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## **DEATH PENALTY AS APPLIED TO THE STATES. THE VIEW THROUGH LEGAL CERTAINTY AS AN ELEMENT OF THE RULE OF LAW**

### ***Abstract***

*Death penalty keeps being common and widespread punishment in certain parts of the world. Despite the worldwide trend aimed at abolition of death penalty, numerous scholars and practitioners keep arguing about the status of this punishment, as well as its pros and cons. However, the approach of death penalty applicable to states has not been in the mainstream research despite states having collapsed or ceased existence in multiple ways throughout all human history. The widespread application of the rule of law principle was one of the major causes of the abovementioned trend on limiting and abolishing death penalty worldwide. Numerous researchers have assessed rule of law impact on death penalty as attributed to humans. Nonetheless, research on death penalty as attributed to states remains novel. This paper aims to establish major points this research could be based upon by attempting to compare death penalty as attributed to humans' features with those of death penalty attributed to the states. One of the most important major points is the definition of death penalty as applied to the states which this paper also makes an attempt to provide. Rule of law does provide assistance in that matter, namely legal certainty as one of major rule of law elements. The paper tries to assess both the death penalty as attributed to humans and death penalty as attributed to the states from legal certainty viewpoint through its elements: clarity and foreseeability of laws and regulations, consistency in application, due process, transparency, and accountability. The paper concludes with the idea that death penalty as attributed to the states does de facto exist as a concept and may be outlined within the scope of public international law and viewed upon through legal certainty as an essential element of the rule of law.*

**Key Words**

*Death Penalty, Rule of Law, Legal Certainty, State, Human*

**Introduction**

Capital punishment in the form of death has always been one of the most controversial issues among those addressed by researchers at all times.<sup>1</sup> Numerous pros and cons, appeal to economics and to morals, horrors of crimes committed, and humanistic considerations have been, and keep being never ending, and have all the possible grounds to stay on the agenda of scholars, legal practitioners, as well as ordinary people for a long time. The concept has had numerous challenges as inhuman, degrading punishment,<sup>2</sup> immoral and economically inefficient.<sup>3</sup> The supporters of death penalty often cite its firm character, irrevocability, harshness and simplicity among other features proving its right to existence.<sup>4</sup> The ongoing debate between opponents and supporters of death penalty seems to be never ending. The widely accepted concept of the rule of law has no traces of having specifically addressed this issue, however the already mentioned humanistic considerations have led to the trend that led to this punishment being eliminated from numerous penal codes and its prohibition appeared in widely supported international conventions.

The difficult nature of death penalty as attributed to humans reveals its more complicated grounds if one views it as a punishment for states. Sovereign entities, as they are seen under the theory of public international law, states appear and disappear on political map, and may thus also be subject to capital punishment in the form of state dissolution, state collapse or state partition. The aim of this paper is to examine the common features states and humans share in terms of death penalty attribution and to analyze the compatibility of this punishment as applied to the states from the point of view of legal certainty as an element of the rule of law principle.

**Death penalty as applied to the states**

Death penalty or capital punishment has a very straightforward definition if viewed as a punishment applied to humans. Encyclopedia Britannica defines it as capital punishment, execution of an offender sentenced to death after conviction by a court of law of a criminal

<sup>1</sup> L. Zavatta Controversial Theories on the Death Penalty *Beijing Law Review* Vol. 8 2017 P. 212-225 Doi: <https://doi.org/10.4236/blr.2017.82012>.

<sup>2</sup> M. S. McLeod. The Death Penalty as Incapacitation *Virginia Law Review* Vol. 104 2018 P. 1123-1198.

<sup>3</sup> Y. Du On the Feasibility of Abolishing Death Penalty in China: From the Perspective of Economic Efficiency and Criminological Principle *Journal of Education, Humanities and Social Sciences* Vol. 17 2023 P. 1-6.

