher norm, and thus shall not stand in contrast from it. Above all norms, stands the theory of constitutionalism, with which all lower norms, including the constitution, shall be in complete harmony, namely with the "will of the People."[77] This is the normative framework with which all legislative and executive norms shall work.[78] This is the normative constitutionalist umbrella that limits the state's power, whereby it purports to maintain the transition from pre-state conditions to post-state life.

73 David Jenkins, "From Unwritten to Written: Transformation in the British Common-Law Constitution," *Vanderbilt Journal of Transnational Law*, vol. 36, 863, 2003; Nathan N. Frost, Rachel Beth Klein-Levine, and Thomas B. McAffee, "Courts Over Constitutions Revisited: Unwritten Constitutionalism in the State," *Utah Law Review,* no. 333 (2004); Luc B. Tremblay, "A Round Table on American Constitutional Law: Marbury v. Madison: History, Legitimacy, Influence: Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice," 37 *R.J.T.* 375 (2003). *See also*: George P. Fletcher, *Basic Concepts of…* pp. 11-27. Professor George Fletcher argues, and thus I support, that the rule of law seems to flourish when power is expressed in orderly bureaucratic behavior. Therefore, the law takes the place of the authority expressed by parents, teachers, and philosophers. The philosophy of the human rights is the basis for the supremacy of the "rule of law" as the "Good and Just Law." Searching for the sources of the idea of "Law," he presents three basics: (1) the analogy between scientific laws and human laws, which lends certain formal criteria to the laws that govern social life; (2) the notion of higher law that brings an element of morals to living under law, for which it renders life under law an aspiration for all people everywhere; and (3) the ancient idea that law is the path on which the community travels as an organic unit, on which its communal vision of law stresses the element of social solidarity that is induced in societies that live peaceably under law. In his opinion, in any given society, such as that of the United States of America, all three of these sources converge in generating a complex legal culture.

74 Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* no. 56 (1989); Joseph Raz, "The Rule of Law and its Virtue", in *The Authority of Law*, ed. Joseph Raz (1979), p. 210.

75 *E.g.* England and Israel.

76 In parallel to the pyramid of norms there is a pyramid of institutions that enforces respectively the norms. Positioned on top of the pyramid of institutions is the sovereign power, namely the "will of the People."

77 Within each layer, where two norms of the same layer stand in contrast, there is another normative mechanism to generate. But, this is not the issue at this stage.

78 Consider and compare: Hans Kelsen, *General Theory of Law and State,* translated by Anders Wedberg, (Cambridge: Harward University Press, 1945).

To complete the whole puzzle that assembles all the components of the constitutionalism theory, there are two other questions to be addressed. The first question concerns the components of the constitutionalist constitution. The second question concerns the constitutionalist interpretation method.

What shall a constitution contain in order to fit the normative constitutionalist umbrella? In the modern constitutional era, I may focus on two impressive constitutional documents as touchstone cases: these are Henkin's Paper of 1992[79] and the Constitution of the Republic of South Africa of 1996. Recalling the constitutionalist spectrum, I would place these documents very close to the ideal end of constitutionalism, namely the constitutionalist constitution.[80] Drafting a model constitutionalist constitution, Professor Henkin suggests the following elements: government according to the constitution, separation of powers, popular sovereignty and democratic government, constitutional review, an independent judiciary, controlling the police, civilian control of the military, individual rights; *i.e.* the right to life, liberty and security of person, freedom of religion, press and expression, property and economic enterprise, equality, economic and social right, worker's rights, permissible limitation on rights. This is, more or less, the model that was adopted by the new South African constitution of 1996, which even drills down to the tiny details of the Henkin's elements.

