

“Capital Punishment - Between Sovereignty and Humanity” by Anine Gunther

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I. Introduction

An intense debate and ongoing controversy over the existence of the death penalty as the state's final and ultimate legal sanction against criminal offenders, has divided the minds of both scholars, politicians and populations in Western world since the so-called *civilising process* of the 18th and 19th centuries.¹ The debate over capital punishment has been equally heated in Europe as in the United States but eventually, the practice of imposing death as a legal sanction came to divide western world into an abolitionist Europe and a retentionist United States. While Europe practically has put an end to state executions, it is still an important as well as increasing part of penal policy in the United States. Without ignoring the existence of opposing viewpoints on the issue of legally imposing death on criminal offenders, the death penalty in the United States is a sanction that to a large extent enjoys political legitimacy and popular support.²

The execution of criminal offenders in the United States is an event that follows fixed and invariable procedures, carried out with extreme precision and ritualistic accuracy. It has a ceremonial aspect to it and it attracts the massive attention of the media, politicians and the general public. Whether evoking disgust and repulsion or relief and satisfaction, the phenomenon is one that possesses an extreme attractive force. A certain interest, an unaccountable amount of curiosity and extreme ambiguity seems to surround the event itself and the feelings of everybody affected by it, whether directly or indirectly.

From a European and an abolitionist's perspective, the factual existence of a perception of death as being just punishment for certain crimes and certain criminals, seems a perplexing if not incomprehensible phenomenon. Especially when viewed within the context of a civilised and modern world in which democracy, the rule of law, division of powers and human and constitutional rights are but some of the means installed to protect people from the risk of state abuse. In a world that reflects a still increasing concern with the protection of "humanity" and in which the justification and legitimacy of political actions, bilateral agreements, legal documents, development projects or social policies (including punishment methods) are to be found in their ability to protect human rights and promote fundamental freedoms, the persistency of a phenomenon that provides for the state's legal execution of its worst criminal offenders seems out of place. Corporal and lethal punishment methods are generally ascribed to absolutist regimes or

¹ A process mainly described by Norbert Elias in *The Civilizing Process*, Blackwell Publishers, Oxford, 1997 as a change in mentality and manners, which entailed new cultural attitudes, social relations and behavioural structures.

² As will be explained later, the common support and popularity of the death penalty in the United States is not at all diminishing. The number of executions carried out yearly increase and the scope of application for crimes eligible for the death sentence. H. A. Bedau, *The death Penalty in America – Current Controversies*, New York, Oxford University Press, 1997 (hereinafter H. A. Bedau 97), pp. 16-24.

underdeveloped societies³ and since the United States is neither, the paradoxical nature of the state enforcing legal homicide remains.

Area and questions of research

It is within the framework of the above-mentioned elements that I direct the focus of the following thesis. The questions asked and answers given are situated within the boundaries of the following: How to understand a generally accepted and legitimately perceived state practice, consisting of ritually executing citizens, in the context of a modern, civilised scheme of reference? Is there a role and function in the implementation of the death penalty that makes it crucial and irreplaceable in American society? How can the ritual of the death penalty be so understood as to legitimise the executing of humans to protect humanity? It is within the framework of this seeming paradox: 'a state executing humans to save humans', that I ask myself the following:

**What is the symbolic meaning and functional role of the death penalty in the United States?
How can the death penalty be understood so as to legitimately encompass, secure and advocate humanity and sovereignty at the same time?**

This thesis suggests that the death penalty regime and the actual execution of criminal offenders can be understood as a ritualised act with symbolic meaning.⁴ Through the death penalty and the execution of only the worst criminal offenders, the American state demonstrates an extreme sovereign power over its subjects.⁵ By further ritualising state killings, the state manages to humanise its executing acts, differentiating them from other forms of killings and thereby demonstrate its ultimate concern for the security, liberty and humanity of its citizens -encompassing the paradox of executing humans to protect humans in a meaningful and legitimate way.

An internal logic

This thesis wishes to find or create a framework in which to understand, make sense and unite two opposing streams, which at first sight seem incompatible: legitimate state executions and a modern

³ According to Emile Durkheim, the civilising process resulted in punishment methods to be directed towards deprivation of liberty. Corporal and lethal punishment were thus left for absolute or underdeveloped regimes. F. Zimring, *Capital Punishment and the American Agenda*, Cambridge, Cambridge University Press, 1987, p. 148.

⁴ The symbolic nature of the death penalty has been noted by H. A. Bedau 97, op. cit., p. 23, though without giving any further account of its symbolic meaning.

⁵ This is usually an aspect of punishment ascribed to the big public executions of traditional societies and absolute regimes. The main objective of Michel Foucault, when describing the evolution of punishment in western societies in *Surveiller et Punir, Naissance de la prison*, Gallimar, 1975, was to show the evolution and redirection of punishment in Western societies as to not being demonstrations of power. The idea that modern executions still have an important element of sovereignty, is acknowledged by W. E. Connolly, *The Will, Capital Punishment and Cultural War*, in A. Sarat (ed.), *The Killing State. Capital Punishment in Law, Politics and Culture*, New York, Oxford University Press, 1999, pp. 187-205.

civilised world; - or as the title of the thesis suggests, sovereignty and humanity.⁶ I wish to understand how the legal sanctioning of death and its imposition can be perceived as meaningful in the context in which it appears. In trying to understand the logics that govern its existence, the inner structure and function of it and thus the legitimacy of the death penalty in a civilised world, it is not my intention to defend or approve of its existence, but simply to recognise it as an existing social and cultural phenomenon with specific functions and meanings. Fully understanding it is the precondition for any attempt to explain its persistency and the apparently unbreakable cultural pattern of punishing by death. The following thesis will therefore not follow the very broad field of research presenting arguments for or against capital punishment. Rather, it will attempt to understand the death penalty on its own terms, within its own logic, as part of a context in which it apparently *does* make sense and in which it *is* legitimate. Such a perspective assumes that it eventually is the most effective way to refute the grounds on which the phenomenon rests.

It is often the task of scholars dealing with capital punishment to situate themselves for or against the abolitionist movement, presenting and dealing with amongst others its justification, evolution, arguments, and legal and political successes or failures. Whilst I simplify their views, they usually understand the death penalty as a social phenomenon with obvious, manifest functions such as legally sanctioning a criminal offence, socially preventing or deterring crime, politically stating moral values or providing retribution for the satisfaction of the victims. From such perspectives, an abolition of the death penalty would simply require to find and achieve these function(s) with other means than by inflicting death (with life imprisonment, for instance). It is the basic assumption of this thesis that the death penalty and the actual execution of it has more to it than just meeting these external social objectives. Capital punishment has an internal and symbolic meaning that goes beyond the mere logic of punishment, revenge, deterrence or prevention of crime and therefore must sought to be changed elsewhere than merely through laws and social and political reforms. Discussions on the role of the death penalty need to exceed the existing stalemate and go beyond the worn out themes of whether or not the death penalty is an economic burden, whether public opinion is supportive, whether the system is fair, consistent or discriminatory, whether the criminal offenders could be rehabilitated instead and even discussions on whether life imprisonment would suffice as a just punishment. While these are interesting subjects, they do not go to the core issue of why punishment by exactly *death is* in fact a crucial element of American life and culture. As a great scholar on capital punishment notes, “...we have not had in recent decades anything approaching a full-scale justification of the death penalty from the point of view of modern social sciences.”⁷ The remark indirectly touches upon the assumption of this thesis: any attempt to justify the death penalty fails, unless it

⁶ A further definition of the concepts of sovereignty and humanity as used in the thesis will be given in chapters IV and V, respectively.

⁷ H. A. Bedau 97, op. cit. p. 123.

acknowledges that the role of the death penalty goes far beyond being social, and that it has a deep cultural and symbolic meaning. The wish to recognise, identify and demonstrate this internal and latent meaning, is presently motivated by a desire to provide the essential precondition to effectively dismiss the phenomenon from within and break an extensive pattern of deeply rooted social practice consisting of the execution of humans to protect humans. An allegory will suffice: Just as the traditional Aztec sacrifices were believed to make the Gods happy and keep the sun in the sky (!), the death penalty seems the "magical" response to disorder, crime and insecurity. And as little as a scientific astronomic argument would convince the Aztecs of not sacrificing, arguments about the non-deterrent effect of death penalty will not impress someone who believes death is a deserved and just punishment (like a retributionist).

A cultural practice

There are several ways of dealing with the role the death penalty plays in the United States. As noted, a sociological approach would look at the social effects and (in)efficiency of punishing by death in relation to deterrence, crime prevention etc.⁸ A legal approach would focus on the constitutional and legal effects of providing (or not) for capital punishment as well the place of capital punishment within national and international laws.⁹ A philosophical approach would emphasise the moral significance of state executions and the (in)compatibility of the concept of justice with notions of human dignity, vengeance, retribution, sanctity of life, charity etc.¹⁰ Finally, a historical point of view would trace the main developments of punishment means, methods and reasons over time.¹¹ All of these perspectives have been elaborated time and again either separately or in an interdisciplinary way. Indeed, it seems difficult to find anything new to say on the subject.¹² In attempting to give a perspective on the meaning and function of the death penalty that is far from worn out, this thesis takes an anthropological approach. Using a theoretical framework and terms pertaining to the world of anthropology implies treating the death penalty as a cultural phenomenon.

⁸ In *The Effect of execution is Brutalisation, not Deterrence*, W. J. Bowers, provides for an empirical study of murder rates in relation to executions, in J. A. Inciardi & Kenneth C. Haas (eds.), *Challenging Capital Punishment, Legal and Social Science Approaches*, Sage Publications, London, 1988, pp. 49-90.

⁹ W. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge, Cambridge University Press, 1997 provides for an inquiry into the place and evolution of capital punishment within international law.

¹⁰ This is illustrated in several articles in H. A. Bedau 97, op. cit. See for instance, H. W. House, *The New Testament and Moral Arguments for Capital Punishment*, pp. 415-428, J. H. Yoder, *Noah's Covenant, the New Testament, and Christian Social Order*, pp. 429-444 and E. van den Haag, *The Death Penalty Once More*, pp. 445-456.

¹¹ This is extensively done for Germany by R. Evans, *Rituals of Retribution, Capital Punishment in Germany 1600-1987*, New York, Oxford university press, 1996, for England by V. A. C. Gatrell, *The Hanging Tree, Executions and the English People 1770-1868*, New York, Oxford University Press, 1994 and for the United States by L. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture 1776-1785*, New York, 1989.

¹² P. Fitzpatrick, "Always More to Do": *Capital Punishment and the (De)composition of Law*, in A. Sarat (ed.), *The Killing State, Capital Punishment in Law, Politics and Culture*, New York, Oxford University Press, 1999, pp. 117-136.

The anthropological approach to the death penalty treats law and its imposition as something deeply embedded in and part of a given culture. Culture is here understood as a whole ensemble of institutions, values, norms, systems, beliefs, relations, structures – be they political, legal, social, economic or mental, which are equally interpreted and legitimately understood by the community of which they form part, but do not necessarily make sense to other communities.¹³ In seeing the legal sanction and the act of execution itself as cultural phenomena, the death penalty becomes more than a question of a state executing a citizen. It becomes part of a wider representation and manifestation of a culture, which on the one hand is determined by this culture and on the other hand plays an active role in determining, shaping and changing it.¹⁴ It is precisely in asking how capital punishment actively displays itself meaningfully that the internal and latent meaning of it becomes clear and the way towards eventual change becomes traceable. As opposed to a purely legal approach, legal anthropology has an underlying premise about dialectical the relationship between the law and the social or cultural context of which the law is part; whether speaking of human rights, death penalty systems or truth commissions, they not only determining but also determined by the world and the way it changes.

In this respect, it is worth noticing that the death penalty doesn't necessarily represent an ordinary and everyday act within the American culture. It is therefore not in itself completely representative of a culture, neither does it fully and exhaustively encompass all aspects of it.¹⁵ It may be that the death penalty in its imposing moment is an inherent part of an American cultural expression of sovereignty and humanity, but that another activity or action any other time expresses something completely different. It is precisely by being a differentiated act, that the death penalty can reveal cultural elements, which are internal, not obvious, and maybe even disappearing or changing.

Working with the hypothesis of the death penalty as being a cultural expression of sovereignty and humanity, has implied the "construction" of these two categories as guiding principles throughout the thesis. The specific emphasis on this dichotomy within the death penalty system, has automatically involved the practical need to give lower priority to other eventual dichotomies, categories or cultural symbolic expressions in the ritual (perceptions of retribution, revenge, responsibility, religion etc.) The choice of focussing on the death penalty as a *cultural riddle*¹⁶ and furthermore as a ritual expressing precisely sovereignty and humanity has necessarily limited the

¹³ This definition pertains to the discipline of legal anthropology which sees the Law as part of a cultural expression, F. von Benda-Beckmann, *Le Monopole d'Etat de la Violence dans la Perspective de L'Anthropologie Juridique*, in E. Le Roy & Tr. Von Trotha, (eds.), *La Violence et l'Etat, Formes et Evolution d'un Monopole*, Paris, Editions L'Harmattan, 1993, pp. 35-57, p. 37. David Garland further treats punishment as a "cultural riddle," deeply embedded in and part of a given culture in *Punishment and Modern Society*, Oxford, Clarendon Press, 1990.

¹⁴ A. Sarat, *The Cultural Life of Capital Punishment*, in A. Sarat (ed.), *The Killing State...*, op. cit., pp. 226-256, p. 229.

¹⁵ C. Bell, *Ritual: Perspective and Dimensions*, New York, Oxford University Press, 1997, p. 91.

¹⁶ Austin Sarat is one of the few scholars actually dealing with death penalty from a cultural point of view, *The Cultural Life...*, op. cit., p. 229.

concrete scope of analysis and thus the extent of the answers finally given. Methodological choices and analytical frameworks are meant to limit a given research area. Yet, such choices should in no way pretend to be exhaustive of the death penalty phenomenon nor be incompatible with other approaches.

Dealing with capital punishment as a cultural phenomenon has automatically restricted the geographical or cultural settings of the following investigation. If perceived within a worldwide perspective, the specific categories and symbolic meanings of one culture would wrongly have to be forced upon another.¹⁷ One cannot suppose that Chinese executions have the same meaning as American or Nigerian executions. The acknowledgement of the cultural meaning of punishing by death necessarily implies that capital punishment in China has a very different meaning than death imposed in Nigeria or Iran. Furthermore, as already noted, the humanity and sovereignty claimed in this thesis to be an internal part of the death penalty, are principles and categories intrinsic to the Western world and not the Asian, African or Arab. Without having investigated death penalty in China or Iran, they seem governed by very different elements, such as social control and repression in an extremely authoritarian regime or a perception of the punishment being inflicted by the hand of God. In neither of these cases does death imposed by the state contradict societal values as much as it seems the case in the United States. Here death is not a question of repressing citizens, neither is God to be held responsible. Politicians and citizens of the United States are solely accountable for institutionally and systematically executing human beings.

A ritual performance

*“All social activity has a symbolic dimension that gives it meaning and all symbolic action has a social dimension that gives it a point”!*¹⁸ As cited here, all social activity (that of demonstrating state sovereignty, that of punishing by death etc.) manifests itself in symbols and by understanding the death penalty as a ritual, its symbolic dimension becomes analytically available. Not only is it a culturally embedded act, but it is also a ritual performance that actively displays its internal cultural meaning in symbols.

Whether speaking of social events like Sunday mass, marriages, board meetings, the Olympic games, the coronation of a king, national festivities, birthday celebrations or state executions, they are symbolic expressions of a given culture and they possess the common characteristics, which are usually ascribed to ritual activities. Being religious or secular, modern or traditional, political or

¹⁷ C. Bell, *Ritual: Perspectives...*, op. cit. p. 165.

¹⁸ Keith Michael Baker, cited from U. Langen, "I sin nåde giver Himlen os endelig vore konger tilbage..." *Studier i den franske restaurations kongelige ceremonier 1814-1830*, in «Den Jyske Historiker», vol. 88, April 2000, pp. 37-62, p. 37.

civic, public or private¹⁹ -that is in all their difference and distinctiveness- these activities are collective human actions, which to some extent differentiate themselves from other everyday acts in the sense that they are carried out in a very formalised and repetitive way within an institutionalised setting. They are furthermore “momental” phenomena, which only exist and make sense in their actual and concrete performance.²⁰ Rituals are essentially sensuous experiences, and have the ability to invoke and express common conceptual orientations, ideas and beliefs while generating some kind of emotional state in the participants and spectators, which goes beyond linguistic expression. The power and meaning of a ritual lies heavily in its ability to evoke such an intense emotional, ambiguous and indefinable response and engagement for anyone implicated.²¹ These characteristics are generally accepted to be ritualistic. While all rituals possess these features, not all activities with the same features can be appointed the label of a ritual.²² Ritual theories are numerous and cover a vast range of different approaches and definitions, but most importantly, they attach very different functions to ritualised activity. The meaning and function of a ritual is precisely where it differentiates itself from other ritual-like activities as well as from other rituals. While the formal features of a birthday celebration, a marriage, a royal coronation or state execution may be alike, one marks a moment of transition in human life, the other reaffirms family values, the third installs a political order; as will be demonstrated later, the death penalty is an exceptional political rite that displays the extreme sovereignty of the American state within a framework of humanity.