<sup>4</sup> S. Vollum, D. R. Longmire, J. Bufington-Vollum. Confidence in the Death Penalty and Support for its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes *Justice Quarterly* Vol. 21 2004 P. 521-546.

criminal offense.<sup>5</sup> Exact formula differs in various state statutes; however, the core essence of this term is that by imposing death penalty, the state applies its power to terminate the life of a convicted person following a court order in due process. The appropriate procedures differ significantly from state to state and from jurisdiction to jurisdiction. Certain provide more opportunities for appeals, others do not. Some require lengthy appellate procedures in order to provide as less room for further doubt as possible. However, those lengthy procedures cannot guarantee full and definite investigation, as well as full and just judgment thus providing rich soil for death penalty criticism from the opponents of this punishment.<sup>6</sup> These are only a handful of issues the regular death penalty process face, and those are extensively researched in academia all around the world. Although, the issue of death penalty can in understanding of the author of this article be attributed not only to humans as physical persons. States can be subject to death penalty too.

Unlike humans, states do not enjoy the privilege of citizenship and co-exist with the other states in the world order, where this coexistence is regulated by public international law. This regulation, while does exist, does not provide for a firm set of rules and regulations as that is by a regular state within its legal system. This absence of an international criminal code designed for states may somehow lead to understanding that death penalty may not be attributable to states as those are not subjecting to criminal procedures and criminal responsibility. This position does have certain grounds, and in the sense of capital punishment definition held by Encyclopedia Britannica cited previously could be proven correct. However, as states are viewed differently in terms of their subject status, the definition of death penalty as attributable to the states can and should be adjusted. In the view of the author of this article, in order for an act of state collapse to be regarded as the one of death penalty attributable to the states, the state has to breach a certain provision of the widely accepted order under public international law instead of a criminal law norm, and instead of being convicted by a court of law (like in the case with humans), the state collapse has to be agreed upon by the majority of the states. Also, this collapse has to be rendered forcefully. This definition is not without flaws; however, it provides a certain framework of death penalty as attributed to states understanding.

International law differs in the approach to supporting the order in the world and peaceful coexistence of the states. While the states have an established set of means they apply to enforce their legal authority, international legal order lacks this set of means due to the concept of state sovereignty as well as due to the absence of meaningful and executable sanctions. Each state is regarded as independent equity being equal in interstate relations despite the size, population, economic and military strength, as well as culture, traditions and other features. Therefore, rather than creating a mechanism of interstate law enforcement,

<sup>5</sup> Encyclopedia Britannica <https://www.britannica.com/topic/capital-punishment> (Last accessed December 1, 2024).

<sup>6</sup> E. van den Haag, J. P. Conrad *The Death Penalty A Debate* Springer Science + Business Media 1983 304 p.

public international law bases its regulations on contractual obligations states take upon themselves by entering into international treaties. That leaves the question of the possibility of introduction of the term “death penalty as attributed to the states” open for discussion as features states possess can hardly be directly attributed to regular citizens, and human death in legal point of view can also hardly be directly attributed to the death of the state. However, certain features may provide a set of guidelines qualifying for their comparison.

The theory of legal interpretation has developed a number of approaches to interpreting issues of legal nature except for strictly literal and textualist.<sup>7</sup> Despite the term “death penalty as attributed to the states” not being included in the documents of legal nature governing international relations, it would not be correct to state that this issue does not indeed exist. Following one of the previously provided stipulations, states may and do appear on political map willfully or forcefully. Same as both of the latter terms attribute to death of an ordinary human, it would be difficult not to be able to attribute those to states representing a set group of humans. However, it is only the forceful disappearance of the state (as stated in the proposed definition above) that can be regarded as a certain form of the death penalty of the state same as it is only forceful termination of human life by the state that is regarded as death penalty and not a euthanasia.

History is full of examples when states terminated their existence willfully (Czechoslovakia has split into Czech Republic and Slovakia, Soviet Union has split into 15 independent states – its former republics, Serbia and Montenegro has split into Serbia and Montenegro both being independent states – to name a few relatively recent cases). For the purposes of this paper, this willful split should not be regarded as an example of death penalty as it was indeed not a penalty but a willful or at least foreseeable legal act, even though it led to distinct political death of the former state or states.