It is interesting that both documents, like other constitutional documents worldwide, devote separate chapter to human rights, as distinguished from structural sections that concern *e.g.* separation of powers, controlling police power, and judicial review. In my view, a quick glimpse on the elements of these documents shows that they are all about human rights.[81] The main desire of the constitution is to acknowledge and to grant explicitly certain rights and freedoms, on the one hand, and to protect human rights, implicitly, through structural provisions, on the other hand. It is my view that a constitution is one form of guarantee of the constitutionalism transition, for I deem constitutionalism as a realm of human rights. It is about the essence of human rights and the protection of human rights. Basically, every constitution is divided into two major chapters. One chapter lists down a set of protected human rights, the essence and the extent of these rights, and even the possible limitations that can be imposed on such rights. The other chapter structures the constitutional

79 *Supra* note 8.

80 *Note*: I emphasize the words "very close."

81 *Note*: The topic of human rights is a separate and large issue that cannot be discussed within the limits of this paper. "Human Rights" is an idea and an ideology. It is a philosophical theory that has been the subject of much discussion between philosophers.

safeguards for human rights, namely invoking a vast domain of constitutional measures. This might be done either by explicitly acknowledging these human rights, or by imposing duties and prohibitions on the state upon any violation of the human rights.

Unlike the Constitution of the Republic of South Africa of 1996, which was drafted with high sensibility to the principles of the constitutionalism theory, most of the constitutions worldwide were written centuries ago, thus embracing constitutional structure but not constitutionalist spirit. Nevertheless, the constitutionalism theory offers a model of constitutionalist interpretation that allows for the adaption of such outmoded constitutions to the substantive principles of the constitutionalism theory.

General legal studies offer several rules of interpretation. Among these rules, famously known is the textual approach of interpretation,[82] which focuses on the simple words of the legal text. Another well known approach focuses on the historical context, namely the historical evolution of the legal text, trying to locate the intent of the legislature as deemed to bind forever.[83] A third known approach is the purposive interpretation, which treats the legal text as a quasi-living text, focusing on what the legal text desires to achieve.[84]

Constitutionalism embodies its own anatomy of interpretation, which is derived basically from the mechanism of the constitutionalist pyramid of norms. This mechanism is controlled by the constitutionalism theory as the Ground Norm, for which it demands the obedience of the will of the People. As said, the "will of the People" does not purport the materialist meaning of the phrase, namely under statehood conditions, but rather the abstract meaning under pre-state conditions. Recalling the "will of the People" goes beyond the simple statutory words, away from the intent of the legislature and against the historical context of the enactment. The "will of the People" reflects the consent that they might have given in the transition process. Searching for this "will" refers to an inter-era interpretation that applies to the same degree to any constitution under any circumstances. This "will," as I present it, is not changeable over time. This is what could have been desired a year ago, today and tomorrow. This is right only under the philosophy of the constitutionalism theory as I present it, namely by not referring to *e.g.* the Founding Father's will but to the abstract will of the People under the conditions of the transition to statehood. Only under this theory, would the constitution have its own life.

82 Justice Scalia of the Supreme Court of the United States is well known for his strong support of this approach.

83 *E.g.* Americans would refer to the Founding Fathers' intent.

84 This rule was adopted in Canada, Israel and South Africa.

B) A New Path Toward the Constitutional Rights of Life and Dignity

Addressing the constitutionality of the death penalty, based on the expansive analysis provided in this paper, it is obvious that the constitutionalism thesis strongly rejects capital punishment. This strong rejection is based on two parallel pillars: (1) the absoluteness of the right to life; and (2) the absoluteness of the right to dignity. However, in my view, treating criminals as ends would mean to punish them for the guilt of their wrongdoing, but not for the sake of other collateral social and public interests, *e.g.* deterrence.