The independent study of rituals and ritual practice is a relatively new field of research. Traditionally, rituals were understood as activities carried out within a religious framework and thus mainly pertaining to the societies of the Middle Ages or Early Modern Europe. Rituals were mainly analysed within the classical dichotomy of the sacred and the profane, in which the ritual represented an act of striving towards the supernatural.²³ From a functional perspective, rituals were mainly seen as a tool to describe religious life and belief.²⁴ In later perceptions, the strife and worship towards the supernatural were understood in a much wider sense, thus interpreting ritual performance as a symbolic worship of society as a whole. Rituals were collective means of either expressing an already existing unity or at least creating an experience of cohesion in the eventual lack of such consensus.²⁵ This line of thought saw rituals as effective tools to describe societies as a

¹⁹ The distinction between these terms is an issue in itself. The denomination of the act itself depends on the definition given to rituals.

²⁰ E. Muir, *Rituals in Early Modern Europe*, Cambridge, Cambridge University Press, 1997, p. 3. The definition of rituals is a large and vast area in which disagreements are just as common as agreements, but at least these basic features are commonly accepted as pertaining to ritual practice.

²¹ C. Bell, *Ritual Theory, Ritual Practice*, New York, Oxford University Press, 1992, p.19.

²² C. Bell, *Ritual: Perspectives...*, op. cit., p. 164.

²³ In *The Elementary Forms of Religious Life*, London, 1915, E. Durkheim saw rituals as rules of conduct in which the sacred guided the profane in their acts and behaviours to reach and worship God. E. Muir, op. cit., p. 3.

²⁴ C. Bell, *Ritual Theory...*, op. cit., p. 14.

²⁵ E. Muir, op. cit., p. 4, 6. D. Kertzer, *Rituals, Politics and Power*, Yale University Press, 1988 is the main theorist within this perspective.

whole. Another tradition came to deal with the existence of conflicts, non-unity and lack of solidarity in society.²⁶ It saw rituals as revealing tensions, conflicts and dissonant norms and values within a community. Having the ability to expose and exhibit differences, tensions and potential conflicts in an organised, formalised and balanced way, ritual performance is here seen as a safety valve because it channels conflicts and helps maintain a certain social equilibrium.²⁷ By putting into play differences, rituals manage to demonstrate their practical coexistence as well as making it theoretically possible to unite principles, norms or values, which under normal circumstances would appear contradictory.

Whatever their perspectives, these theoretical approaches focus on the social functions of rituals, asking questions as to what rituals do. They tend to assume that rituals have universal qualities and that they can be analysed equally, as ahistoric and autonomous social phenomena, regardless and independently of the context in which they appear.²⁸ A more substantial approach to the actual ritual performance focuses on the content and meaning of the act itself. Seeing rituals as a way of communicating that allow people to produce a story of how they and their society perceive and understand themselves,²⁹ rituals become a key to reveal cultures³⁰ and the question is not so much what rituals do, but what they mean.

In an attempt to combine the substance and inner meaning of a ritual with its function in broader society, an approach to ritual performance will be taken here, that on the one hand sees rituals as human actions being products of a specific social and cultural reality, and on the other hand producing, creating, shaping and changing these societal structures.³¹ The mutual and dialectical relationship between culture, society and human action becomes essential in viewing rituals as both determined by society as well as determining it. In this perspective, what becomes the centre of attention is neither what rituals do, nor what they mean, but how they do what they do, that is, how they construct societies, structures, values, norms, beliefs etc.³² If a ritual is a symbolic act, which expresses and creates belief systems to internalise and reaffirm them, concepts like social control, power and legitimacy become essential. Power should not be understood as a direct imposition of one will over another, or as an explicit forceful act, but rather as a social practice that indirectly influences, controls and legitimises certain structures, values or norms. Rituals should then not merely be understood as tools to impose, mask or disguise power relationships.³³ Rituals are power.

²⁶ An exponent of this tradition is V. Turner, *The Ritual Process, Structure and Anti-Structure*, Aldine de Gruyter, 1995.

²⁷ C. Bell, *Ritual Theory...*, op. cit. p. 172.

²⁸ Ibidem, p. 69.

²⁹ C. Geertz, *Negara: The Theatre State in Nineteenth Century Bali*, Princeton University Press, 1980. C. Bell, *Ritual: Perspectives...*, op. cit., p. 67.

³⁰ C. Bell, *Ritual Theory...*, op. cit., p. 7.

³¹ Ibidem, p. 79 and E. Muir, op. cit., p. 6.

³² C. Bell, *Ritual: Perspectives...*, op. cit., p.75.

³³ This was the idea of most Marxist theories, C. Bell, *Ritual Theory...*, op. cit., p. 195.

They are acts of “symbolic power” constituting ideas, beliefs, norms, structures etc. by not only expressing and reaffirming them but also by actively shaping and modelling them so that they make legitimate sense.³⁴ The performative nature of rituals is essential in this respect. It is by actively performing and displaying certain truths that these truths can be modelled, reshaped or reaffirmed, thus being a source of both social change and status quo, of power and legitimacy.

Each of the previously mentioned approaches to ritual studies should not be understood as necessarily excluding each other, but rather as complementary³⁵ to a full definition of the form, function and meaning of rituals. The powerful and paradoxical nature of rituals lie precisely in their complexity on both a formal, substantial and functional level, in their ability to evoke strong emotive feelings while creating social solidarity, channelling conflicts, repressing human behaviour, defining reality, changing reality or merely legitimising it. In the following thesis, a ritual is assumed to be a highly formalised and “*rule governed activity of symbolic character which draws the attention of its participants to objects, thoughts, feelings which they hold to be of special significance*”³⁶ and hence, the ritual of execution is an actively displayed symbolic representation, an indirect statement, encoded in the symbolism of the rite itself, of what participants perceive as true, valid and legitimate. In the following thesis, the formality and rule-governed nature of state executions will be shown to display the extreme sovereignty of the state while modelling and creating a humane framework in which to carry out such sovereignty. By ritualising the death penalty, it becomes a legitimate act of executing humans humanely!

Sources of investigation and course of action

By perceiving the death penalty as a performed representation of a given culture, my main object of analysis is the very concrete act of executing a criminal offender. The empirical access to American executions has obviously been limited, for which reason the official execution protocols have been a main source of analysis. Whether required by state law or not, most states have a written protocol governing the rules and procedures of an execution.³⁷ Only some state protocols are public, but descriptions and detailed résumés of most of them are available from the Florida Corrections Commission's Monitor on Executions Methods,³⁸ which reviews execution methods, protocols and everything implicated in their imposition. Alongside secondary literature, different eyewitness

³⁴ Ibidem, p. 199.

³⁵ C. Bell 97, *Ritual: Perspectives...*, op. cit., p. 62, 88.

³⁶ P. Connerton, *How Societies Remember*, Wiltshire, Cambridge University Press, 1991, p. 44.

³⁷ Others, such as Texas and Mississippi do not.

³⁸ *A Monitor: Methods of Execution & Protocols*, by Committee on Criminal Justice – The Florida State, 1997, on www.fcc.state.fl.us/fcc/reports/monitor/methmon.html, last visited 05/05-03. The Monitor is not a report and does not evaluate or conclude anything on the legality or morality of the specific types of execution, nor on the capital punishment itself.

accounts, newspaper reports, and published interviews with prison staff, death row inmates etc.,³⁹ the execution protocols have provided for a thorough description of the official rules, procedures and process of executing a criminal offender, a solid basis for an insight into the practical executions as commonly carried out in the different states. The protocols vary according to the specific state and its capital statutes, the execution method and the prison staff that has written it, but since the focus in this thesis is on the phenomenon itself, the different protocols and sources available have reconstructed the common characteristics of the process - from the preceding trials, through the death row phenomena and very last days of a criminal offender's life, to his final execution and burial.

With an anthropological approach and a theoretical framework pertaining to the world of ritual theory,⁴⁰ the above-mentioned sources and thus the ritual of the death penalty will be analysed as an act expressing sovereignty and humanity. In concrete terms, after having provided for an introductory section on the facts, the laws and the general tendencies surrounding the death penalty, the second section applies the very formal characteristics of ritual activity to the act of state executions. In the two following sections, the exercise of sovereign power and the concern for humanity will be respectively demonstrated as being the symbolic meaning and function of the ritual execution and of the death penalty system as such.

³⁹ S. Trombley, *Henrettelser efter Bogen* (The Execution Protocol), Gylling, Centrum, 1992. Steven Trombley has conducted interviews with all those implicated in executions in Missouri. The Danish version of this publication has been used throughout this thesis and all quotes are my own translations.

⁴⁰ Catherine Bell has provided for the theoretical framework of the ritual analysis. C. Bell, *Ritual: Perspectives...*, op. cit. and C. Bell, *Ritual Theory...*, op. cit.

II. Facts and Tendencies

An international perspective

The abolitionist movement is generally traced back to the ideological revolution of the 18th and 19th centuries. It is often referred to as both a humanitarian and a rational revolution, for hand in hand, humanism and rationalism guided thinkers and theoreticians in their ideas about man and his life on earth. In 1764, Beccaria published what would become the foundation of all future discussion on capital punishment.⁴¹ Inspired by Rousseau, Montesquieu and Voltaire, his work took a secular, rational and utilitarian approach to the grounds and ends of law, justice and punishment. It very well illustrates how pure rationalism became the foundation of philosophical thinking and humanism that of political reform. It envisaged both the criminal law reforms that would definitely change the logics and objectives of punishment policies in the last decades of the 18th century and the strong movement against death penalty that started sweeping its way across the world a century later.⁴²

It was in the aftermaths of the Second World War and following the adoption of the *Universal Declaration of Human Rights* in 1948, that the abolition of the death penalty became an issue of legal importance. The adoption of international treaties and conventions touching on issues of the right to life, the prohibition of torture, cruel, inhuman and degrading treatment or punishment etc., initiated a process of abolishment which to this day has resulted in 112 states somehow having abolished the death penalty.⁴³

The international laws that govern worldwide death penalties are mainly to be found within the realm of the UN. The *International Covenant on Civil and Political Rights* (ICCPR) and the *Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty* (1989), illustrate the abolitionist tendencies in international law. The ICCPR emphasises the inherent and absolute right to life of all individuals and the prohibition of cruel or inhuman treatment or punishment (art. 6), it restricts the use of the death penalty for "the most serious crimes" only,⁴⁴ if provided by law, imposed by the courts, not contrary to the provisions of the treaty (i.e. fair trial, right to appeal etc.) (art. 6(2)), and not for persons pregnant or under 18 (art. 6(5)). The optional protocol additionally prohibits the use of the death penalty, even in times of war, though allows for reservations (art.2). Several other

⁴¹ Cesare Bonesana, Marquis of Beccaria (1738-1794) anonymously published *Des Délits et des Peines*, in Livorno in 1764.

⁴² Already by the middle of the 19th century some states had abolished the death penalty: Venezuela, Portugal (1867), Netherlands (1870), Costa Rica (1882), Brazil (1889), Ecuador (1897), W. Schabas, op. cit., p. 6.

⁴³ Either for all crimes in all circumstances (76), only for ordinary crimes in peacetime (15), or simply de facto (21), W. Schabas, op. cit., p. 296 and http://web.amnesty.org/pages/deathpenalty_countries_eng, last visited 26/05-2003.

⁴⁴ ICCPR, art. 6(2). These would generally be crimes such as treason, espionage and sabotage in wartime, intentional crimes with lethal consequences or other extremely grave consequences, political crimes etc. It varies a great deal from country to country though, and thus the covenant includes all these varieties. W. Schabas, op. cit., p. 104.

documents of international legal character, such as the *Convention against Torture and Other Inhuman or Degrading Treatment or Punishment* (1984) and the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* (1984),⁴⁵ illustrate the well intentioned attempt of the UN to lead the way towards total abolition of state executions. Most states in the world have ratified the ICCPR (the United States having made a reservation to article 6, the right to life, and the protocol has 49 contracting parties. As such, punishment by death and everything that it entails (the total duration of detention, conditions of detention, methods of execution, age and mental stage of the “victim,” the eventual disproportional nature of the punishment) is governed and restricted by international law within the realm of UN.

In a parallel evolution, the Council of Europe and the Organisation of American States, have adopted treaties aiming at abolishing the death penalty. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) and its additional protocols 6 and 13⁴⁶ represent the culmination of the movement towards total abolition, i.e. in all times and all circumstances. While the convention still allows for its use (ratified by all 44 COE states), the protocol 6 (ratified by 41 states) abolishes it while allowing for reservations on wartime infliction (art. 2) and the protocol 13 (ratified by 13 states and just in 2003 entered into force) prohibits the death penalty all together. From a comparative perspective the Inter American legal system seems most advanced when it comes to limiting the imposition of death.⁴⁷ *The American Convention on Human Rights* (1969) and *The Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (1990) restrict the imposition of death respectively by first excluding political crimes as eligible for death (art. 4(4)), banning any further expansion of the scope for the sentence (art. 4(2)) and emphasising the irreversible nature of an actual abolishment (art. 4), to finally prohibiting it totally but still allowing for reservations on the issue of death penalty in wartime.⁴⁸

Since the Second World War, concentrated judicial attempts have tried for the abolition of the capital punishment worldwide. Many countries have indeed followed the way set forth by the UN and the regional organisations. Unfortunately, as ratifications as well as statistical facts on the practical imposition of death penalty show, the abolishment movement is still working in its initial phases. Out of the world's 172 states, only 76 have abolished death penalty all together, 15 still provide for capital punishment in times of war and 21 have not taken the step to legally abolish but

⁴⁵ Adopted by the Economic and Social Council, ESC Res. 1984/50, it is not a legally binding document, but it sets out the norms of the Second Optional Protocol. It includes the right to seek appeal, to legal assistance, to seek pardon, to a minimum of suffering etc.

⁴⁶ *Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (1983) and the *Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances* (1983).

⁴⁷ W. Schabas, op. cit., p. 290.

⁴⁸ While the convention is ratified by 25 states, the protocol has, with only 8 ratifications, not yet entered into force, http://web.amnesty.org/pages/deathpenalty_treaties_eng, last visited 26/05-03.

have withheld using the death sentence within the last 10 years. Finally, 83 countries still retain the death penalty as a legitimate punishment. According to the latest figures, 3.248 people were sentenced to death in 67 countries in 2002, and 1.526 people were actually executed in 31 countries.⁴⁹ Of these 1.526 executions, 81% took place in 3 countries: Iran, China and the United States. By the end of 2002, it was estimated that at least 1.060 people were executed in China, 113 in Iran and 71 in the United States of America.⁵⁰

The American Agenda

The abolitionist movement was not lost on the United States. Beccaria and his successors influence on the humanitarian reform of criminal laws also found its way to the North American continent.⁵¹ As the result of an intense movement towards abolition in the 1840's, led by secular reformers, Quakers and liberal Christians, Michigan was the first jurisdiction in the world to abolish capital punishment in 1846.⁵² Since then 12 American States have followed.⁵³ The persistency of capital punishment within American society is very well illustrated by the abolitionist movement's constant waves of success and failure. These are but a sign of the ambiguity related to using state executions as a legal sanction. A short time after the initial decades of abolishment tendencies in the middle and late 19th century, many abolishing states restored their capital statutes in the first half of the 20th century.⁵⁴ During the 1930-40's, execution rates steeply increased across the federation. This was followed by a decline in the 50-70's, where the abolition movement again gained momentum⁵⁵ and finally culminated in a series of rulings by the Supreme Court, in which capital punishment was found to be unconstitutional in its application.⁵⁶ The issue was, whether the capital statutes of certain states,⁵⁷ were in breach of the American Constitution's Eighth and Fourteenth Amendments, securing equality before the law, due process and protection from cruel and unusual punishment.⁵⁸ Many cases were brought before the Supreme Court on the issue, and the outcome

⁴⁹ The discrepancy between sentences and executions is due to the fact that not all countries carry out executions every year. Further execution may additionally be carried out unofficially. I. Floto, *Dödsstraffens kulturhistorie* (The Cultural History of the Death Penalty), Museum Tusulanum, Gylling, 2001, p.164.

⁵⁰ http://web.amnesty.org/pages/deathpenalty_sentences_eng, last visited 26/05-03.

⁵¹ M. Maestro, *A Pioneer for the Abolition of Capital Punishment: Cesare Beccaria*, in *Journal of the History of Ideas*, vol. 34(3), 1973, pp. 463-468.

⁵² W. Schabas, op.cit., p. 5. Other states followed the example in the following years; Rhode Island (1852) and Wisconsin (1853), H. A. Bedau 97, op. cit., p. 7.

⁵³ The abolitionist states in the United States are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11#without>, last visited 26/05-03.