Unlike willful split, states have had forceful splits in the history. This happened usually as the result of the defeat in the war and was legally stipulated by a certain international treaty that established a new order to exist after the split has had place. In this case, two possible ways can be traced. The leftover states either occupy all of the territory of the former state (German Reich has been eventually split into Federal Republic of Germany and German Democratic Republic), Korea has been split into the Republic of Korea and People’s Democratic Republic of Korea or have certain parts of their territory ceded to the other, usually neighboring states (Hungary has ceded parts of its former territory to its neighbors under Trianon treaty after World War I, Germany has ceded its Königsberg region to Soviet Union and Danzig region to Poland).

<sup>7</sup> Є. Зверев Деякі питання стосовно теорій юридичного тлумачення [Some Issues Concerning Legal Interpretation Theories] *Наукові записки НаУКМА. Том 168 Юридичні науки* 2015 С. 48-52.

These events may and in many cases do cause certain nostalgic and resentment movements in former parts of a previously existing state. Their success highly depends on the ability of the newly formed states to establish a stable living order for its people through the system of effective institutions. This is however not granted and numerous ongoing and potential conflicts exist on today's political map of the world.

Despite the difference between the two ways of state dissolution, the fact that the previous state ceased existing, and therefore "died" could be viewed as having been established. The possible existence of the "government in asylum" should not (and is not for the purpose of this article) be viewed as an indicator of the prolonged existence of the former state but rather should be regarded as a prolonged existence of the government itself as one of the essential features of the existing state – its territory – will in that case be lacking. The cases of "government in asylum" did and do exist in present day but history reveals that such governments do not usually reestablish the pre-existing state but establish or contribute to establishing a new one under newly formed conditions that may arise.

Regardless of the consequences to states, mentioned above, for the state collapse to get features of death penalty, this state has to previously have breached certain elements of international order that was agreed upon. The collapse of the Soviet Union is a clear example of the case as one should not deny the fact that Soviet Union as a state did breach a number of internationally agreed norms of the world order, specifically in the area of human rights.

Therefore, the death penalty as attributed to the state may and does have place within the current public international law understanding. It results in either dissolution or partition of the previous state and either the formation of the new state or states or annexation of the territory or its parts by the existing state. The fact that death penalty as attributable to states exists should be further elaborated upon through its features. These will provide a more in-depth understanding of this concept.

### **Irrevocability**

Death penalty attributed to a human is irrevocable. In that case, the outcome of death penalty execution is same as in the case with murder or euthanasia. All these processes result in human's life termination. This means that the only possible outcome a state legal system is able to provide in case the wrongful conviction is found out later in time, is the procedure of rehabilitation of the convicted by the court which has certain legal consequences to his/her relatives or other persons related to this person's former existence and actions.

It is the point of the author, that this same feature of irrevocability should be attributed to the states that ceased to exist, and should the "government in asylum" wish to reestablish the former state, it has to be regarded as a new state, not the resurrection of the previous one.

This view is supported by the essence of the rule of law principle element, namely by legal certainty.

### **Legal certainty**

Legal certainty is viewed as one of the core rule of law elements supporting the idea that the law has to provide logical and firm idea about possible outcome of one's actions or inaction.<sup>8</sup> This principle is widely applied in contract law and a set of regulations regarding lost profit may provide a good example of its legal application. The importance of legal certainty rises in criminal law, where one has to deal with often harsh punishments, while death penalty may be regarded as the harshest of them. Its irrevocability supports the idea that death penalty falls well within the rule of law concept as this punishment is definite, understandable and very precise. If the approach to the death penalty of the states proposed by this article is adopted, one must bear in mind that in that case legal certainty will be attributable to death penalty in the case of states in a similar way as it is attributable in the case of humans. Legal certainty has already been assessed by the experts of Kyiv-Mohyla Rule of Law Research Centre earlier with a set of features proposed<sup>9</sup> but for the purpose of this article, the author outlines the features of **clarity and foreseeability of laws and regulations, consistency in application, due process, transparency, and accountability.**

### **Clarity and foreseeability of laws and regulations**

For the laws and regulations to be clear and foreseeable, those should be written in a clear and understandable manner comprehensible to an ordinary reasonable person. A long-lasting academic discussion exists as to the need to eliminate legalese and switch to writing in plain English with its equivalents in many other languages.<sup>10</sup> However, it is the belief of the author of this article that the hard cases like those involving death penalty verdicts possibility should be regulated by plain and simple laws. They should clearly state the offence and clearly provide punishment in case that offence is committed. The usage of synonyms, metaphors, slang and any other terms subjects to possible multiple interpretation should be very significantly limited. The already mentioned irrevocability of this punishment contributes to the foreseeability feature. Death in the form of state conducted execution is as foreseeable as it is may be, and the state should establish that all supporting laws and procedures were followed.