In 1787 the United States decided to subject itself to a written constitutional document. The Constitution of the United States imported constitutional ideas from many people and several existing documents, including the Articles of Confederation and Declaration of Independence. This is certainly one of the most influential legal documents in existence. It is one of the world's oldest surviving constitutions. This constitution is a living document that has been holding the crown of the United States for untold generations, governing grandfathers' grandfathers' grandfathers![85]

Challenging the constitutionality of the death penalty, the Supreme Court did not sit idly by. Nonetheless, the Supreme Court limited itself to the explicit outmoded words of the Constitution and to the ancient intent of the Founding Fathers. This approach might be constitutionally sufficient, but constitutionality is flawed for two reasons: (1) imposing the death penalty is opposed to the "will of the People." The will of the Founding Fathers reflects only the materialist will of the People in post-state conditions, but not the constitutionalist meaning of the "will of the People." (2) The Constitution is the "supreme **L**aw," and not the "supreme **l**aw," of the United States, as a democratic state.[86] Applying the constitutionalism theory, the Constitution of the United States is certainly the highest and the supreme norm in the pyramid of norms. Nevertheless, it is subject to the constitutionalism theory as the ground norm, which demands obedience to the sovereign power institution, namely the "will of the People."[87] Therefore, the theory on constitutionalism does not permit any form of capital punishment, because death penalty as such opposes the "will of the People."

Holding the constitutionality of the death penalty, the Supreme Court of the

85 *The U.S. Constitution And Fascinating Facts About It* (U.S.: Oak Hill Publishing Company, 2004), pp. 1-4.

86 Mohammed Saif-Alden Wattad, "*The Meaning of Guilt*: Rethinking *Apprendi*," *New England Journal on Criminal & Civil Confinement* no. 33(2), (2007).

87 It is worthwhile mentioning that the notion of "People" as the legitimacy of the constitution is well addressed in the Preamble of the Constitution of the United States.

United States relied on the explicit and implicit recognition of the Constitution to capital punishment, as arguably presented by two major Amendments: (1) the Fifth Amendment provides that "No person shall be held to answer for a **capital**, or otherwise infamous crime…;"[88] and (2) the Fifth and the Fourteenth Amendments provide that "… deprived… of **life** … without due process of law."[89]

In my view, these specific parts of the Amendments are manifestly unconstitutionalist, and thus shall be pronounced as so.[90] As if an ordinary statute that is inconsistent with the constitution is unconstitutional, a constitutional norm that is inconsistent with the constitutionalism theory, as the Ground Norm, is unconstitutionalist. Being unconstitutionalist, it shall be either amended or abolished.[91]

However, within the Constitution of the United States I recognize two loopholes with which the Supreme Court can make serious steps toward constitutionalist determination against the death penalty dilemma. These are the Eighth Amendment and the Ninth Amendment. Applying the constitutionalism theory to these amendments, I argue, the Supreme Court of the United States may pave a constitutionalist path towards the abolition of the death penalty.

The Eighth Amendment provides that "cruel and unusual punishment" shall not be inflicted. Whereas the Supreme Court interpreted this phrase as concerning only the constitutionality of the form the execution takes, I argue that the word "cruel" concerns the form of the execution, but the word "unusual" concerns the type of punishment, namely that certain punishments are unconstitutional. Literally and conceptually, both words have different meaning. "Cruel" means "having or showing a desire to cause pain and suffering."[92] "Usual" means "expected based on previous experience."[93] But, is it unusual according to the Americans' history? Is it unusual as to what Americans believe nowadays? Or, is it unusual as to what the international community may assert?

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88 The Fifth Amendment of the Constitution of the United States.

89 *See*: The Fifth and the Fourteenth Amendments of the Constitution of the United States.

90 In my opinion, under the principle conception of the power of judicial review, the Supreme Court shall have the power to do so. On the origin of the judicial review power, *see*: *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

91 Another possibility could be abolishing all federal and state statutes that impose criminal punishment. Thus, the constitution's words on "capital" and "deprive life" turn to be dead letters. This is a plausible step under the constitutionalism theory.