⁵⁴ Out of the 24 states that abolished death penalty from 1847 to 1984, 12 have restored them. Out of these 12, only 2 have presently re-abolished the death penalty. H. A. Bedau 97, op. cit., p. 9.

⁵⁵ States like Oregon (1964) and West Virginia (1965) abolished the death penalty in this period, Bedau 97, op. cit., p. 13.

⁵⁶ The leading case was *Furman vs. Georgia*, 408 U.S. 238.

⁵⁷ Among them Georgia, Texas...

⁵⁸ The Eighth Amendment of the Constitution reads: "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.*" The Fourteenth Amendment reads: "*...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person...the equal protection of the laws.*" Cited from I. Floto, op. cit., p. 171.

generally favoured the defendant's claims because of the present arbitrariness, capriciousness and thus discriminatory imposition of the death penalty, which according to the court amounted to cruel and unusual punishment. Thus, while these cases were pending before the court and until a few months after its final conclusions in on the unconstitutionality of the death penalty in *Furman vs. Georgia* in 1972, the Supreme Court commuted all death sentences to life imprisonment and the United States experienced a complete abolition of the death penalty. Only shortly after, a process of remaking and reforming capital statutes was initiated in most states. These extensive reforms and several newly installed procedural guaranties were in 1976 affirmed by the Supreme Court to meet the requirements and principles conforming to the Eighth and Fourteenth Amendments.⁵⁹ The present situation of the death penalty in the United States is very much marked by the affirmation of the constitutionality of the death penalty. Since then, the trend has been a steady increase in the number of executions carried out every year,⁶⁰ an expansion of the list of so-called aggravating factors which, taken together with a first degree murder, can have fatal consequences, a growing or at least non changing level of public support, a tendency to politicise capital punishment (making it an issue within electoral campaigns), a decline in the number of executive clemencies given annually, a growing scholarly tendency to acknowledge the non deterrent effect of capital punishment and thereby indirectly accepting the symbolic meaning of it.⁶¹

Very recent developments in the United States are understood as to show willingness towards abolition. Responding to critiques on the risk of executing innocents, several states have initiated independent studies assessing the imposition of the death penalty in their jurisdiction. With the objective of reforming and solving the problematic aspects of sentencing and imposing the penalty, several states have established different types of Commissions and have come to declare moratoriums on all executions in the period of inquiry.⁶² The moratoriums in Maryland, North Carolina and most recently in Illinois, where Governor George Ryan in January 2003 pronounced a blanket commutation of all death sentences to life imprisonment in his jurisdiction,⁶³ are signs of further abolitionist successes. Moratoriums and Commission Reports may well be interpreted as important steps towards abolishment, but they may also be understood as the opposite. By trying to meet the principles of fairness, equal treatment and due process, the eventually successful reforms

⁵⁹ *Gregg vs. Georgia* 428 U.S. 153 was the first case in which the court affirmed the constitutionality of the death penalty. Many others have followed since.

⁶⁰ During the last 30 years, the increase is striking. From 5 in 1983 to 56 in 1995, 84 in 2000 and 71 in 2002, I. Floto, op. cit., p. 175 and <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146>, last visited 26/05-03.

⁶¹ H. A. Bedau 97, op. cit., pp. 16-23 includes tables based on Gallup polls showing public opinions from 1936-94 and tables on the number of pardons and commuted death sentences from 1961-94. The decline in pardons is drastic, especially if taken together with the increase in number of actual executions, I. Floto, op. cit., p. 175.

⁶² An example of such a report is that of the Illinois Commission on Death Penalty and their final report issued in April 2002. It was followed by a *Death Penalty Moratorium Act of 2000* and as such, no executions have been carried out since 2000. T. Sullivan, *Repair or Repeal – The Report of the Illinois Governor’s Commission on Capital Punishment*, in *The Champion Magazine*, July, 2002, p. 10-13.

⁶³ In a speech at the Northwestern University College of Law, 11th January 2003, available at www.cuadp.org, last visited 26/05-03.

of capital statutes end up providing for the final justification that retentionists need. By securing the use of a jury (and not only a judge) in all sentencing trials, the use of DNA as evidence to assure guilt as well as several other procedural guaranties, the validity of sentencing criminal offenders to death is strengthened and the practice of executing in a fair, consistent and proportional way remains legitimate. While the reforms should be welcomed as long as the death penalty exists and has flaws, their ultimate purpose should not be ignored: to justify the imposition of death as a fair punishment.

Taken together with the fact that the United States hasn't ratified the international provisions regulating the imposition of death, but recently have increased its use and expanded its scope,⁶⁴ the current statistic of 38 states still enforcing the death penalty⁶⁵ and the fundamental wish of most jurisdictions to "*rid our state of the shame of threatening innocents with execution and the guilty with unfairness,*"⁶⁶ somehow paradoxically illustrates the persistency of state executions in this part of Western civilisation.

Procedures and execution methods

The 38 jurisdictions in the United States that allow provision for the death penalty (36 states and the federal civil and military jurisdictions) have total jurisdictional freedom as to its imposition. They are only restricted by constitutional guaranties and the guidelines set by the Supreme Court. As mentioned, capital punishment cannot amount to cruel and unusual punishment and it must provide for equal treatment before the law. Capital punishment cannot be inflicted on children, mentally insane, mentally retarded (a very recent decision⁶⁷) and pregnant women. Additionally, a so-called "super due" process must be secured in every way (appeals, defence council, DNA evidence, jury discretion etc.) so that no discrimination occurs on the grounds of economic status, race, mental health, age etc.

American criminal law generally distinguishes between first and second-degree murder.⁶⁸ Even though some states still legally provide for it in their statutes, since 1977⁶⁹, no one has been executed for other than homicide. Neither is there any mandatory sentence in relation to specific

⁶⁴ On federal level, recent developments have included death penalty for crimes other than homicide, i.e. espionage, treason, drug trafficking in large quantities, authorising or advising the killing of an officer, juror or witness, 1994 Crime Bill Expansion, www.deathpenaltyinfo.org, 20/06-03.

⁶⁵ Of which only 6 haven't carried out executions since 1976.

⁶⁶ Pronounced by Governor George Ryan, in his Speech at the Northwestern University College of Law, 11th January 2003, op. cit.

⁶⁷ *Atkins vs. Virginia* 122 S.Ct, 2242, June 2002.

⁶⁸ H. A. Bedau 97, op. cit., p. 4, 27. First-degree murder is the equivalent of capital murder in some states, aggravated murder or premeditated murder in others. The wording as well as the precise definition of these varies from state to state. But generally, death penalty is only eligible for some form of criminal homicide -the just mentioned developments on federal level excepted.

⁶⁹ *Coker vs. Georgia* 453 U.S. 584 (1977).

crimes. For a capital offence to be eligible for a death sentence, the offence has to meet at least one of the so-called aggravating factors, which were amended to most capital statutes to meet the constitutional principles of fairness and consistency during the 80's. An aggravating factor is a specifically determined action or circumstance surrounding a capital crime, which can trigger the capital sentence. The procedure of a capital trial is split into two phases, a guilt establishing trial and a sentencing trial –both subject to the discretion of a jury, that in the latter case are bound to balance aggravating factors against any mitigating circumstances (also provided for in an amended list) in relation to the crime, the offender and the victim.⁷⁰ Furthermore, if the death sentence is given, there is an automatic judicial review of the proportionality and impartiality of the first trials. Then a very thorough system of appeal is a further possibility at both state and federal level, resulting in a period of 10 years on death row not being unusual for all appeal options to be exhausted.⁷¹

When it comes to the actual execution of the death penalty, the retentionist states provide for five different execution methods. With a history in English colonial rule, hanging is the oldest method of execution. It isn't commonly used, but is nevertheless provided for in Washington, Delaware and Montana.⁷² The most recent execution by hanging took place as late as 1996 in Dealware.⁷³ Execution by firing squad is another method of execution with deep historical roots as well as the preferred method for military executions. Offenders in Utah and Idaho may choose execution by firing squad⁷⁴ and this method was last used in 1996.⁷⁵ As a replacement for hanging, several states adopted electrocution as their primary method in the beginning of the 19th century, when the death penalty was subject to much debate. In New York, a Commission was established in 1888 to find the most swift, effective and humane way to carry out capital punishments. The Commission's report concluded that execution by electricity was the most efficient and humane way to execute. Electrocution was first adopted by New York and several states steadily followed.⁷⁶ Until the 1970's and 80's, when many accounts of botched electrocutions were reported, electrocution was the most common method of execution in the United States. An alternative was invented in 1924 by a major in the American army's medical corps. Execution by lethal gas was meant as a humane alternative to

⁷⁰ Before, there was mandatory death penalty for certain crimes, and the jury/judge did therefore not have an influence on the sentencing question, only the guilt establishment. Since *Woodson vs. North Carolina* 428 U.S. 280 (1976), mandatory death penalties are considered unconstitutional. H. A. Bedau 97, op. cit., p. 206.

⁷¹ I. Floto, op. cit. p. 170.

⁷² Idaho also provides for hanging, but hasn't used in 30 years. In Washington and Montana, the offender has the choice between hanging and lethal injection. In Delaware, all offenders sentenced before 1986 are hanged, *A Monitor...*, op. cit.

⁷³ Bill Bailey was executed by hanging, *Washington Execution Protocol on*, in *A Monitor...*, op. cit.

⁷⁴ *A Monitor...*, op. cit.

⁷⁵ John Albert Taylor chose to be executed by firing squad on 26th January 1996 in Utah.

⁷⁶ I. Floto, op. cit., p. 121.

both hanging and electrocutions.⁷⁷ Execution in a gas chamber is presently possible in 5 states.⁷⁸ The one execution method, which became the modern civilised world's response to states executing its humans humanely, was lethal injection. After the constitutional crisis of the 70's, where the Supreme Court deliberated on electrocution amounting to cruel and unusual punishment, lethal injection was adopted by 36 states.

The foregoing has traced the lines of international law moving towards total abolition of the death penalty while the American federal and state law has moved in the opposite direction. In spite of a constant pressure from the international community, accounts of broken ropes, unreliable voltage, misfiring and leaking gas chambers and on-going controversies over the effects of the death penalty, its support among the public, its humane or inconsistent nature etc., the American state leads a constant battle to reform and secure the fairness, humanity and thus legitimacy of inflicting death as a just punishment.

⁷⁷ The basis lied in experiences with gas as mean of warfare during the Great War, but were heavily revised and rethought for execution purposes. S. Trombley, *op. cit.*, p. 16.

⁷⁸ Arizona, California, Maryland, Missouri, Wyoming, *A Monitor...*, *op. cit.*

III. A Ritualised Execution

In the following section, it is my intention to go through the common characteristics of state executions as carried out in the United States. Applying the terminology of ritual theory⁷⁹ to the concrete execution procedures as described in the execution protocols, the form within which the state imposes its final sanction will be commonly characterised. The prerequisite for understanding the essential significance and symbolic meaning of the execution is to ascertain its external form.

Formalism

Ritual activity is carried out with an extreme degree of formalism. A ritual is generally performed within a specific and organized set of rules as to the way things are said, done and acted out. The mere existence of the so-called execution protocols bear witness to the complex “*code of communication or behaviour*”⁸⁰ governing every speech and gesture. From the moment it is announced to the offender that his time has come, to the reading out of his death warrant, the pronouncement of his last statement and the final official pronouncement of death,⁸¹ the formality of the procedure is a striking example of how formalism guides the ritual activity in one specific direction – a direction from which deviance seems impossible. Without allowing for a last statement, the execution would not be considered rightly carried out. Without the final pronouncement of the offender's death⁸² the act would not officially be considered completed.

Whether the execution is carried out in Texas, Utah, North Carolina or Washington and whether the methods are lethal injection, electrocution, hanging, shooting or gas, the procedures are strikingly similar. The form of the ritual act seems far more essential to its validity than the content of it. The only thing that varies from one execution process to another is the offender's and the staff's names, the exact time of execution, and the content of an eventual last statement.⁸³ What remains a common feature throughout all executions is the exactitude of every single action, gesture and wording. At this final stage of a capital case, after the proceedings of a courtroom, the specific content and very essence of the case, the *whats*, the *whos* and the *whys* are no longer an issue. What

⁷⁹ The characteristics of rituals that I apply to the death penalty pertain to Catherine Bell, *Ritual: Perspectives...*, op. cit.

⁸⁰ Ibidem, p. 139.

⁸¹ The execution protocol of the State of Florida (among others) even regulates the exact words to be pronounced as “*The sentence of the State of Florida vs. (name of the offender) has been carried out at (time of execution completion). Please exit the rear at this time.*” *Florida Execution Protocol, Execution Day Procedures*, Florida Department of Corrections, available at www.dc.state.fl.us.

⁸² I. Floto, op. cit., p. 129.

⁸³ *Florida Execution Protocol*, op. cit., a protocol that serves as an invariable manual for executions but also as the official record of the way every single execution has been carried out.

does have the utmost importance is that the execution be carried out in conformity with the formal code -regardless of the character of the offender, of the nature of his crime, the feelings and reactions of the involved, the eventual guilt and responsibility of the offender or even the truth. As such, the ritual may appear to be empty and a pure form without specific content. However, by dealing with humans and with life and death, the formality of the execution ritual becomes fatally ambiguous. The execution protocol may be formalised to its final detail but it is definitely not empty; it has an impact, a very concrete, deep, bodily and physical impact on those involved. In this sense, the ritual of the death penalty distinguishes itself from other forms of ritual activities in everyday American social life. As noted earlier, marriages, birthdays, courtroom proceedings have the same formalistic and ritualised features,⁸⁴ but they do not have the same concrete and fatal impact on the persons involved. Just as much as the execution protocol is formalised and empty, so it also touches the individuals whose lives and deaths it deals with.

The very determined stylistic form of the execution procedure implies a series of consequences as to the meaning of the ritual. By specifically determining the form of the execution act, how things are said and done, the ritual also delimits what can be said and done. Formality tends to restrict both the means and the actual communication, not allowing for relativity or flexibility. The more formally an activity is carried out or a statement is uttered, a lesser deviance seems possible as to its content. If an interaction between people is loosely guided or structured, a wide variety of unexpected and inappropriate events can occur. Informality invites participation and reaction, either in a supporting or a negating way. However, formalism restricts the range of optional linguistic or behavioural choices⁸⁵ and thus only invites acceptance and consent. If one wishes to challenge the meaning of the ritual, then its whole form needs to be challenged as well.⁸⁶ The formalism of American executions displays and indirectly forces compliance with a set of symbolic messages concerning cultural meanings, structures, norms and values⁸⁷ –among them, perceptions of sovereignty and humanity. The ritual of execution tells a story about how the state keeps its sovereignty intact while securing the humanity of its actions.

Rule-governance

Closely related to the formalism of a ritual activity is the rule-governance with which it is carried out. As stated earlier, the protocols of execution represent a complex code, which orchestrates, regulates and thus limits what to do when and why. Every aspect of the execution is bound by the

⁸⁴ For an account of the ritual nature of the Law, see A. Garapon, *Bien juger. Essai sur le rituel judiciaire*, Paris, O. Jacob, 1997.

⁸⁵ P. Connerton, *op. cit.*, p. 59.

⁸⁶ C. Bell, *Ritual: Perspectives...**op. cit.*, p. 140.

⁸⁷ *Ibidem*, p. 143.

specificity and the rules of the protocols.⁸⁸ They set out guidelines for how and when to escort the offender to the execution chamber, how many witnesses and precisely which type (family, press etc.) may attend the execution, who carries out the execution, how the offender is positioned according to the witnesses, what kind of head cover he is given, when the offender may state his last statement, who secures the straps to the offender's legs/hands/head and how the offender's death must be pronounced.⁸⁹ Just like the procedures relating to a courtroom hearing are governed by formality and specific rules, so is the death penalty, from the first moment the death sentence is given to the final execution and following burial.⁹⁰ Every second of the process is carefully planned and the fact that execution staff as well as the offender are carefully instructed and briefed on the routines of an execution⁹¹ is thought to be essential for the execution to be considered successfully carried out.⁹² As expressed by an official for executions in Missouri,

“About 48 hours before the execution we hold a rehearsal. I set up the machine and everybody involved in the execution take part in the exercise. We lay down someone on the couch (...) an officer/guard about the same size as the offender. We make sure everything runs as planned. We leave nothing to chance.”⁹³

The extreme belief in rule-governance as a prerequisite for successful and professional executions demonstrates the very essence of ritual activity. For on a concrete level, rules are indeed essential for constraining violence and preventing unexpected or improvised action, but they also give these actions sense and legitimacy. Rules have the ability to order conflicts and allow for them to take place within the constraints of the rules. By carefully preparing and instructing both staff and offenders in carrying out their specific tasks -neither more nor less,⁹⁴ the rule governance of the executions regulates and keeps everything within the limits of any accepted deviance. By emphasizing repetition, rhythm and accuracy in carrying out the ritual activity with punctuality, precision and control,⁹⁵ the ritual requires discipline and self-control from its participants. As such, self-discipline and self-control become powerful tools to keep all actions within the allowed boundaries, conform to the higher principles and values that the ritual embodies. All specificity, personal creativity or individual forms of expression disappear and are replaced by the institutionalised routines of the state.⁹⁶ At least this is what the staff, the offender and everybody

⁸⁸ The protocols do vary according to their origin and the method of execution that they regulate. But it is striking how the differences are minimal and pertaining to details such as how many tests to carry out before the execution or how many witnesses may be present on the offender's request etc., *A Monitor...* op. cit.