<sup>8</sup> J. Braithwaite. Rules and Principles: A Theory of Legal Certainty *Australasian Journal of Legal Philosophy* Vol. 27 2002 P. 47-82.

<sup>9</sup> M. Koziubra. Rule of Law Checklist at National Level. 2021 <https://rm.coe.int/rol-2021-web-eng/1680a4a0e9> Last accessed: December 1, 2024.

<sup>10</sup> R. Assy. Can the Law Speak Directly to its Subjects? The Limitation of Plain Language *Journal of Law and Society* Vol. 38 Issue 3 2011 P. 376-404. Doi: <https://doi.org/10.1111/j.1467-6478.2011.00549.x>.

In the case of the death penalty attributable to the state, its compatibility with this feature is not obvious. Neither of the recognized sources of international law provides for a clear universal norm stipulating for the penalty to the state in the form of death. Rich history of state collapses and dissolutions briefly assessed earlier lacks the track of any possible international legal norm, be it of treaty or international custom nature to provide for that type of punishment. Article 41 of the United Nations Charter<sup>11</sup> provides that in case of a threat to international peace and security, all possible non-military actions should be taken first. While Article 42 of the same Charter states that in cases the United Nations Security Council views the measures provided in Article 41 inadequate, it may authorize “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” The wording of the Charter and of this particular article does not, however include formula meaning punishment specifically aimed at state collapse (i.e. death of the state or death penalty aimed at the state). The aim is rather to restore international peace and security. This wording is definite to have appeared with regard to state sovereignty which does not provide a *de jure* possibility to death penalty attributable to the state. This significantly differs it from the death penalty as attributable to humans, as it provides a clear differentiation of a human, subject to state authority and state being not subject to almost any authority on international level. The lack of this clear regulation seemingly makes the feature of clarity and foreseeability not relevant in case of states, however the fact that states do collapse provides grounds for doubt specifically regarding the foreseeability as while in certain cases state collapse was foreseeable, there are traces in history of states collapsing unexpectedly but purposefully by the actions of other states or international actors.<sup>12</sup>

### Consistency in application

This feature of legal certainty has indeed an important value and is closely linked to the previously mentioned feature of foreseeability. Consistency in application of laws and legal regulations is generally viewed more as a feature of common law than civil law, where case law has significant impact on the previous feature of clarity and foreseeability.<sup>13</sup> Despite the existence of death penalty in penal codes of many states, the inconsistency of their application is widely viewed as one of the strongest arguments against this type of punishment.<sup>14</sup> Consistency of its application requires a clear and foreseeable model of criminal conviction and due process to be applied repeatedly and allows only minor derogations. Numerous historic

<sup>11</sup> United Nations Charter <https://www.un.org/en/about-us/un-charter> (Last accessed December 1, 2024).

<sup>12</sup> G. J. Veith *Black April: The Fall of South Vietnam 1973-75* Encounter Books New York, London 2012 589 p.

<sup>13</sup> J. E. Coons. Consistency *California Law Review* Vol. 75 1987 P. 59-114.

<sup>14</sup> P. Verma. The Inevitable Inconsistency of the Death Penalty in India *Cambridge Law Review* Vol. VI, Issue ii 2021 P. 24-61.

examples of wrongful convictions (e.g. of Andrey Chikatilo<sup>15</sup> and Kirk Bloodsworth<sup>16</sup>) provide grounds for serious doubts that consistency in application of death penalty is at all possible. While there may be cases when the practice of death penalty crimes conviction and further punishment execution by the states may create a number of wrongful convictions (either or not leading to executions)<sup>17</sup> thus making that practice consistent, this will clearly contradict the general rule of law principle.