92 Oxford Dictionary, *supra* note 55, at 281.

93 Bryan A. Garner, ed., *Black's Law Dictionary* (St. Paul, Minn: Thomson, West, 2001), p. 740.

The term "unusual punishment" is covered by the American Constitution. This term and the American Constitution are both governed by the theory of constitutionalism. Applying the constitutionalist mechanism of interpretation, focusing on the "will of the People," requires granting this phrase immaterialist meaning. Would the People, under pre-state conditions, consider death penalty to be usual punishment? Simply I argue that the answer is: "No." If they do not agree to limit, namely to be deprived of, their right to life, as I argue, how could death penalty be considered usual! A constitutionalist reading of the Eighth Amendment provides that the death penalty is an unusual punishment and thus is unconstitutional and unconstitutionalist.

The second constitutionalist loophole in the American Constitution is the Ninth Amendment, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."[94] Does that include the right to life? In my view, though the Ninth Amendment has received almost no serious attention by the Supreme Court of the United States, it may establish the core of my constitutionalist theory under the American Constitution, for which it recognizes unlisted rights that are retained by the People.[95]

Hitherto, the Ninth Amendment has been successfully invoked in *Griswold*,[96] where the Supreme Court held that the state anti-birth control statute was an unconstitutional invasion of the right of marital privacy. This right, though not specified under the Bill of Rights, was nevertheless among those rights "retained by the people," to which the Ninth Amendment alludes. Following this holding, on its face, if the right of marital privacy was recognized as a retained right by the People, all the more so the right to life may plausibly be so invoked. This is a conceivable reading of the Ninth Amendment, as a general recognition of inherent or natural rights.[97] The right to life is an inherent and natural right, expressly recognized by Hobbes, Locke, Rousseau and Paine,[98] and also by the American Declaration of Independence of 1776.[99]

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94 The Ninth Amendment of the Constitution of the United States.

95 This idea gives even normative power to the Preamble, which refers to "the People" as the legitimacy of the Constitution of the United States.

96 *See*: *Griswold et al.* v. *Connecticut*, 381 U.S. 479 (1965).

97 Norman Redlich, "Are There 'Certain Rights… Retained by the People'?" *New York University Law Review* 37/787 (1962).

98 Hugo Adam Bedau, *The Courts, the Constitution...*, p. 42.

99 *Supra* note 4: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

Given that, the death penalty should have no life, neither under a pure constitutionalist regime nor under the American constitutional regime.

VI. Epilogue

The language of human rights arises in different contexts, among them the relations between a state and its citizens. Rightly and conceivably, a question of whence this idea comes from is strongly addressed. Philosophers like Hobbes, Locke, Rousseau, Rawls, Paine and Kant led this discussion. Each of them, in his magnificent way and language, succeeded to articulate a formula of legal thinking, a theory of hypothesis, a theory of logic and a theory of rationales. Carrying this package of human rights, they tried to understand how far these rights are independently owned by individuals and to what extent they can be limited by the state.

The question I raised in this article is whether we are talking truly about one package of human rights or that we have to draw a clear line between certain rights. Though it is a debatable issue, curiously, many constitutions refer to "The People" as the legitimacy of constituting a state and others refer to God.[100] Referring to God or to the People does not mean that both or either should be asked about any constitutional issue that is raised. It is merely a hypothetical reference for purposes of emphasizing a notion of the All Good that people are willing to have, as if they were in pre-state conditions. This is the rhetoric of enlightenment. The notion of enlightenment may appear as a legal question, but in its core it is a philosophical concept, and to some extent an intuitive notion.

Philosophical hypotheses, moral theories and intuitive beliefs are not odd to our legal system. Law has its own life. It is a living entity. It has internal and external interactions. The words of any legislative norm might be the starting point in understanding the norm, but not the ultimate. There are higher principles that we appeal to, especially in all complicated and sensitive cases where issues of morality, life, dignity and the human being's shape are involved. This is right in my view, but also in the Americans' implicit view. Incorporating certain fundamental rights in the Due Process Clause or "locating" the right to dignity in the Equal Protection Clause, might be legally justified as an act of interpretation. Nonetheless, I frankly think it cannot be anything but an appeal to a higher set of

100 Though the Constitution of the United States refers solely to "The People," it is interesting to see that all Americans' deeds and coins are labeled with the strong religious statement "In God We Trust." That is to say, it is an institutional belief. These deeds and coins are printed by governmental institutions authorized by state laws. This is, therefore, a state action, namely the state's belief.

principles. In my opinion, approaching any question on human rights requires a fundamental understanding of the philosophy of human rights.