⁸⁹ *A Monitor*, op. cit. and *Florida Execution Protocol*, op. cit.

⁹⁰ Unless the offender's family claims the body, S. Blaustein, *Witness to Another Execution*, in H. A. Bedau 97, pp. 387-400, p. 397.

⁹¹ S. Trombley, op. cit., p. 102.

⁹² *Ibidem*, p. 107, 204 and I. Floto, op. cit., p. 129.

⁹³ Cited from an interview with the person responsible for executions in Missouri, S. Trombley, op. cit., p. 150.

⁹⁴ I. Floto, op. cit., p. 129.

⁹⁵ C. Bell, *Ritual: Perspectives...*, op. cit., p. 150.

⁹⁶ *Ibidem*, p. 152. M. Foucault precisely argues that incarceration and prison life in modern times is the ultimate form of discipline and thereby exercise of state control.

involved believe. However, the effect of rule-governed activity is more than merely a question of discipline, security, professionalism and efficiency. Without undermining these aspects of an execution,⁹⁷ in the world of rituals, the issue is not whether the rules actually do disperse and prevent conflicts. For being a spectacle and a display of the state's control over life and death, the whole activity is meant to demonstrate that not only do the staff not “*leave anything to chance*,” but more importantly, they show that they don't—regardless of whether the rules actually are necessary or not.

In concrete terms, the scenario of an execution, just like that of a courtroom, is an intense combination of different actors and their conflicting interests, perceptions, feelings and objectives. In the execution process, the hate of the victim's family meets the regrets of the offender, their sorrow is confronted with his pride, one party's version of the truth collides with the lies claimed by the other, the past of the offender unites with the present and even future of everybody else, a single individual's responsibility meets society's lack of same, the humans witness the execution of an inhuman and victim meets offender; all of this in a process which puts order into chaos, suddenly reversing the roles of who is the victim and who is the offender, who is the powerful and who is the subordinated, who is guilty and who is not.. The rule governance pertaining to the execution process can be understood as facilitating a form of interaction, which by its very nature may be considered conflicting. Both in concrete terms and in the sense that executions become a perfect way to display an institutionalised state violence, that executes humans within a humane, civilized and non-barbaric framework.⁹⁸

Traditionalism

Closely linked to the formalism of a ritual is its tendency to draw on traditions. Whether these are truly traditional, in the sense of being old, or recently “invented”,⁹⁹ is a lesser issue than the force they seem to give to ritual activities. Whether rituals evoke the past as pure repetition of previous activities, by adapting traditions to new settings, changing them a little to fit into new activities, or creating new practices evoking links to the past in some way,¹⁰⁰ the role of ritual is essential for constructing a link between the past and the present and thus giving authority to present values, norms, beliefs and structures. A tradition tends to transcend current reality and appeals to eternal values and truths.¹⁰¹ Any ritual activity easily becomes the embodiment and very essence of the truth

⁹⁷ This is time and again emphasised as being the main criteria for evaluating an execution. S. Trombley, op. cit., p. 72.

⁹⁸ C. Bell, *Ritual: Perspectives...* op. cit., p. 154.

⁹⁹ Benedict Anderson uses the term “*inventing traditions*” in *Imagined Communities*. Generally, the term refers to the process with which the limits of national identities are created, Ibidem, p. 148.

¹⁰⁰ Ibidem, p. 144.

¹⁰¹ Ibidem, p. 147 and C. Bell, *Ritual Practice...* op. cit., p. 120.

and eternity as well as participants become bearers of unquestionable duties and activities.¹⁰²

Traditionalism presupposes the authority of past ideals, practices and activities and the mere fact of evoking tradition as the grounds for acting in a certain way is often justification enough in itself.

The ritual of execution is often evoked as a traditional practice and the fact of traditionally using death as a sentence, “*we have always done this*,” somehow unites past and present values and gives authority to state executions within a modern punishment system.¹⁰³ The most striking aspect of traditionalism in the execution procedure is the way the activity is practically carried out. There are striking similarities between the modern execution protocols and the way executing rituals were carried out in the Old World.¹⁰⁴ Without going into too many details, traditional execution ceremonies always comprised a grand procession through town, in which the offender was subject to a long and humiliating walk before the crowds. At the arrival of the whole procession to the scaffolds, the death sentence was read out loud and the offender given the right to a final statement (which at the time was supposed and hoped to be a plea and a remorseful repentance for having disgraced the Lord). Throughout the process, priests and other religious authorities were present to closely follow the ritual's every step.¹⁰⁵ The settings may have changed since then, but modern executions have kept many of the same elements. Adjusted to its modern circumstances, the procession is transformed into walking the Last Mile,¹⁰⁶ the publicity of the ritual is transformed into a limited number of witnesses the last remorseful statement is still hoped for and the priest and his crucifix is still ever present during the whole process.¹⁰⁷

Sacral symbolism

The use of sacral symbols is yet another typical characteristic of ritual activity. Sacral should here be understood as any supernatural or higher valued abstract authority, be it religious or secular (as God, the Nation, the People or in this case Sovereignty and Humanity).¹⁰⁸ The ritual uses either

¹⁰² C. Bell, *Rituals: Perspectives...* op. cit., p. 146.

¹⁰³ C. Bell, *Ritual Theory...* op. cit., p. 120. The examples of scholars arguing the validity of death penalty based on the Bible or ancient philosophy are many, see for instance H. W. House, op. cit., or J. J. Vallenga, *Christianity and the Death Penalty* in H. A. Bedau (ed.), *The Death Penalty in America – An Anthology*, New York: Doubleday & Company, 1967 (hereinafter H. A. Bedau 67), pp. 123-135. Even though the traditional Christian notions of forgiveness may oppose death as a just punishment, the traditional and biblical principle of “*An eye for an eye*” is often presented as a valid argument for death penalty advocates, H. A. Bedau 97, op. cit. p. 101.

¹⁰⁴ I. Floto, op. cit., p. 126, argues that the only common points between traditional and modern executions are the priest and his crucifix.

¹⁰⁵ Ibidem, p. 16 and pp. 20-23. Though not formerly guided by written protocols, they had the same amount of formalism and rule-governance to them as modern executions. The traditional execution process is described thoroughly in V. A. C. Gatrell, op. cit., M. Foucault, op. cit. and J. Pratt, *Punishment and Civilization, Penal Tolerance and Intolerance in Modern Society*, Sage Publications, Gateshead, 2002.

¹⁰⁶ A concept used about the last walk from the cell in which the offender spends the last 48/70 hours (depending on the circumstances) to the actual death chamber., I. Floto, op. cit., p. 128.

¹⁰⁷ I. Floto, op. cit., p. 126, 129. The escort by a priest is an option in most protocols and generally accepted by the offender.

¹⁰⁸ C. Bell, *Ritual: Perspectives...*, op. cit., p. 159.

concrete items or geographical locations which represent higher authorities or values within society and thereby displays the abstract and transcendent ideals and values that the symbols represent.¹⁰⁹ In the ritual of execution, the mere use of words like the Deathhouse¹¹⁰ or the Last Mile indicates the symbolic meanings, which are attached to these locations. The wording describes more than a location since it alludes to the activity that it encompasses, the symbolic meaning given to it. Just like a national flag signifies a lot more than a piece of cloth with randomly chosen colours on it, the Last Mile has more meaning to it than just being a passage through a corridor leading to another room or building. Rather, the Last Mile connotes the final steps of the offender, his last march before passing from one world to another, his stepping over the limits from where life ends and death begins.¹¹¹ Likewise, the Deathhouse represents more than just a random location where people die. It is situated in another building, a fair distance away from the inmate community's daily lives, in a world beyond, a world of death.¹¹² The symbolic meaning of the Deathhouse is clearly shown by an inmate on death row in Missouri, when asked his opinion on the Death chamber exceptionally being situated in same building as the hospital:

*"...It is a symbol to have a 'death chamber'. When it is situated in the hospital, it doesn't have the same significance. You're not allowed to see that part of the building until...until you are supposed to be killed. And they do everything to make sure you don't see it."*¹¹³

The awe surrounding the Deathhouse is kept sacred for it is the one and only place where the state legitimately carries out its executions, sacrificing its citizens for the purpose of demonstrating its humane sovereignty.

As this thesis suggests, the whole activity of state executions can be understood as a sacral symbol in itself since it entails more meaning than the mere execution of criminal offenders. As a ritual, the death penalty represents higher values and abstract meanings and furthermore displays these as sacral. As an act, a ritual differentiates itself from other acts; it emphasizes itself as distinct and privileges itself over other acts.¹¹⁴ By doing so the ritual distinguishes the sacred from the profane, the special from routine, transcendent ideals from concrete realities and the ritual sacralises itself and everything that it represents.¹¹⁵ Just like the crucifix distinguishes itself from other religious symbols and the Deathhouse differentiates itself from other possible death locations, execution

¹⁰⁹ Ibidem, p. 157.

¹¹⁰ The Deathhouse is commonly used among convicts to describe the execution chamber. I. Floto, op. cit., p. 128.

¹¹¹ Precisely this aspect of the execution ritual would be interesting to analyse as a *rite of passage*, in the sense given to it by Arnold Van Gennep in *The Rites of Passage*, Routledge and Kegan Paul, 1960 or V. Turner in *The Ritual Process, Structure and Anti-Structure*, Aldine de Gruyter, 1995.

¹¹² P. Fitzpatrick, op. cit., p. 127.

¹¹³ S. Trombley, op. cit., p. 175.

¹¹⁴ C. Bell, *Ritual Theory...*, op. cit., p. 90.

¹¹⁵ C. Bell, *Ritual: Perspectives...*, op. cit., p. 159.

rituals differentiate themselves from all other forms of death occurrences or executions (euthanasia, war, criminal homicides etc.). By ritualising executions, the state singles out its violence as something inherently sacral, just and legitimate and it gives another nature to its killing, doing precisely everything in its power to show that it isn't about killing!

Performance

Rituals act out a certain message instead of just telling it. By means of visual imagery, dramatic sounding or olfactory stimulation, they leave anyone implicated with an extremely sensuous experience, dragging them into participating rather than passively observing. Both cognitively and emotionally, participants find themselves acting out the message that the ritual tries to communicate.¹¹⁶ Most eyewitnesses report that witnessing an execution puts into play all senses. It doesn't only involve actually *seeing* the offender taking his last breath, *seeing* the fear, loneliness or pain in his eyes, but also *hearing* the sighs, cries or moans and even *smelling* the burnt flesh or the chemical material.¹¹⁷ The performance of a ritual activity furthermore has a tendency to “*frame*”¹¹⁸ and highlight itself as a distinct and significant activity. A ritual occurs at special places at fixed times¹¹⁹ and draws attention to itself by being a spectacle, a theatre-like activity that frames, orchestrates and gloriously demonstrates whatever message it might have.

The execution process indeed reminds one of a stage performance, with timings, settings and accessories that are carefully prepared and situated beforehand, “...*six strong spotlights...concentrate their brutal light around the chair...*”¹²⁰ official actors who know their parts inside out, a public “*herded into the carpeted witness room...(standing, ed) behind bars and a pane of thick glass, which separated (them, ed) from the actual death chamber...*”¹²¹ waiting to experience and evaluate the message or morale of the performance. As one eyewitness describes watching and experiencing the execution through the windows of the witness room:

*“The view was stunning...Cook (the offender, ed) lay spread-eagled on the gurney, ready, bound by six thick leather straps....His eyes were only partly open; his strong chin pointed upward. He was balding, and his longish auburn hair looked blond beneath the chilling fluorescent light...Suddenly I saw movement in front of me and realised that on Cook’s far side was a one-way mirror in which we all were reflected. It was our own movement...that had been captured in the glass. The effect was eerie; not only would I witness an execution but I would witness myself witnessing it.”*Do you

¹¹⁶ Ibidem, p. 160.

¹¹⁷ During electrocutions witnesses have noticed the smell of burnt flesh, H. A. Bedau 67, op. cit., p. 18. A Danish journalist witnessing an execution especially emphasised the sensuous experience he had of almost being present in the execution chamber. I. Floto, op. cit., p. 131.

¹¹⁸ C. Bell, *Ritual: Perspectives...*, op. cit., p. 160.

¹¹⁹ P. Connerton, op. cit., p. 44.

¹²⁰ Cited from I. Floto, op. cit., p. 128, (my translation).

¹²¹ S. Blaustein, op. cit., p. 396.

*have anything to say?" the warden muttered at 12:08. Cook opened his eyes. 'Yessir...I just want to tell my family that I love them and I thank the Lord Jesus for giving me another chance and for saving me.' With that, Cook shot his eyes. The warden gave a small, sharp nod toward the person or persons behind the mirror. We all stood rigid, frozen. The silence was absolute, a perfect vacuum. Within seconds cook took a sudden deep breath, gagged once, and stiffened his chin upwards, all in one gesture. His chest expanded tremendously when he breathed, as if he had eagerly inhaled his own death. His arms were still outstretched and bound; his mouth and eyes were slightly open; nothing else moved. My eyes slowly traced the contours of his body...searching for signs of life, a cough, a twitch, a moan, a second thought. None came. I waited for him to exhale. But the air he had so urgently seized a moment before remained trapped in Cook's chest. The show was over...The play had ended*¹²²

It is to their highly sensuous and performance-like features that rituals owe their emotive force and attracting ability. Whether the ritual activity is a sports event like a national football match or a state execution, it seems almost as stunning, exiting and breathtaking as watching a thriller in a movie theatre. What gives strength to ritual performance is the way it on the one hand represents, orchestrates and displays the world, and its truths, values, beliefs and structures as a *totalising objectification of values*,¹²³ that is, as a complete ordering of the cosmos, and on the other, how this orchestration and active participation or performance allows people to construct, shape and mould their values, beliefs and perceptions of the world.¹²⁴ In the words of the same eyewitness, just prior to witnessing the execution:

*"I'd never seen anyone die, and here I was, about to witness a man's death, to observe it without objection. Already I felt sullied, voyeuristic. Yet, this is the law, I told myself."*¹²⁵

This journalist expresses how her mere presence drags her into silently participating and consenting, but also how she constructs or affirms her performance as being part of an already existing and irrevocable higher fact, namely the law. Her specific role is simply seen as a response or reaction to such a fact. She doesn't see her role in creating, shaping and reaffirming the event, for

*"...ritualised activities are ways of acting that doesn't particularly encourage a great deal of immediate and overt explaining: Ritualisation gives people the sense that these activities do not need a lot of justification."*¹²⁶

In the preceding, I have presented some of the formal characteristics of ritual activity and applied them to the American execution rituals, as they are generally carried out. Rituals tend to be

¹²² Pronounced by a journalist before witnessing an execution in Huntsville, Texas, S. Blaustein, op. cit., pp. 396-397.

¹²³ C. Bell, *Ritual: Perspectives...* op. cit. p. 164.

¹²⁴ Ibidem, p. 167.

¹²⁵ S. Blaustein, op. cit., p. 395.

¹²⁶ C. Bell, *Ritual: Perspectives...*, op.cit., p. 167.

formalised, rule-governed, invariant performance, which draw on traditions and sacral symbols to objectify themselves and the value that they represent. These are the obvious, visual and analytically available features of the execution ritual. And these formal features of the execution process are vital for detecting the meaning and essence of the execution ritual. If seen as a mean of communicating, the formal features of the execution process is analogous to the language that a ritual speaks, but the message that it wishes to convey must be found within its symbolic meaning. For the question remains, what it is that the ritual displays? Or more specifically, how does the ritual of execution manage to demonstrate itself as a sovereign act of humanity?

IV. A Sovereign Execution

Sovereignty is a concept with many different meanings, employed within many different discourses and thus subject to many different definitions.¹²⁷ In the following context, a standard modern definition of sovereignty as a supreme law making power will be applied. It is the state, which is conceived as "... a structure exercising absolute power and authority in society."¹²⁸ What this structure precisely resides in (a person, an institution, many institutions, a government, a constitution, the people etc.) is not so much the issue as is the notion of strength, i.e. "...the state's capacity to impose its will whether on its own citizens or other states..."¹²⁹ connected to such a structure. Over time, concepts of sovereignty have

"...developed from the right to give final judicial decisions to the possession of executive power to the right to make laws. (...) As states moved from absolutist to representative rule, democratically elected governments co-opted a term that had originally been linked with the supreme powers of a state's ruler and used it to assert their own sovereign powers delegated to them by their citizens. ""¹³⁰

It is the purpose of the following section to analyse and understand the death penalty or elements of it, as a ritualised display of such state sovereignty in its all-powerful sense.¹³¹

State Sacrifice

An allusion to founding myths will initiate the account of the ritual display of state sovereignty. Myths, as well as rituals, are mediums that express and exemplify the values, norms and beliefs of a given community.¹³² Since the beginning of times, primary myths of western culture and tales of the origin of civilisation have shown how collective violence or human sacrifice, form the very foundation of these communities. Founding myths, like those telling the story of how Rome was founded on the Gemini conflict between Remus and Romulus, the Biblical tale of Job being collectively rejected and excluded by the Christian community,¹³³ or the often told story about Cain

¹²⁷ M. R. Fowler, *Law, Power, and the Sovereign State, The Evolution and Application of the Concept of Sovereignty*, Pennsylvania, Pennsylvania University Press, 1995, p. 7.