In terms of state collapse or death penalty as attributed to the state, consistency in application is also hardly possible. Its probability significantly rises in times of wars and other conflicts, which may lead to reforms in state borders, state dissolution or any other forms when former states cease their existence upon the decision of another state, states or other international actor or actors. However, the already established absence of clear and concise rules on what crimes should state commit in order to collapse leads to the most probable conclusion that neither these non-existent rules nor the existent practice of state collapsing may be viewed as consistent. However, the already mentioned war related examples, when a certain state or a group of states deliberately create conditions resulting in the collapse of a state or group of the states (thus creating a special action model similar to the one applied in cases of death penalty attributable to humans) may indeed be consistent, but will, however, be more comparable to assassinations than to death penalty executions.

### **Due process**

It was already previously noted that death penalty is established in criminal codes of different states. Moreover, most states which retain this punishment in their statutes provide special procedure for those cases that involve capital punishment.<sup>18</sup> Such cases are usually reviewed thoroughly and are subject to numerous appeals at different stages of the case. All this is meant to support the definite character of the conviction and to provide the convicted person a wide range of possibilities to defend him-/herself. It is not the view of the author that even the most detailed and duly followed process provides the accused and/or convicted person all the possibilities for defense as the examples of wrongful convictions described in the previous section prove the opposite. The wide application of DNA testing not known before

<sup>15</sup> D. Willmott, D. Boduszek, R. Robinson A Psychodynamic-Behaviourist Investigation of Russian Sexual Serial Killer Andrei Chikatilo *The Journal of Forensic Psychiatry and Psychology* Volume 29 2018 P. 498-507 Doi: <https://doi.org/10.1080/14789949.2017.1416658>.

<sup>16</sup> T. Junkin *Bloodsworth* Chapel Hill, 2004 293 p.

<sup>17</sup> S. Wu. The Effect of Wrongful Conviction Rate on Death Penalty Support: A Research Note *Journal of Experimental Criminology* Vol. 18 2022 P. 871-884. Doi: <https://doi.org/10.1007/s11292-021-09467-w>.

<sup>18</sup> D. T. Kobil. Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency *University of Richmond Law Review* Vol. 27 1992 P. 201-226.



could have saved numerous innocent lives.<sup>19</sup> Due process itself may also be subject to certain concerns, especially if it is constructed without the regard to the major rule of law principles and entails prejudice. It is difficult to clearly define what is just, however there are numerous examples in legal scholarship and in practice, when something unjust is explained.

In the case of the state collapse or state of death penalty as attributed to the state, the issue of due process seems not to arise in the first sight. The absence of clear and comprehensive legal norms regulating the death of the state as discussed above provides a strong incentive to leave this feature out of the scope of this research. This is however not that obvious. Yes, indeed, the death of the state or state collapse as a mean of state punishment is not regulated by any international treaty or other source of international law. However, there were cases in history when a certain state signed an international treaty with binding provisions stipulating the collapse of a certain state (e.g. the Comprehensive Peace Agreement of 2005 ending the Second Sudanese War stipulated a referendum leading to creation of South Sudan as an independent state by ceding territory from Sudan).<sup>20</sup> This leads to the conclusion that even in cases of state collapse, there may be certain sources of international law providing for the due process in this state's partition. Partition does not fully fit into the concept of the death of the state as viewed in this paper, however it does provide certain guidance on what should be done in case a certain state ceases its existence in the previous borders.

## Transparency

Transparency is an ultimate feature of the law, and the process of the promulgation of a certain statute primarily focuses on providing citizens possibility to get acquainted with its text, to comprehend what it means. The historical significance of death penalty as a mean of punishment did and does require transparency for many reasons.<sup>21</sup> Many states have held public executions in the past.<sup>22</sup> Certain states retain this policy up to this day.<sup>23</sup> Those who started restricting spectacularism of the procedure still make sure that the information about the execution is provided. Totalitarian states use this in their propaganda of fear and horror

<sup>19</sup> J. D. Aronson, S. A. Cole. Science and the Death Penalty: DNA, Innocence, and the Debate Over Capital Punishment in the United States *Law & Social Inquiry* Vol. 34 Issue 3 2009 P. 603-633. Doi: <https://doi.org/10.1111/j.1747-4469.2009.01159.x>

<sup>20</sup> R. Belloni. The Birth of South Sudan and the Challenges of Statebuilding *Ethnopolitics* Vol. 10 2011 P. 411-429.