The peculiarity of the human beings is their inherent and undoubted rights to life and to dignity. This is why human beings are distinguished from other creatures. When they lose this dignity, they cannot be human beings anymore, as there will be no supreme value to distinguish them from other creatures. This dignity can no longer survive where human beings are humiliated, namely treated as means rather than ends. Humiliation is the grossest mean of depriving human beings of what they are. In a world where there is no special meaning to the inherent right to life, I doubt if any dignity may exist. And so, I doubt if any sense of liberty may exist.[101] Such a destruction of the human being's unique entity occurs when a state grants itself the power to impose the death penalty. This is in my view a barbarian way of treating human beings. Such barbarian treatment shall have no life under any constitutionalist society.

The American Constitution, as far as it was interpreted by the Supreme Court of the United States, permits such barbarian means. This is not to say that the American Constitution has no sensitivity to human rights. Nevertheless, it is not yet a constitutionalist constitution. All constitutions, even if for decoration matters, include language of human rights, and thus the American Constitution. All constitutions have something unique and we only need to find it. But, for that we need the uniqueness to do so, and thus we are yet to have it all. This uniqueness is called "Constitutionalism." Whereas many states had purchased this uniqueness, and others are making serious efforts to follow this path, the United States has consistently avoided this avenue of enlightenment.

Americans do not lack the concept of constitutional law, but rather the right understanding of constitutional law. Like Criminal Law, Constitutional Law is a universal concept. It is surrounded by high principles and by international law. It does not live in a vacuum. It is not limited even to certain eras or to certain nations. Neither is it limited to certain literal words and phrases. *E.g.*, the meaning of "Due Process" is not limited to the phrase combined of two words, starting with "D" and ending with "S." Its meaning goes beyond this limited view. It has a wide universal meaning. Unfortunately, this is not the path the Supreme Court of the United States decided to take as to the death penalty discussion.

101 Mohammed Saif-Alden Wattad, *Revisiting Plessy and Brown: Why "Separate But Equal" Cannot Be Equal* (Toronto: The Munk Centre for International Studies, University of Toronto, 2007), pp. 20-22.

It is true that the American constitutional law is not static. Yet its dynamism is very slow; it is a lazy system. The basic feature of this dynamism, which admittedly cuts throughout all the cases, is the evolution toward the future through history. If constitutions and the protection of human rights are about enlightenment, this cannot be the way constitutional evolution should occur. History is a place that we can never visit, and thus shall not visit. History is the opposite meaning of constitution. Constitution is ultra-cultural and ultra context. It is a timeless notion. Constitution is a notion of a new beginning, namely leaving the darkness for the sake of the lightness. Asked of his opinion on the death penalty, Hon. Justice Haim Cohen,[102] God bless his memory, once said, he would never sign a capital decision, not even in dissent.[103] This is the right way to follow for a democracy that purports to protect human rights, because if not, it shall not flaunt feathers that do not fit it.

> So Jacob went near to Isaac his father, who felt him and said, "The voice is Jacob's voice, but the hands are the hands of Esau." And he did not recognize him, because his hands were hairy like his brother Esau's hands; so he blessed him. He said, "Are you really my son Esau?" He answered, "I am." Then he said, "Bring it to me, that I may eat of my son's game and bless him…[104]

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102 Former justice of the Israeli Supreme Court.

103 This was said in a television interview with Cohen when he reached the age of ninety.

104 Genesis Book, 27 (21-25).

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