¹²⁸ J. A. Camilleri, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, Worcester, Edward Elgar, 1992, p. 18.

¹²⁹ Ibidem, p.11.

¹³⁰ M. R. Fowler, op. cit., p. 6.

¹³¹ Without further showing it, Hugo Adam Bedau has noted that "*the death penalty symbolises the ultimate power of the state and of the government of society, over the individual citizens,*" cited from P. Fitzpatrick, op. cit., p. 118. I. Floto, op. cit., p. 139.

¹³² Rituals tend to be much more bound to their form than myths. Myths are constantly recreated and reinvented whereas rituals are invariably reproduced, P. Connerton, op. cit., p. 54, 57.

¹³³ The story is one of Job, the successful leader of a Christian community, who is excluded by the community out of envy and jealousy, further deprived of all his property, family and elements of value to him as a test of his love for God.

sacrificing his brother Abe, all articulate the idea of violence and an initial homicide as the basis and founding principle of a given society.¹³⁴ Also modern violent acts and homicides (the French Revolution, the beheading of Louis XVI, the execution of Ceaucescu seem to have initiated new beginnings.

As a common characteristic, mythical tales of foundation consist of three phases.¹³⁵ First, some form of extreme violence occurs, which unbalances the community in question. Whether Remus disobeys his brother's laws or Job's success becomes too big a threat for the rest of the community, the initial violent act is provoked by a primordial mimetic desire,¹³⁶ a jealousy, envy and drive for vengeance that one feels towards a fellow being (brother, father, son, friend etc.).¹³⁷ At a second stage, the community reacts to the chaos that this initial violence has created. With a violence considered constructive, rather than destructive, the community responds to the initial perpetrator, or a symbol of him (a "sacrificial victim"), and thus initiates the third phase. Here the community restores or founds itself on new grounds. This reactionary violence can take quite different forms and a distinction should therefore be made between the lynching of a perpetrator and the sacrifice of one. While the first is seen as the primitive, spontaneous and unique response of traditional societies to a perpetrator's mimetically provoked violence, the sacrifice pertains to an institutionalised form of reaction that is repetitively carried out –an act belonging to the world of rituals.¹³⁸ While the first becomes an act of foundation, the second remains a technique for survival. The sacrificial violence is one that rests on the unanimity of the community, thus channelling the risk of even worse violent acts occurring (acts of personal vengeance) and preventing the community from permanently falling into the evil circularity of violence breeding violence.¹³⁹ In a common exclusion, an "all against one" act, the community manages to restore peace and harmony. By choosing a "victim," that represents society and have features that are similar and common to it, the community successfully transfers its common guilt onto such a "victim."¹⁴⁰ By further excluding or killing this individual, the community somehow purifies itself. It is not the transfer of guilt in itself but the unanimity of the community, the common belief in the effects of the sacrifice that gives it value.¹⁴¹ The participation of the victim is even essential: it needs to put on

¹³⁴ This is the thesis of René Girard, French contemporary philosopher whose primary work, *La Violence et le Sacré*, describes the connection between violence and religion. The following is an account of parts of his ideas and an application of them on the ritual of death penalty, based on secondary readings on his work and thoughts, J-B. Fages, *Comprendre René Girard*, Toulouse, Privat, 1982 and R. Girard, *Violences d'aujourd'hui, violences de toujours: textes des conférences et des débats*, Lausanne, Editions L'Age d'Homme, 2000.

¹³⁵ R. Girard, op. cit., p. 16.

¹³⁶ "Mimetic desire" is a concept deriving partly from psychological research, that Girard uses to describe the forces that drives man to violence, the very origin of the original ritual violence of founding myths. J-B. Fages, op. cit., p. 77.

¹³⁷ This is illustrated by the many Greek myths focussing on relationships of rivalry, hate and love between family members, friends etc. (Oedipus, Dionysus), P. Connerton, op. cit., p. 55.

¹³⁸ J-B. Fages, op. cit., p. 74.

¹³⁹ Ibidem, p. 69 and D. Jeffrey, *Rompre avec la vengeance*, Québec, Les Presses de L'Université de Laval, 2001, p. 51.

¹⁴⁰ R. Girard, op. cit., p. 20.

¹⁴¹ I. Floto, op. cit., p. 45.

the role of victim, either admitting or negating his guilt and thus follow the rules of the game and join the community in their quest to restore order.¹⁴²

The modern ritual of execution can be placed somewhere in between the original violent lynching of a perpetrator and the collective ritualised sacrifice of an innocent victim.¹⁴³ Embodying all mimetic feelings present within society and further acting them out by committing the initial violent act, the criminal offender has threatened the stability and order of the whole community. On the one hand, the perpetrator committed a violent act that would destroy society if committed at large. He is not innocent and his personal guilt and responsibility must be established as an unambiguous certainty, at least in theory. Once established, society reacts to his crime with responsive violence in order to protect itself from falling into even worse violent acts. By executing criminal offenders, the community unanimously liberates itself from everything he encompasses. On the other hand, by carrying out executions as ritualised activities, choosing only some criminal offenders, i.e. “the worst of the worst” and further claiming that only they deserve to die (this is usually the retributionist argument), the offender comes to represent not only his own evil, but all past and future crimes, the sum of all potential evils in society. The very essence of society's survival comes to rest on the liberating virtue of collectively and symbolically executing a scapegoat. The retributionist argument for punishing by death is precisely one that acknowledges anger, outrage and vengeance as reasonable rationales for punishment and see death penalty as a way for society to act out these feelings in an orderly a legalised way.¹⁴⁴

Legal sovereignty and state violence

The Sovereign¹⁴⁵ derives his power from his right to make the laws, including the laws that penalise (with death or other sanctions); this was the ground assumption of John Locke (among others), when speaking of the very foundation of society. According to this theory, Law is the Sovereign's exercise of a power given to him by result of an agreement¹⁴⁶ made between men and is thus fundamental to both the power of the Sovereign and to society's very existence. Legal sovereignty

¹⁴² D. Jeffrey, op. cit., p. 60, 106.

¹⁴³ E. Purdum & J. A. Paredes compare contemporary executions in the State of Florida with the human sacrifices practiced by the Aztecs in Mexico in 16th century. *Rituals of Death, Capital Punishment and Human Sacrifice*, in M. Radelet (ed.), *Facing the Death Penalty, Essays on a Cruel and Unusual Punishment*, Philadelphia, Temple University Press, 1989, pp. 139-155.

¹⁴⁴ For an account of the retributionist stand, see Walter Berns, *For Capital Punishment: Crime and the Morality of Death Penalty*, New York, Basic Books, 1979. The sacrifice or lynching becomes all the more paradoxical, when considering that modern societies somehow have managed to remove the very sources of the first violent act, i.e. elements that foster the mimetic desires, envy, jealousy, revenge etc. by installing an institutionalised scheme governed by the rule of law, human rights, no discrimination, no slavery, no caste, no social classes, no inequalities, R. Girard, op. cit., p. 25.

¹⁴⁵ As previously stated, "the sovereign" should not be understood literally as an absolute ruler, King or Dictator, but rather, in a modern democracy, as comprising the state, the representatives of the people, the people themselves etc.

¹⁴⁶ *Compact* is the term used by Locke for the equivalent of Rousseau's *social contract*.

rests on the enforceability of the Law, either by direct coercive power, or the threats of it.¹⁴⁷

Violence is what gives strength and validity to the Law. As such violence is the basis and very grounds that the Sovereign rests upon.¹⁴⁸ Only if founded on a monopoly of violence, the state and its representatives can legitimately and successfully impose the Law. A monopoly of violence is thus crucial for the state's basis of power and it must constantly protect itself from any challenges against this monopoly (terrorism, criminals, guerrilla forces etc.). The institutionalisation of state violence, whether the police, the judicial system or penal sanctions, is the state's way of responding to violence with violence and thus protecting itself and its very grounds of existence. The connection between the Sovereign, the Law and violence is essential in relation to the death penalty, that is, to a penal system that involves the right of the state to carry out the corporal extermination of its subjects.

If the Law and the monopoly of violence are the grounds on which the Sovereign rests, the exercise of violence in its extreme and absolute form, like the institutionalised imposition of death, represents Law in its most extreme and absolute form. If the Law is the essence of sovereign power, then capital punishment, as an exercise of absolute violence, represents the absolute exercise of such sovereign power.¹⁴⁹ The death penalty represents the very last possible mean to exercise a monopoly of violence. The legal sanctioning to death is a threat of state violence, but the actual killing takes the violence a step further. It is an institutionalised, rehearsed, exercised, structured, predictable and prearranged exercise of violence¹⁵⁰ that by its very nature corporally violates and denies the humanity of its “victims.” It is the only legitimate form of violence dealing with the lives and deaths of the state’s subjects in an ordered, legal and institutionalised way (other forms of institutionalised violence may include war, military death penalty, mental institutions, prisons etc.). When dealing with death, the imposition of capital punishment exceeds the Law. By definition, death goes beyond the Law, it expresses the finality and the very horizon of the Law. Death only comes into play if the Law fails; imposing it is the ultimate attempt of the Law to fix and position itself, its subjects and the world into a stable order. By using death as a sanction, the Sovereign, the Law, the death penalty not only responds to everything that exceeds the limits of what the Law tries to order by means of violence,¹⁵¹ but by means of an *exceptional* violence. Viewing the legal endorsement of death as an exceptional sanction can be related to a theory of sovereignty, in which sovereign power is founded on exception. From this perspective, the Sovereign rests on a right and duty to define the rules, the structures and everything that regulates life in a given community (the

¹⁴⁷ J. A. Carimelli, op. cit., p. 17.

¹⁴⁸ F. von Benda-Beckmann, op. cit., p. 48.

¹⁴⁹ Fitzpatrick, op. cit., p. 118.

¹⁵⁰ These are the conditions for violence to be institutionalised, according to L. Lombardo, *Collective Violence in Prisons: Psychological Dimensions and Ritualistic Transformations*, in G. Summers (ed.), *Collective Violence*, New York, Rowman & Littlefield Publishers, 1997, pp. 141-167, p. 159.

¹⁵¹ Fitzpatrick, op. cit., p. 120.

Law) as well as a right to protect these with extreme and exceptional violence. In this perspective, the Sovereign is seen as manifesting himself in his right to act exceptionally, beyond the Law (states of emergency, wartime)¹⁵² - the more exceptional the act, the more powerful the Sovereign.

The relevance of this in respect to the present thesis is precisely that the imposition of death by the state is an exceptional and supreme expression of both the Law and of the Sovereign's monopoly of violence. The death penalty is in every way a system that expresses sovereignty –both in its power to make the laws that kill, threat about using its monopoly of violence and actually carry out an absolute and exceptional violence against its subjects. The exceptional nature of state killings will be further strengthened when considering the necessary and highly ritualised scenery within which this violence displays itself; as the following will show, it is only with a ritualised violence that the Sovereign truly can differentiate its violence from other forms of state violence, fully turn it into an institution and thus in principle legitimise its exceptional killing.

The force of the Law

The so-called aggravating factors that define crimes eligible for the death penalty, serve as an example of the Sovereign's lawmaking power. It shows how the Sovereign through the Law both reflects and creates the cultural values and norms that it rests upon. In principle, capital punishment can only be imposed as a sanction for capital murder.¹⁵³ But capital murder in itself does not suffice for a jury to sentence an offender to death. In addition, so-called aggravating factors must be considered and balanced against eventual mitigating circumstances. Out of the list of circumstances, behaviours, acts or categories of victims, which define the crimes “suited” for a death sentence, only one aggravator suffices for death to be sentenced.

The list of aggravating factors include murder on a wide range of specific victims, all considered to be of specific vulnerability or importance: peace officers, judicial personnel (prosecutor, executive officer, judicial legislative), correctional officers, witnesses, informants, juror, pregnant, mentally or physically handicapped, hostages, seniors and children. Another type of aggravating factor has to do with the offender and the nature of his crime: whether or not the offender was a convict, committed another murder at the same time, was committing murder for pecuniary gain, for the

¹⁵² This was the concept of sovereignty proposed by Carl Schmitt (1888-1985) in *Dictatorship*, 1921 and *Political Theology*, 1922. Schmitt was a legal and political theorist of Nazi Germany and as such is presently not referred to for his extreme critics of liberalism or justifications for dictatorships or states of emergencies. The idea of exception as the basis of sovereign power is interesting though, since it seems to touch on aspects of the capital punishment imposition, which the idea of sovereign monopoly of violence does not; namely that institutionalising and ritualising the death of the state is a sovereign act on the very edge of the law, on the border of other legal sanctions, of other forms of deaths imposed by the state (in war, for instance). G. Agamben, *The State of Emergency*, extract from a lecture given at the Centre Roland-Barthes, Université de Paris VII, Denis-Diderot, available at www.generation-online.org/fpagagambenschmitt.htm, last visited 20/06-03.

¹⁵³ Without going further into details on which crimes constitute capital crimes in which states, it should once again be noted that on federal level the scope of capital crimes have expanded to include non-homicides.

purpose of avoiding arrest and whether the murder was committed in relation to rape, robbery, car jacking, kidnapping, using a bomb, poison or being motivated by hate, gang activities etc.¹⁵⁴

By defining activities such as car jacking, kidnapping and gang activities as aggravating circumstances to a capital crime, the state automatically defines the subjects carrying out these activities –even before them having committed the crime. The state signals that these activities are unacceptable as social behaviours, that the subjects carrying out these activities belong to a group of individuals who are society's enemies, in contrast to the group of individuals that the aggravators protect and validate (peace officers, correctional officers, prosecutors etc.). With aggravating factors, the state broadens its area of control to include private activities, lifestyles, behaviours and conducts (such as being part of a gang) and defines its citizens within two main categories: those worthy of empathy, state protection and services –publicly identifiable by their social activities; and those individuals who should be excluded, the "worst of the worst" criminals, the monsters and the inhuman who cannot claim any other reaction from society than vengeance, sacrifice or retribution.¹⁵⁵

Aggravating factors not only serve the state to broaden its realm of influence on social life, define the very essence of good public life, but to actually preserve itself and its functions. It is striking how many of the aggravators formulated in capital statutes seem to protect state institutions, responsibilities, functions and employees. The aggravators protect the category of people pertaining to those who are part of the fight against society's enemies (prosecutors, officers, witnesses, law enforcers etc.); they emphasise and a priori condemn actions that attempt to destroy state functions (an offender resisting arrest, hindering government functions, committing a crime while under sentence of imprisonment etc. are all aggravating factors) or seem to be a threat against its very essence (murder committed against elected or appointed official engaged in the performance of his official duties is an aggravating circumstance).¹⁵⁶ Aggravating factors are the state's legal tools to preserve and strongly emphasise itself as the very source and reason for societal order.¹⁵⁷

Perceiving the Law as a cultural expression, aggravating factors are symbolic representations of what the state, the Sovereign or the people perceive as good or bad behaviour, good and bad people, good and bad social activities.¹⁵⁸ Aggravators are symbols or narratives of much more in

¹⁵⁴ A table listing all aggravating factors, ordered by jurisdiction, with year of adoption is presented in J. Simon & C. Spaulding, "*Tokens of our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*" in A. Sarat (ed.), *The Killing...*, *op. cit.*, pp. 81-113, p. 102-109.

¹⁵⁵ *Ibidem*, p. 96.

¹⁵⁶ H. A. Bedau 97, *op. cit.*, p. 34.

¹⁵⁷ Aggravators respond to eventual rebellions against societal, civil or religious order in the same way that public executions did in the Old world. These "worst of the worst criminals" are perceived as ultimate threats and the state condemns them, their actions and their lives by executing them. L. Masur, *op. cit.*, p. 27.