<sup>21</sup> C. C. Goodman, H. M. Caldwell, C. A. Chase. Unpredictable Doom and Lethal Injustice: An Argument for Greater Transparency in Death Penalty Decisions *Temple Law Review* Vol. 82 2009-2010 P. 997-1040.

<sup>22</sup> R. McGowen. Civilizing Punishment: The End of the Public Execution in England *Journal of British Studies* Vol. 33 Issue 3 1994 P. 257-282.

<sup>23</sup> N. Cawthorne. *Public Executions. From Ancient Rome to the Present Day*. Arcturus Publishing London 2012.

which are used as means to ensure citizens' obedience.<sup>24</sup> Democratic states and civilized nations do the same in order to ensure that the society is aware of inevitability of punishment and to provide the society with means to control the due process. This is usually done by opening the execution to certain limited groups of spectators, mostly lawyers, relatives and journalists. Moreover, many states who practiced or still practice death penalty provide the convicted person a possibility to express his/her final word which is a sign of transparency as it permits him/her to deliver the desired message.

Transparency in the case of death penalty attributed to the state may be viewed under a different angle. The traditional approach of providing information of the former state collapse by a number of possible means should not be underestimated, however there is not much novel to be found there. This aspect, however, can be assessed from the point of view of state recognition.

Unlike humans who are recognized as humans from the moment of their birth (which was not the case in slavery times, however), states do not exercise this privilege. State recognition is an important feature of international law, namely stating that in order to be regarded as a subject of international law, a certain entity willing to exercise the status of a state should be recognized by other states.<sup>25</sup> This is usually done in the form of establishing diplomatic relations. State recognition is vital in researching the concept of the death penalty as attributable to the state. It may be viewed that state recognition alone could be assessed as a mean of state collapse, i.e. that the state ceases to exist once it loses recognition of the other states. This is not true in practice, however. A number of entities in international law exist as *de facto* partially recognized (Kosovo) or non-recognized states (Transnistrian Moldovan Republic). They are either non-recognized by any other state or recognized by some and not recognized by the others. Recognition is an information stating that one state regards the other as equal subject and deals with it on that basis. This information is a sign of transparency stating, however that despite being non-recognized by some states, or even if it is not recognized by any other state, the state may still exist, and may not be subject to collapse for varying reasons.

### **Accountability**

This last feature of death penalty is the reflection of the view, where each action or inaction bears its consequences. Death penalty being one of the harshest punishments to be ever introduced in history does in itself provide the feature of accountability. Accountability closely relates to the emotional state of both the convicted person and of the victim's relatives

<sup>24</sup> A. Fijalkowski. The Abolition of the Death Penalty in Central and Eastern Europe *Tilburg Foreign Law Review* Vol. 9 2001-2002 P. 62-83.

<sup>25</sup> H. Lauterpacht. Recognition of States in International Law *Yale Law Journal* Vol. 53 1943-1944 P. 385-458.

or other people who have directly suffered or just learned about the crime committed. This emotional state is primarily the case many people support death penalty as it has traces in an ancient concept of revenge.<sup>26</sup> It is experienced the strongest among those, who were directly affected by the crime committed by the person convicted to death penalty. Certain convicts have also reported having similar feelings and emotions thus feeling themselves accountable. However, accountability attributes not only to the convicted person but it is also attributable to the whole society as losing one of its members is the form of accountability of the society thus bearing responsibility for not being able to prevent a crime committed by its member.

Accountability in cases of death penalty attributable to states, or in other words the accountability in case of state collapse can also be traced. The collapse of a state can never be completely unnoticed. In most cases it bears serious economic, political, cultural and many other consequences. However, unlike the death penalty as attributable to humans, the collapse of the state if provided for in international treaties or other sources of public international law should not happen suddenly and follow a provided procedure.