¹⁵⁸ J. Simon & C. Spaulding, *op. cit.*, p. 82.

society than merely those crimes that can be punished by death. They define acts, social activities, types of victims and types of offenders that reflect and convey certain images and conceptions of how people think the world is and should be. As such, aggravators easily become a powerful tool for state rulers to meet people's perceptions and images of the world and furthermore their claims for change and wishes for an ideal society.¹⁵⁹

State discipline

If perceiving the imposition of death as a long process starting with the pronouncement of the sentence in the courtroom and ending with the actual execution, the death penalty ritual also includes the so-called death row phenomena.¹⁶⁰ The mentioned invariance of the ritual of death penalty manifests itself in this process, more specifically in the effective disciplining of the offenders' everyday lives. Daily routines of hygiene, the precise periodicity of eating, working, exercising or sleeping are all part of a highly ritualised practice that moulds and shapes the offenders down to the slightest details of what society values (values such as working, studying, learning, praying) and must be taken into account as an effective disciplining method.¹⁶¹ At a first stage, the art of disciplining and mechanisms for control involve the specific and restricted repartition of individuals in social space.¹⁶² One aspect of such repartition is the incarceration and segregation of individuals. It is a disciplinary element present and used in many different areas of societal life (schools, hospitals, factories, prisons) and more specifically, on many different levels within the death penalty regime. The incarceration of criminal offenders is society's collective exclusion and segregation of criminal offenders from citizens. On a smaller scale, within the prison community itself, the death row phenomena furthermore segregates and differentiates the ordinary prison community from that of capital offenders, separating the world of the living from that of the dying. The segregation and lack of physical or social contact between the two communities, establishes a certain hierarchy and obliges death row inmates to define themselves in relation to life-imprisoned inmates. Even in the few prisons that don't segregate the living from the dead,¹⁶³ such differentiation and non-human identification¹⁶⁴ is still very much a part of a capital offender's

¹⁵⁹ Ibidem, p. 82.

¹⁶⁰ The average time of incarceration on the death row is esteemed to be approximately 6 years, due to the many possible options for appeal on different levels of the judicial system, W. Schabas (ed.), *The International Sourcebook on Capital Punishment*, Boston, Northeastern University Press, 1997, p. 250.

¹⁶¹ C. Bell, *Ritual: Perspectives...*, op. cit., p. 151.

¹⁶² The following account of how the sovereign exercises its disciplining power builds on Foucault's analysis of the means of disciplining in the modern world. While Foucault uses the mechanisms of discipline on a large societal scale, illustrating it within modern school systems, hospitals, prisons etc., the following will apply these same disciplining means and strategies to the death penalty regime in the United States. While Foucault wished to show the modern world's self-regulating and self-disciplining characteristics, the following apply these disciplining means as an illustration of the state's exercise of power.

¹⁶³ Except from a few exceptional cases of state prisons mixing inmates sentenced to death and inmates sentenced to life (Missouri, for instance).

¹⁶⁴ S. Blaustein, op. cit., p. 398.

identity (or lack of same). A death row inmate is reduced to being a legal person, more often defined and called by the number closely following his name (designating his "C.P." status, his turn in the line of planned executions, prison department and cell number) than by anything else (ex: A.J. Bannister C.P. #24 5B-37).¹⁶⁵

A third level segregation takes place within death row itself. At least 48 hours before a planned execution, a death row inmate is subjected to a final exclusion, exhibiting him most obviously as a dying man (hence the expression "Dead Man Walking"). After the death warrant has been issued and execution day determined (usually 10 days ahead), the inmate is read aloud his sentence and led into isolated confinement for the last so-called "death watch."¹⁶⁶ Without undermining the aspect of security and protection that is referred to by the staff as the reason for this final isolation, it nevertheless represents a strong disciplinary element within the death penalty regime.¹⁶⁷ If the staffs consider that no chance is left for the offender's survival, he is led to trespass the boundaries of the world, physically leaving the building of the living and entering that of the dead. He is led into final isolation, where a specifically designated space and specific regulations will form the surroundings of his last days. The architectural nature of "the holding cell"¹⁶⁸ reinforces the somewhat contradictory aspect of isolating the offender, leaving him to himself and his own differentiated situation, segregating him from the world of the living and at the same time subjecting him to the constant and very visible presence of the staff and the state. The death cell is usually an open room divided in two, designating one space for the offender and the other for the guard whose job it is to register every move, act, call, visit, menu, behaviour etc. The disciplining strategy of isolating individuals in space while at the same time securing their total visibility is a mechanism of control that organises individuals in space, while making sure that no collective tendencies occur, that no confusion or dangerous communication takes place, but that every single individual is physically and psychologically fixed and given the singularity required for constantly being under the control and power of the Sovereign.¹⁶⁹ Again the very close contact and concrete relationship between the Sovereign and his subjects is accentuated in the death penalty system. The rather abstract and general rules and regulations (the Law) that are usually seen as the state's disciplinary means, must give way to an absolute and all powerful strategy touching and imposing itself physically on the bodies of its subjects.

¹⁶⁵ This example is from Missouri, S. Trombley, *op. cit.*, p. 183.

¹⁶⁶ The Missouri Execution Protocol prescribes for 48 hours, but it may vary depending on the state, the protocol and the circumstances in question. S. Trombley, *op. cit.*, p. 110. Florida usually initiates this last period earlier. E. Purdum & Paredes, *op. cit.*, p. 146.

¹⁶⁷ S. Trombley, *op. cit.*, p. 203. The following account of the final days before an execution is based on the Missouri Protocol.

¹⁶⁸ I. Floto, *op. cit.*, p. 180.

¹⁶⁹ Again, Foucault would not ascribe such a strategy to a sovereign power, but to a state disciplining mean, *op. cit.*, p. 168

On execution day itself, the segregation and isolation of the offender is drawn to its extreme and final phase. The world closes in on the institution, on the staff and on the offender himself. All normal activities are suspended, no access or traffic is allowed on prison grounds (except for witnesses and staff arriving), the whole institution is shut down, all inmates are locked up, all communication with the media is stopped until after the pronouncement of death, security is placed on high alert, every movement is controlled and carefully registered in protocols; the few activities taking place are carried out with the upcoming execution in mind. On execution day, time stops; everybody hold their breath; When the state carries out its final sanction, demonstrating its ultimate power over life and death, it clearly differentiates state killings from any other form of ordinary events by setting a into motion a timetable without comparison. Once the last visitors have left the building, the inmate has received his last meal and all other inmates are secured in their cell, the procedure of state killing is activated.¹⁷⁰

16.30 Serving of the offender's last meal. 18.00 Final briefing of the staff by the Chief Superintendent. 18.15 Everyone who is part of the execution team go to their designated post. 19.00 All phone lines to and from the execution chamber are checked. Watches are synchronised with the watch in the media room. 19.30 The inmate is led to a shower room and kept under surveillance whilst showering; he is given a set of clean clothes, explained the lethal injection procedure (or shaved if death is to be carried out by electrocution), medically examined as well as offered a tranquilliser. An authorised operator controls the lethal injection machine. 20.30 The execution gurney is prepared. The curtains in the execution chamber are drawn. 22.00 The execution team meets in the execution chamber and the poison is filled into the injection machine. 22.30 The priest arrives to the holding cell. The ambulance and the hearse arrive at the prison gates. The State witnesses arrive at the staff entrance. The telephones are monitored. 22.40 The Director of the Department of Correction presents himself before the Parole Board Courtroom in the prison. 22.45 The State witnesses arrive to the witness room. 23.00 The Director of the Department of Correction arrives at the witness room. The Deputy Director controls the open line to the Justice Department and the State Prosecution. 23.05 The Deputy Director presents himself in the big conference room. 23.10 The phone lines are tried out. 23.15 The doctor tests the heart monitor. 23.20 The Director tries out all the telephone lines. The watches are checked again. The Director carries a mobile phone in case the phone system fails. 23.30 The Director calls the Governor's office to control that a stay hasn't been issued. The Deputy Superintendent makes sure that no one except authorised personnel is present in the execution chamber. 23.35 The inmate is escorted to the execution chamber and is immediately fastened to the execution gurney; the intravenous syringe is inserted (if not previously done in the death cell). 23.40 Phones are monitored. The offender's witnesses arrive. They are kept separate from the State witnesses during the whole process. 23.55 Phones are monitored. 24.00 The Director calls the Chief

¹⁷⁰ The following is a reconstruction of execution by lethal injection, based on the Missouri Execution Protocol, S. Trombley, op. cit., p. 113, the Florida Execution Protocol, *A Monitor...*, op. cit. and E. Purdum & Paredes, op. cit., p. 148.

Superintendent present in the execution chamber to make sure no postponement is necessary (due to problems with the intravenous drop). If not, the curtains in the execution chamber are drawn back and the inmate is allowed a last statement. 00.01 The Chief Superintendent reads out loud the death warrant and the execution begins (in Florida with the words “*God save us all!*”)

When the execution is completed, a doctor or other authorised personnel (such as the warden) conducts a brief examination and the offender is officially pronounced dead. Someone in attendance signals death with a white cloth to the people assembled outside the prison and ambulance attendants remove the body from the execution chamber, transporting it to a medical examiner's office for autopsy. Finally, the corpse is released to the funeral home for burial on prison grounds, unless the offender or his family has made private arrangements. The staff are debriefed and prison life returns to normal.

Minute for minute, the procedure alludes to a military operation, in which the discipline, exactitude and a chain of command remains crucial for all parties involved:. As pronounced by a former death row chaplain,

“Only the ritual of an execution makes it possible to endure. Without it, the condemned could not give the expected measure of cooperation to the etiquette of dying. Without it, we who must preside at their deaths could not face the morning of each new execution day. ...Nor could you...No matter how you think you feel about capital punishment, no matter how you imagine you would face the legal giving or taking of life, you would meet the reality of it by holding tightly to the crutch of ritual.”¹⁷¹

The role of rhythm, repetition and regularity in such a highly differentiated timetable on execution day is a crucial element in the disciplining and controlling strategy of the state.¹⁷² Time is not simply imposed on every activity, it is clearly made an inherent part of these activities, turning them into programmes of action that govern any behaviour, gesture or direction¹⁷³ and as such, every participant becomes an instrument, a part of the operational mechanism of imposing death. As expressed by a member of the execution staff in Missouri:

“The last twenty-five minutes when you are in the execution chamber (...) -then a minute seems forever. I’m serious. And it goes for the whole institution. We don’t take things easy in this execution procedure, but the last thirty minutes, when you get ready to take the life of another human being –then you have to look at yourself and say to yourself: ‘I’m the state’s instrument. I have a job to do and I have chosen to do it. I have never killed anyone, but this individual is

¹⁷¹ Pronounced by Byron Eshelmann, former death row Chaplain, San Quentin Prison, cited from R. Johnson, *Condemned to Die, Life under Sentence of Death*, New York, Elsevier, 1981, p. 1.

¹⁷² M. Foucault, op. cit. p. 176.

¹⁷³ Ibidem, p. 180.

sentenced to death. So this is the most severe punishment being imposed, and we are the instruments that have to carry it out...’’¹⁷⁴

Criminal bodies

The imposition of the death penalty is a bodily practice. It literally deals with the human body, displaying and imposing the Sovereign physically on the involved parties.¹⁷⁵ The corporal relation between the Sovereign and his subjects has historically been an integral part of western state power. The state has always exercised some form of corporal violence against its subordinated. Whether inflicting the bodies with pain in a penal system of physical punishment, fostering a culture of slavery, applying physical torture or incarcerating criminals, “*les corps violétés*”¹⁷⁶ are as a result marked and differentiated from other bodies, as the sole property of the Sovereign. As the terminology suggests, the meaning of *capital* punishment lies in its physical nature, referring both to the decapitation (death) of the criminal subject, but also to the political sense in which the beheading (execution) is carried out by the head (Sovereign) of society.¹⁷⁷

As previously shown, the execution protocols govern the execution to the finest detail. By constantly and continuously regulating every gesture, movement and attitude of the criminal bodies condemned to die, governing what can be done, how, why, when, the death penalty regime secures the criminal bodies’ constant subordination. However, this total domination of the process is not only directed towards meeting the obvious ends of the death penalty regime, i.e. serving the purpose of executing a human body. For only by controlling the process and techniques of how to reach that end can the Sovereign exercise power fully and completely.¹⁷⁸ The objective of the execution protocols and the whole ritual of death penalty is not only to execute, neither is it to make the criminal bodies do specific things (work, study, exercise), but to make sure that they do it in the exact way the Sovereign prescribes. The ritualistic dealings of the criminal bodies within the death penalty regime, i.e. the demand for total physical (and psychological) obedience becomes the very essence of sovereign power as well as the objective of the ritual.

¹⁷⁴ S. Trombley, op. cit., p. 207

¹⁷⁵ M. Foucault, op. cit., p. 154, ascribes the physical presence of the sovereign to the Old World, to the big spectacles of public executions. However, in this following perspective, the physical demonstration of sovereignty still remains an important aspect of modern executions.

¹⁷⁶ M. Porret, *Les Corps Violétés*, in R. Girard, *Violences d’aujourd’hui, Violences de toujours*, Lausanne, L’age d’Homme, 1999, pp. 169-197, p. 173. Porret argues that modern civilisation has gone beyond the practice of the state directly violating the body. But this thesis suggests precisely that the death penalty is a last standing persistent sign of an extreme state sovereignty.

¹⁷⁷ P. Fitzpatrick, op. cit., p. 118.

¹⁷⁸ M. Foucault, op. cit., p. 161.

“*Ceremonies of the body*,”¹⁷⁹ like the death penalty ritual, not only displays or shows the sovereignty and power of the state by controlling and disciplining the criminal bodies in every detail, making them act in a specific way; the ritual also incorporates this power, turns it into a persisting habit, it “cognitivises” and objectifies its message as a persuasive truth by using the body as a training field. The ritual of the death penalty teaches the criminal bodies ultimate obedience both by displaying the Sovereign's total control, but also by being a textbook of practical bodily training and incorporation of obedience. Governing the flesh becomes the means to reach the minds¹⁸⁰ and in this sense, the body of the criminal offender turn out as being both an object for and a means of absolute state control. The physical connection between the Sovereign and his subjects is what turns the execution act into such a strong and powerful message. For while the Law, already stated to be an exercise of sovereign power, is experienced as an abstract and general phenomena, state executions display sovereignty extremely clearly on the criminal bodies.

State Custody

The death row confinement that every criminal offender sentenced to death is subjected, has a custodial nature, leaving inmates with a loss of civility, autonomy and humanity while awaiting their deaths.¹⁸¹ During the years of confinement, inmates are not only segregated from the world of the living, separated from eventual friends and loved ones, but also from other inmates on death row, since all contact between them is highly restricted -if at all existent. Differentiating between contact visits and non-contact visits, death row inmates are generally subjected to the latter and in such lack of human contact with the outside world, they lead a life of solitude, dominated by feelings of abandonment, apathy, passivity and emotional emptiness. A decline, deterioration and eventual death on first an emotional, then a mental and finally a physical level is generally the effects of a system that cultivates loneliness, isolation and inactivity.

Added to this emptiness is a total sense of powerlessness. As a result of an extreme custodial regime that imposes rules and regulations for every aspect of everyday life, death row inmates lose any possibility to influence their own lives.¹⁸² The constant restrictions and inflexible regulations on how and when to receive and send mail, on the number and timing of visits, on which family members

¹⁷⁹ P. Connerton, op. cit., p. 84, deals with collective memory and uses the term “*ceremonies of the body*” to designate rituals of bodily practice that create habits and patterns of human behaviour, thus eventually creating collective memory.

¹⁸⁰ M. Foucault, op. cit., pp. 160-166.

¹⁸¹ The conditions on death row vary from state to state, but the following is based on Robert Johnson’s analysis of the psychological impact of death row confinement in Alabama. The interviews and research was carried out in 1978 and thus the situation on death row may very well have changed a great deal since then. But in general, the basic elements of isolation, time and regulations are still inherently part of the modern death row regime and so is the experience and psychological impact of powerlessness, emptiness and fear affecting death row inmates. R. Johnson, op. cit. p 11. A recent account of life on death row is given in Mumia Abu-Jamal, *Live from Death Row*, Reading, Addison-Wesley Publishing, 1995 as well as accounted for its formal details on for instance, Florida Department of Correction, www.dc.state.fl.us.

¹⁸² R. Johnson, op. cit. p. 16.

may visit, on whether physical contact is allowed, on the possibility of shopping and purchasing personal goods, on the amount of minutes available for showering, the time for exercising etc., affirms the constraints that the state imposes on death row inmates and the total sense of dependency they are subject to (obtaining even the smallest items, like a weekly ration of toilet paper!, or an appointment with an attorney is dependent on state wardens).¹⁸³ During final deathwatch, even more specific regulations govern the last days of the inmate's life. Only the specific personal items listed in the protocols, a certain type of reading materials (religious material or books distributed by the prison chaplain) and a few comfort items (a TV located outside the cell, one radio, one deck of cards), are allowed into the cell.¹⁸⁴ The bureaucratic ineptitude and formalistic compliance with the rules and regulations are not entirely a question of security but seem to be enforcing a systematic humiliation, degradation and minimising of inmate's self respect. It reveals a strategy of taking complete control and responsibility for any movements, thoughts, or feelings. It leaves inmates in a totally powerless situation by removing any signs or activities pertaining to adulthood, personal autonomy or individual decision-making.¹⁸⁵ The death row regime is an environment that

“...place(s) the inmate in an atmosphere that cultivates loss of self esteem, ... deny(s) (their, ed.) morale and dignity, and place the inmate in a position of non existence...”¹⁸⁶

Being suspended as human beings, negated basic human needs of physical or social contact and even a minimal degree of autonomy, they are deprived of their humanity and life in death row is by many inmates symbolically well put as the “*zombie like mechanical existence of an isolated physical organism.*”¹⁸⁷ The dehumanising result of an all potent state practice constantly treating its inmates as “*... dead ... persons even as their bodies maintain physical life,*”¹⁸⁸ becomes paradoxical when considering the fact that most inmate find themselves awaiting their execution for an average of about 6 years. The extreme finality of death row forces inmates to accept their destiny and final end, while at the same time having ages of time and opportunities to appeal, to hope or wait for a miracle. This affirms the legalised degradation of human dignity by being torn by the uncertainty between life and death, hope and despair, past and future. For one thing is to be systematically denied of one's existence, dignity and human needs; another thing is, when this non-existence is practiced in an

¹⁸³ C.M. Lambrix, *The Isolation of Death Row*, in M. Radelet (ed.), *Facing the Death Penalty, Essays on a Cruel and Unusual Punishment*, Temple University Press, pp. 198-201, p. 200.