However, accountability in cases of death penalty attributable to states requires regard to involvement and accountability of the individuals whose actions have caused the state to collapse. In most cases, the former state would have that type of action criminalized but either due to lack of state power or due to previous agreements (either in the form of international treaty or in any other form) it is rarely exercised, and most political leaders directly accountable for state collapse do not bear legal responsibility. They may, however, be held either politically or historically accountable, and their actions may well be compared to those of assassination if death penalty as attributable to humans would be regarded.

## **Conclusion**

Legal certainty is one of the most important rule of law elements. This principle is viewed by the author as a cornerstone of the law generally, not specifically of the rule of law concept. Every human being or every legal entity or any other subject to legal regulation needs to be aware of the possible consequences, possible outcome of the actions of his/her/its own as well as of the actions undertaken by other subjects.

Death penalty has been viewed widely as the simplest but most controversial type of legal punishment and unlike popular belief, it could be attributable both to humans and to the states alike. Legal certainty through its elements of clarity and foreseeability of laws and regulations, consistency in application, due process, transparency and accountability provides firm grounds for comparison of the two concepts. It is the understanding of the author of this

<sup>26</sup> M. Byron. Why My Opinion Shouldn't Count: Revenge, Retribution, and the Death Penalty Debate *Journal of Social Philosophy* Vol. 31 No. 3 2000 P. 307-315.

research that despite certain flaws in assessing death penalty as attributed to the state, this term can still be used attributable to the states who ceased their existence in the result of the international legal process agreed upon by its participants. State collapse or state partition should not be sudden but planned ahead, and state's former actions should have posed threat to international legal order either worldwide or in a certain area involving other state actors. Death penalty as attributable to the states would not apply if only a state regime is changed but the general state name is retained. In the case of death penalty as attributable to the states, a completely new state should be established.

This rather short attempt to shed light into the topic has highlighted certain major issues one has to deal with in the case of death penalty as attributable to the states and highlighted the role of the rule of law principle in assessing this issue. Despite the seemingly purely theoretical nature of the issue raised, it may have impact on the area of state responsibility, as well as bankruptcy of the state that are being raised by various researchers and practitioners in the area. Further research should and will be conducted based on current findings.

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**СМЕРТНА КАРА СТОСОВНО ДЕРЖАВ. ПОГЛЯД ЧЕРЕЗ ПРАВОВУ ВИЗНАЧЕНІСТЬ ЯК ЕЛЕМЕНТ ВЕРХОВЕНСТВА ПРАВА****Анотація**

*Смертна кара продовжує залишатися звичним і поширеним покаранням у певних частинах світу. Незважаючи на загальносвітову тенденцію до скасування смертної кари, численні науковці та практики продовжують сперечатися про статус цього покарання, а також про його плюси та мінуси. Однак підхід до застосування смертної кари до держав не був предметом дослідження, незважаючи на те, що протягом всієї історії людства держави неодноразово розпадалися або припиняли своє існування. Широке застосування принципу верховенства права стало однією з головних причин вищезгаданої тенденції до обмеження та скасування смертної кари в усьому світі. Численні дослідники оцінювали вплив верховенства права на смертну кару стосовно людини. Тим не менш, дослідження смертної кари стосовно держави залишається новим. Ця стаття має на меті визначити основні моменти, на яких може ґрунтуватися таке дослідження, і спробувати порівняти смертну кару стосовно людини з характеристиками смертної кари стосовно держав. Однією з важливих спроб цієї роботи є надання визначення смертної кари стосовно держав. Концепція верховенства права, а саме правова визначеність як один з основних елементів верховенства права дають міцне підґрунтя для такої спроби. У статті робиться спроба оцінити смертну кару як стосовно людини, так і стосовно держави з точки зору правової визначеності через її елементи: чіткість і передбачуваність законів і підзаконних актів, послідовність у застосуванні, належну правову процедуру, прозорість і підзвітність. У статті робиться висновок, що смертна кара стосовно держав де-факто існує і може бути визначена як концепція в рамках міжнародного*

*публічного права і розглянута з точки зору правової визначеності як невід'ємний елемент верховенства права.*

***Ключові слова***

*смертна кара, верховенство права, правова визначеність, держава, людина*