¹⁸⁴ This is what the Florida Execution Protocol allows for, E. Purdum & Paredes, op. cit., p. 147.

¹⁸⁵ R. Johnson, op. cit., p. 31.

¹⁸⁶ Correll, p. 282.

¹⁸⁷ R. Johnson, op. cit., p. 17.

¹⁸⁸ Correll, op. cit., p. 282.

atmosphere that in many ways fosters perspectives for the future.¹⁸⁹ In the words of a death row inmate: “Ironically, there is probably more hope on death row than could be found in most other places.”¹⁹⁰

Individual responsibility

The extremities of time of death row confinement is by definition crucial for the inmates to exhaust all possible appeal options and as such it represents the very essence of securing the fairness and humanity of the death penalty. But the time element of a detention lasting an average of six years can also be viewed as an important part of a ritualised confinement in which the state imposes itself on the very personality and intimate thoughts of its subjects before taking their lives: By providing and even cultivating an atmosphere of isolation, loneliness and time lost, death row leaves the criminal offender alone with himself and his thoughts, forcing him to contemplate and face his situation, the facts and his place within them. The environment and time of confinement makes it possible or rather inevitable for the offender to take a stand on the deeds he has done, preferably acknowledge his responsibility, face his guilt (or not) and thus repay part of the pain he has caused.¹⁹¹ Death row is a confinement that on the one hand deprives its subjects of all present and future responsibility and autonomy while on the other hand demanding their taking a total responsibility for past actions. By fostering an atmosphere of individual responsibility, death row becomes a ritualised strategy in which the Sovereign not only imposes death, but also imposes itself and its basic values on the most intimate thoughts of its subjects.

As opposed to the public executions of the Old World, in which force and physical torture were legitimate means to oblige criminals to admit their crimes and publicly repent, a civilised world must find other means to reach the inner minds of its subjects. As noted by an 18th century priest: “*no human tribunal can investigate the secret emotions of the heart.*”¹⁹² Indeed, no legal system can. While the Old Regime would emphasise the public *appearance* of repentance, the modern death penalty system and its ritualised confinement period, expect the regrets and remorse of the offender to be of a sincere nature.¹⁹³ The importance of individual responsibility is partly deriving from a common Christian understanding of free will and personal autonomy,¹⁹⁴ and therefore deeply rooted in the cultural values pertaining to the Western world, including its punishment system. A simple example includes the fact that death only represents a legitimate punishment for those who were fully aware of their

¹⁸⁹ R. Johnson, op. cit., p. 81.

¹⁹⁰ W. J. Darden, *An inhumane Way of Death*, in M. Radelet, op. cit., pp. 203-205, p. 204. The hope of inmates is well founded since far from all condemned actually get executed. The vast opportunities for appeal or clemency provide for hope of release or commutation of sentence. This is also part of the critics against the death penalty, it being a lottery, an arbitrary and thus cruel and unusual punishment because of the uncertainty of its imposition.

¹⁹¹ Individual responsibility is part of the retributive argument for the death penalty.

¹⁹² L. Masur, op. cit., p. 40.

¹⁹³ *Ibidem*, p. 41.

¹⁹⁴ This is the argument of W. E. Connolly, op. cit., p. 187-205, p. 195, 240.

crime at the time committing them, did it wilfully and therefore can be held truly responsible: the death penalty is not applicable to the mentally ill, children and the mentally retarded. For those judged to be fully responsible for their choice of action, there is no other affirmation of collective responsibility on the part of society, than what death and the minimum of care provided by death row provides. By ritualising death row confinement, the death penalty system secures what a purely legal procedure in a courtroom cannot: a moral responsibility alongside the legal one. In all possible ways, the ritual incorporates the Sovereign and makes sure that the law, the values and the norms surrounding it are physically and morally internalised.

Clemency and grace

The actors that participate in the ritual of execution all have very different tasks, responsibilities and symbolic meanings. The main actor is of course the criminal offender, the dominated subject, whose total submission and prior exclusion from society eventually culminates in his final execution. As noted, the taking of responsibility for his criminal offence (or denying it), is a crucial part of his act. If he plays his part well (if he faces and accepts his deeds), he reaffirms and embraces the values that the ritual, strongly assisted by the specialist in moral issues (the priest), communicates. Members of the execution team serve as representatives of the Sovereign, they embody the morality and values of the governing. They act on behalf of the Sovereign, firmly carrying out what the law prescribes. As the concrete physical intermediary between the Sovereign and his subjects, the executioner carries out his duty with precision, professionalism and efficiency. Above them all, the State Governor personalises the state, the Sovereign. His role stretches widely from issuing the death warrant, officially recognising that the execution has been carried out, to actually having the last saying and absolute power over the lives and deaths of his subjects. A crucial aspect of the Sovereign's power is the so-called clemency prerogative ascribed to the executive power. Whether given by a king, a president, or in the case of the United States, a State Governor, the institutionalised possibility to seek and being granted a final pardon accentuates the power of the Sovereign. When all other appeal options are exhausted the offender's last chances of survival, lies in his hands. The procedure for granting mercy varies from state to state, but it typically includes the Governor and/or a board of advisers. As noted, throughout the procedure on execution day and right until the very last seconds before execution, the phones and direct lines to the Governor's office are checked and rechecked. At any time, he has the sole prerogative to overrule the decision of the judiciary, reprieve an execution or eventually commute a death sentence to life imprisonment.¹⁹⁵ Since 1976, a total of 221 death row inmates have been granted clemency for

¹⁹⁵ In 14 states, the decision lies with the Governor alone. In the remaining states, recommendations, either binding or not, are provided for by the board of advisers, www.deathpenaltyinfo.org, last visited 26/06-03.

different humanitarian reasons.¹⁹⁶ The power of the Sovereign doesn't limit itself to the imposition of death on a person, but to actually solely put its subjects lives on the balance, weighing the good against the bad, the past against the future and thus pronounce or not his final mercy. Put in rather extreme terms, at this stage it is neither consistency, rules or legality that govern the institution of state killings, but the will of the Sovereign, his personal discretion and thus in some ways a total arbitrariness.¹⁹⁷ Clemency is on the one hand meant as a guarantee, as a possibility to be saved from death if sentenced unfairly¹⁹⁸ but on the other hand, the meaning of the Sovereign's decision is also to show "*the wise and humane power of the executive to reprieve offenders sentenced to death.*"¹⁹⁹

Publicity

Apart from the offender, the staff and the Governor, also witnesses play a crucial part in executions. A display of power or any other ritual, cannot perform its message, meet its objectives, teach its lesson or show itself off, if no one is present to watch, participate, learn and accept the message transmitted. The big execution ceremonies of the Old World had their force and very meaning in their public nature, (they were carried out in the city centre square, they assembled incredible crowds, they involved the whole city in the prior processions to the gallows or the stake and took several days of preparation etc.). The connection between the Sovereign and his subjects was not only very physical it was also very visible -this until the 1830ies, where public executions withdrew to behind prison walls.²⁰⁰ However, even if behind prison walls, modern executions are official activities in which a political message about sovereignty needs to be transmitted to the state's subjects, and that is -of course- to all its subjects.

The protocols of execution demand a very specific witness policy. Each state protocol has different rules authorising witnesses at an execution, but generally the same degree of publicity is maintained. While the public announcement of an execution often brings with it a lot of requests from media, state officials and private persons, the warden is relatively bound by the execution protocol in his choices of setting up the witness list.²⁰¹ Official state witnesses must comprise representatives from the Department of Corrections, members of the Board of Criminal Justice, departmental chaplains, representatives from both law enforcement and the judiciary, the district sheriff, the sentencing

¹⁹⁶ Humanitarian reasons comprise doubts about guilt, the Governor's general conclusions on procedure and process of the death penalty system, the rehabilitation of the offender, www.deathpenaltyinfo.org. The decrease in the number of clemencies given is a result of the new improved appeal system added to the capital statutes in the 80's. H. A. Bedau 97, op. cit., p. 18.

¹⁹⁷ I. Floto, op. cit., p. 152.

¹⁹⁸ The principle is guaranteed in international law. It is part of the right of the offender in the UN *Safeguards guarantying Protection of th Rights of those Facing the Death Penalty*,, ESC Res. 1984/50., art. 6: "*Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.*"

¹⁹⁹ D. Pannick, *Judicial Review of the Death Penalty*, London, Duckworth, 1982, p. 208.

²⁰⁰ H. A. Bedau, *American Populism and the Death Penalty: Witnesses at an Execution*, in «*The Howard Journal of Criminal Justice*», vol. 33 (4), nov. 1994, pp. 289-303, p. 293.

²⁰¹ H. A. Bedau 67, op. cit., p. 22.

judge and prosecuting attorney, as well as a representative from the Governor's office. Additionally, about 10 seats are distributed between reporters from the printed media (covering different geographical areas, both regional and federal level, local and national) and television and radio broadcasting; finally, a varying number of alternate witnesses may include a few relatives or friends of the offender and a few relatives of the deceased victim.²⁰² Arriving at different times, entering thorough different entrances and being separated in the witness room itself, the three witness categories are carefully kept apart throughout the whole process.²⁰³ Though separated from the execution chamber by thick Plexiglas windows, both microphones and speakers are installed for them take properly part in the execution.²⁰⁴ Witnesses are asked to sign a copy of the death warrant before being allowed to leave the room and thus terminate their function as the few chosen ones, representing the general public, testifying and sanctifying the Sovereign's display of power.²⁰⁵

The general public's perception of the method and procedure of an execution is mainly shaped through the eyes and representation of the media. Newspapers, radio transmissions, internet-sites, television shows and popular culture are the mediums that act as the eyes of the public and thus transmit the message that the ritual displays. Almost a whole marketing strategy surrounds the death penalty, comprising everything from articles, reports, discussions, tape recordings, books, biographies, movies -all informing and showing the public every aspect of the ritual: the detailed minute-by-minute schedule of the offender's last week, his final activities, visits and requests for food, the pictures, names and personal stories of whole death row populations, publications of final statements, evaluations of his state of mind etc. ²⁰⁶ A recent and still on-going controversy over the eventual direct transmission of execution by broadcasting stations further adds to the publicity and crucial connection between the Sovereign and his subjects.²⁰⁷ Through witnesses and the media's reports, the wider general public is given the knowledge needed to uphold the principle of sovereignty in modern democratic societies, i.e. that the punishment is inflicted by society as a whole, that it is carried out by the Sovereign in the name of its subjects and in conformity with their votes.²⁰⁸

²⁰² *A Monitor...*, op. cit.

²⁰³ S. Trombley, op. cit., p. 150.

²⁰⁴ *A Monitor...*, op. cit.

²⁰⁵ A. Sarat, *The Cultural Life...*, op. cit., p. 227.

²⁰⁶ L. Myers, *An Appeal for Clemency: The Case of Harold Lamont Otey*, in H. A. Bedau 97, op. cit. pp. 361-383, p. 382.

²⁰⁷ The San Francisco television station KQED in 1990 filled a complaint for not being allowed to attend, record and broadcast a pending California execution. Between arguments stating the rights of a free press, the right to privacy of the offender, the brutalisation of society, the non-educating and rather telling a half truth effect of it, the degradation of the offender, the pornographic tendency to expose death to the public etc... the court ruled, that if prison regulations didn't provide for television or camera filming of an execution, then broadcasting could not be imposed on a prison. KQED did not take the case any further, even though the issue hasn't been resolved as a matter of principle. H. A. Bedau, *American Populism...*, op. cit., p. 296.

²⁰⁸ I. Floto, op. cit., p. 100.

Outside prison walls, on execution day itself, a crowd of both advocates and opponents of the upcoming execution generally participate in what may be seen as an extension of the execution ritual.²⁰⁹ With billboards, signs, frying pans and aggressive racial outbursts on one side and vigilant candlelight and quiet hymns marching on the other, the manifestation gather round a common theme, participating one way or the other in the execution ritual.²¹⁰ The activity outside the prison has in fact been referred to as a chocking “*carnavalesque...circus atmosphere*,” in which the aggressive outburst of a crowd consisted in “*screaming and yelling*,”²¹¹ “*...setting off firecrackers and sparklers*,” “*...counting down the seconds... like a New Year’s celebration...They jeered, whooped...*”²¹² -thus in many ways alluding to the public executions of the Old World, time and again emphasised as a public tribute to the Sovereign, a collective reaffirmation of collective values, norms and rules, while at the same time providing for a short moment of relief and rebellion against an all-encompassing sovereign power.²¹³ Whatever the forms of publicity surrounding the death penalty and its execution, it is an unconceivable fact, that the ambivalent nature of the death penalty, attracts the interest, curiosity, fascination and/or repulsion of the public. “*I feel myself ashamed and degraded at the brutal curiosity which took me to that brutal sight*,” said Thakeray, a member of the British Royal Commission on Capital Punishment in 1953.²¹⁴ The strong tendency to politicise the death penalty in American political life (in presidential electoral campaigns), the big importance and emphasis on public opinion confirms the political nature and symbolic meaning of the death penalty as a demonstration of power. One would expect such sovereignty to be imposed and demonstrated with outmost certainty and confidence.²¹⁵ However, the ambivalence surrounding the phenomenon is well put in the following quote, emphasising it as an act torn between sovereignty and humanity.

*“Power is the capacity to transform a living person into a corpse – that is, into a thing. Through our laws and our electric chairs, we are taking upon ourselves that power. But even if we do so, we cannot forget that as long as they are alive, these condemned men are humans.”*²¹⁶

In the previous section, the death penalty regime as a whole and the ritual of execution especially, have been analysed as a ceremonial exhibition of state authority. By understanding the death penalty as a ritual that displays and demonstrates the power of the Sovereign, emphasis has been given to the way the ritual reminds and teaches its spectators of such sovereignty. By highlighting only a few

²⁰⁹ H. A. Bedau 97, op. cit., p. 291.

²¹⁰ This is an example of a situation with an execution in Nebraska in 1994, L. Myers, op. cit., p. 382.

²¹¹ Ibidem, p. 382.

²¹² Reported in Boston Globe, 6 January 1993 and Spokane Spokesman-Review, 6th January 1993, cited in H. A. Bedau, *American Populism...*, op. cit., p. 290.

²¹³ L. Masur, op. cit., p. 20. The momentary release from self-restraint, the opportunity to express fascination and identification with outcasts etc., is generally referred to as the attractive power and popularity of carnivalesque public celebrations, Connolly, op. cit., p. 200.

²¹⁴ Bedau 1964, op. cit., p. 20.

²¹⁵ Fitzpatrick, op. cit., p. 125.

²¹⁶ Pronounced by Stephen Gettinger, sentenced to death, cited from R. Johnson, op. cit., p. 1

sovereign aspects, it has not been the objective of this section to exhaust all signs of sovereign power from the execution ritual. The elements chosen as sovereign characteristics are neither unambiguously sovereign (as the following section will show, most are also characteristics of a humane death penalty regime), nor do they unequivocally pertain to the death penalty regime. With a firm basis in a right to make the laws that kill and further threaten or act out a monopoly of violence, the Sovereign in principle possesses a right to restore order, if not his exceptional right to kill certain citizens. In this act, the Sovereign corporally deals with and incorporates its message to its subjects in the name of witnesses and thus the general public. With the death row regime, the Sovereign disciplines and controls every movement, gesture and thought of its subjects, depriving them of humanity, taking total custody over and responsibility for their present and future lives (or deaths), while at the same time demanding that they live in conformity with specific cultural values and norms. The Sovereign imposes itself on the outer as well as inner state and deepest minds of its subjects. In such a regime and during such a ritual, the Sovereign sends out a message about its all potent power to govern, control, construct and uphold the structure, order, cosmos and values, which it, the public and society as a whole rests upon. If the ritual of executing criminal offenders indeed is carried out for the sake of the Sovereign, to demonstrate and reaffirm itself, the act remains a pure political message, by its very nature deprived of all humanity and concern for victims, offenders or witnesses. The following section will deal with the necessity to humanise and thereby justify the inherently inhuman nature of state executions.

V. A Humane Execution

Before continuing the account of an act being torn between sovereignty and humanity, the following will shortly describe the so-called *civilising process* that societies generally referred to as Western, modern and democratic, went through in the course of the 18th and 19th centuries.²¹⁷ It was a civilising process, which came to affect economic, social, political, religious, ideological and moral life. It was also a process whose results at first sight seem incompatible with a continuous practice that corporally and publicly demonstrates extreme state sovereignty. The process of civilisation is a complex one, spanning over several centuries and containing many different elements, causes and consequences. The following briefly traces the main elements of what turned the Western world into a civilised one.

A civilised world

Alongside the rational revolution, with figures like Beccaria advocating a rational and utilitarian reform of penal policies, a change in mentalities took place, which is often referred to as a civilisation of manners. Norbert Elias gave birth to the idea of societies undergoing a change in cultural attitudes, behaviours and mental structures.²¹⁸ Parallel to the development of a modern, bureaucratic, professional, efficient state apparatus, also manners, etiquette, social behaviours and belief systems went through a civilising transformation. While the state became more and more centralised, assuming formalised control and authority over increasing areas of human life – education, tax raising, legal sanctions etc.- the governing elites also came to formalise their social behaviour.²¹⁹ An increasing self-control and internally regulated behaviour came to outlaw and suppress the public and free expression of desires and instincts.²²⁰ Furthermore, the rise of the Nation state and a process of urbanisation resulted in a stronger interdependency between people. A sense of reciprocity and obligation towards each other increased the level of sympathy and respect in both thoughts and acts. The focus on an increasing sensitivity and humanism diffusing from the middle and ruling classes through all areas and layers of society, is closely linked to Elias' theory on the civilisation of manners. In this perspective, a rise in humanitarian sensibility, a

²¹⁷ The process may be said to have started before, depending on how and what one wishes to emphasise. While originally used by Norbert Elias in *The Civilizing Process*, the term is here used in its very broad sense, not only restricted to describing the changes in manners and mentality taking place during the period.

²¹⁸ N. Elias, op. cit.

²¹⁹ J. Pratt, op. cit., p. 4.

²²⁰ I. Floto, op. cit., p. 74 and V.A.C. Gatrell, op. cit., p. 17.

humanisation of thoughts eventually led to a psychological “*formation of conscience*,”²²¹ resulting in an increasing identification with and respect for other individuals. As a consequence, a general distaste at the sight of pain, suffering, blood and public killings alongside a sense of sympathy and respect towards others, including criminals,²²² came to dominate a culture of sensibility and sympathy, in which feelings, mutual concern and identification became the source of all human relations and activities.²²³

Adding to the mental and behavioural changes of the civilising process, Michel Foucault argued that in a society undergoing big changes with respect to production methods, a growing welfare and appreciation of private property at some point required state authority to increase its social control with people and law offenders.²²⁴ The logics of punishment methods, amongst other things, were thus redirected towards self-disciplining means in order to control social behaviour in a more systematic and efficient way. In this perspective, state power indirectly tightened its grip on all aspects of social life – including the mind and souls of criminal offenders. The growth and rise of market economy also entailed a new cognitive style and way of thinking.²²⁵ An increased sense of responsibility towards one another became a necessary aspect of modern life. Furthermore, the success of the market place entailed an increasing focus on the relationships between cause and effects. Man developed a belief in his ability to locate, identify and ameliorate issues and aspects of societal life that seemed unsatisfying.

Neither as a result nor as a cause, but parallel to the above-mentioned changes, Western societies underwent drastic humanising reforms of their criminal law and punishment apparatus. Both in Europe and in the United States, new attitudes and findings in the fields of criminology, penology, psychology, psychiatry, medicine influenced legislators and public opinion about the objectives and meanings of modern, civilised punishment.²²⁶ Taken together with the scheme of democracy, rule of law and respect for human rights and liberal freedoms that seem to be expressing the ultimate culmination of such civilising process, the framework and cultural circumstances surrounding the death penalty are set. This scheme is what is referred to when speaking of *humanity*. Everything that meets the logics of the civilised world and is compatible with the described cultural scheme is considered as the yardstick for humane actions and as a concern for humanity as such.

²²¹ P. Spierenburg, *The Spectacle of Suffering: Execution and the Evolution of Repression*, Cambridge, 1984.

²²² I. Floto, op. cit., p. 72, 75.

²²³ V. A. C. Gatrell, op. cit., p. 326, 329.

²²⁴ M. Foucault, op. cit.

²²⁵ T. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility*, in «*American Historical Review*», vol. 90, 1985, pp. 339-361.

²²⁶ For an account of this development in the United States, of Beccarias influence on American reformers, see Marcello Maestri, op. cit., and L. Masur, op. cit.

Being part of a modern civilised punishment system, the death penalty in the United States must be viewed for its humane and civilised elements as well as its sovereign aspects. While executing its worst citizens, the state exposes its sovereign power and ability to rule over life and death. It sends a message about the order of the world and its place or abilities within it. But in a modern and civilised world, in which democracy, the rule of law and individual rights (of privacy, freedom, liberty etc.) is the framework and basic scheme of reference within which the Sovereign is allowed to move, the ritual of execution becomes something more than a pure display of power. It necessarily becomes a humane execution, a form of punishment that attempts to secure the humanity of all its objectives, intentions, actions and "victims."

The laws and procedural guaranties

As emphasised in the previous section, the Law and state violence are the Sovereign's means to order and impose itself on society. As much as the law and its violence is the basis of sovereignty, so is the law meant to limit such exercise of violence. As part of a democratic system governed by the rule of law, separation of powers and human rights, the law and its monopoly of violence are meant to protect the ideas of liberty and freedom while at the same time being in a position to threaten them. The laws that govern the death penalty are thus supposed to limit the state's imposition of death.²²⁷ The international laws and guidelines concerning the rights and guaranties of criminal offenders (fair trial, respect for private life etc.), the constitutional rights articulated in the amendments of the American Constitution, the list of aggravating and mitigating circumstances articulated in the capital statutes of each state, the judicial review system, the many appeal opportunities, the judiciary discretion of both establishing guilt and sentencing to death. - They and other legal guaranties are elements of a death penalty regime that secures the "*just, fair and accurate*"²²⁸ nature of the system.

The constitutional guaranties and Supreme Court rulings have in fact limited the methods of execution to inflict "*no more than the mere extinguishment of life*,"²²⁹ in other words, as long as the state's violence doesn't inflict any "*torture or lingering death*,"²³⁰ the state's sanction by execution is apparently perceived as a legitimate sovereign exercise of violence. What the law restricts in relation to the death penalty in the United States is not the sovereign act of systematically and institutionally taking lives, but only the methods of how to do so. The so-called *super due* process that every criminal

²²⁷ T. V. Kaufman-Osborn, *What the Law Must not Hear: Capital Punishment and the Voice of Pain*, in A. Sarat (ed.), *Pain, Death and the Law*, Michigan, Michigan University Press, 2001, pp. 71-102, p. 71.

²²⁸ This is a sentence that can be found in almost all investigations, reports and court rulings (with variation in details) when stating the ultimate goal and final objective of the death penalty system. Here cited from T. P. Sullivan, *op. cit.*

²²⁹ *In Re Kemmler*, 136 U.S. 436 (1890). It was the first Supreme Court ruling on the constitutionality of the death penalty. A. Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, in A. Sarat (ed.), *Pain, Death...*, *op. cit.*, p. 53.

²³⁰ *In Re Kemmler*, *op. cit.*

offender eligible for death is entitled to, is another procedural guarantee meant to limit the Sovereign's violence. It involves a trial, which is divided into two phases, or rather, two different trials. A first trial establishes the guilt or innocence of the alleged offender. If his guilt is established, the second trial deals with his sentence. The two trials have very different objectives and as such, very different procedure. While both are subject to the discretion of a jury, it is the very nature of their deliberation that is different. The guilt establishing trial is built on evidence, proof and the reconstruction of factual events, whereas the sentencing trial deals with the character, feelings and emotions of the implicated parties. It assesses the pleasure the offender took in committing the crime, the victim's innocence and degree of resistance (or not). It basically asks the jury to judge whether these criminals deserve to die.²³¹ While the first trial requires rational arguments and deliberations on the course of events and conduct of the offender in relation to the crime, the second allows for emotional and moral evaluation of his character and inner state of mind.²³² It is in the second trial that aggravating and mitigating factors are balanced and weighed against each other. However specific the list of aggravators and mitigators and however meant as a guarantee for consistency in sentencing trials, the fact remains, that once the balance has tipped either way, the jury is part of a system that pronounces itself on the inner worth of a person and not only his actions; a system that acknowledges emotions and feelings as legal guiding principles -all while trying to meet a civilised world's requirement and appear "*fair, accurate and just.*"

A civilising regime

In spite of the obvious finality of the death penalty, its systematic degradation and dehumanisation, governing and disciplining of the criminal body, death row is also a humane and civilising regime attempting to secure the basic needs and development of criminal offenders. While the general conditions within the different death rows vary from one state prison to another, there is a general concern for the well being of inmates. As acknowledged by international guidelines,²³³ visitations and out of cell policies are for inmates the two most positively valued aspects of life on death row.²³⁴ The length and number of visitations vary from six hours/week in Florida to 3 hours/week in Nevada and South Carolina, but their importance lies in their ability to provide for a direct human contact with the outside world and eventual loved ones. Visitations allow for a rare opportunity to speak in confidence, to rebuild lost connections as well as providing a break from everyday boredom. Inmates consider visitations the one source that gives them the strength to endure and

²³¹ This is the retributive element of the trial.

²³² H. A. Bedau 97, op. cit., p. 335

²³³ Within the UN, the following non-legally binding instruments express the concerns and basic standards of visitation, out of cell policies, degree of privacy etc: to ensure imprisoned inmates. Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 (1957) and 2076 (1977), Basic Principles for the Treatment of Prisoners, General Assembly Res. 45/111 (1990), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment., General Assembly Res. 43/173 (1988).

²³⁴ R. Johnson, *Condemned to Die, Life under Sentence of Death*, New York, Elsevier, 1981op. cit., p. 52.

feel temporarily renewed as human beings. The second element of death row confinement emphasised as valuable for inmates, is the time they are allowed outside their cell. In most prisons with death row confinement, programs have been set up that provide for a significant and meaningful out-of-cell policy. In Texas the classification of inmates in categories is exemplary; it includes a work-eligible group, allowed up to 90 hours/week outside the cell for working purposes, 4 hours/week for recreation etc.²³⁵ While the finality of the death row remains indisputable, visitations and out of cell policies allow for a needed human contact with other inmates and the outside world. It also provides the opportunity of having small satisfactory emotions, life experiences, joys and material goods (TV, volleyball games in the courtyard, chess competitions etc.) All in all, death row tries to be a friendly regime that with appeal and commutation possibilities even provides for hope and perspectives for the future.²³⁶

The high degree of discipline that is part of daily life on death row and of the execution act, is a feature of great importance for securing the humanity of the death penalty. For whilst discipline may be a tool for the sovereign to impose his will, for the bodily and physical shaping and moulding of his subjects, it is also an element that rebuilds and civilises criminal offenders. By routinising behaviour and schemes of action, the death row secures the basic safety of both inmates and staff, it cares for their physical and mental health, it provides for an educating, correctional and civilising atmosphere. As noted, the civilising process within punishment objectives came to emphasise the treatment and rehabilitation of the offender. A strong belief in punishment as a corrective measure came to take precedence over a belief in deterrence and retribution as the rationale behind punishments.²³⁷ As a result of an increasing interest in both psychological and sociological aspects of crime, the offender came to be seen as both a product and a victim of society and its organisation and as such, society also came to take responsibility for the rehabilitation of its criminal offenders.²³⁸ Penal policy thus became the actual practice of a society taking responsibility for curing and reshaping the wrong minds that it had itself produced.²³⁹

It would be absurd to claim that rehabilitation is the objective governing death penalty policies; however, the so-called Departments of Correction in charge of prisons as well as death rows in the United States, situate themselves within the same civilising process (as their name suggest). Departments of Correction are the institutions that daily administer and carry out the responsibilities of the sovereign - not only in exercising a total custodial power over its subjects, but also in providing for a nurturing and caring atmosphere. The Florida Department of Correction has

²³⁵ J. L. Carroll, *Death Row, Hope for the Future*, in J. A. Inciardi (ed.), *Challenging Capital Punishment*, California, Sage Publications, 1990, pp. 269-288, p. 279.

²³⁶ *Ibidem*, p. 279.

²³⁷ J. Pratt, *op. cit.*, p.29.

²³⁸ *Ibidem*, p. 30.

²³⁹ V.A.C. Gattrell, *op. cit.*, p. 16.

the mission to "*protect the public by operating a safe, secure, human and efficient corrections system.*"²⁴⁰ Since the major penal reforms of the 18th century, the ideology underlying penal policy and the discourse surrounding punishment, prisons and criminal offenders has humanised. The state (and its officials) began

*"... to express some notion of acceptance, of respect, some duty towards even those most unworthy citizens, some recognition that even these creatures were actually human beings."*²⁴¹

Inmates are spoken of as human beings with feelings, sensibilities and abilities to react to impulses and stimulations. A general concern for confinement conditions and an interest in diminishing the difference between those inside and those outside prison walls,²⁴² has resulted in darkness and dirtiness giving way to light and cleanliness; an interest in dietary habits resulted in concerns for food variety, choice, quality and quantity;²⁴³ additionally, ideas about hygiene and personal appearances has institutionalised into daily routines of shavings, washings and cleaning.²⁴⁴ While death row by definition is administered differently from ordinary prison life, it is rooted and embedded in the same ideological basis and as such contains the same practical tendencies to humanise and civilise its death row inmates. It doesn't treat inmates with the sole objective of degradation, abandonment and isolation, seeing them as enemies to be excluded;²⁴⁵ emphasis is also given to securing their health, well being and humanity, encouraging their basic similarities with the rest of society, guiding and helping them to develop, change and become better people.

In a civilising regime, that tries to be friendly and furthermore guides and leads the way to becoming a peaceful, responsible and civilised person, the issue of individual responsibility reappears. As seen earlier, the law does not force individual responsibility directly upon its subjects. But it does create a civilising atmosphere of discipline, rules and responsibility. The system expects an improvement of the moral worth of its criminal offenders. However, such a worth is only valuable if directed towards future purposes and perspectives. What is the point of civilising, providing for individual responsibility, helping an offender to come to terms with his inner self and thus provide future perspectives if the system of execution by definition emphasises, evaluates and exterminates him on the grounds of his past?²⁴⁶

²⁴⁰ Florida Department of Correction, www.dc.state.fl.us/vision.html, last visited 05/06-03.

²⁴¹ J. Pratt, op. cit., p. 87.

²⁴² Ibidem, p. 71.

²⁴³ Ibidem, p. 73.

²⁴⁴ All these elements are furthermore reflected in the international guidelines and basic principles protecting persons in confinement, op. cit.

²⁴⁵ J. Pratt, op. cit., p. 89.

²⁴⁶ Maybe even a paradox that goes against international norms of respect for privacy, of human integrity and dignity. Such argument was first presented by Dr. Eric Claes, Catholic University of Leuven, Belgium, in a conference on the Death Penalty, held in Brussels, 23-24th May 2003.

An invisible death

As part of a civilising process that repressed emotions considered vulgar and inhumane and instead nurtured sensitivity and compassionate feelings, capital punishment privatised and eventually resulted in the emergence of prisons, penitentiaries and punishment methods that didn't involve publicity. American as well as European elites were disgusted by the public exhibition of pain and death, had a fear of loosing control over public order at huge carnival-like spectacles and were increasingly convinced that public punishment didn't deter crime. Hence, legislators removed execution day from the public eye.²⁴⁷ The modern ritual of execution follows the idea of a humane death being a private, hidden and invisible death –at least for the public's point of view. As demonstrated earlier, there are witnesses and other public elements pertaining to the ritual of execution, but as a general feature, executions are carried out behind prison walls in the most remote corner of the institution, far from the curiosity and direct scrutiny of the public, the staff and other inmates. The most intimate moment of a persons life, his death, is thus kept private. In the course of time, laws have attempted to prohibit the media from reporting anything other but a short factual notice on an execution.²⁴⁸ Apart from fictive representations, neither pictures of the deceased nor direct representations of the dying process are available,²⁴⁹ leaving it to the imagination of the public to find out what it looks like when the state kills on their behalf. The invisibility of state killings has the imaginary power of an unknown phenomenon. It keeps the general public as well as the condemned inmates in an anxiety about the nature of state killings as well as the circumstances surrounding it.²⁵⁰ Unless or until revealed the ritual procedures on execution day itself, rumours and media reports colonise the minds of the implicated parties and the general public. In trying to uncover, catch a glimpse of death and of this immense sovereign display that is only heard of in theory,²⁵¹ is maybe the link to understanding the constant public interest and debate about public broadcastings and live executions.

The invisible nature of executions is related to a modern perception (or taboo) of the dying process and the moment of death itself. From the when the executioner(s) pushes the button and sets into motion the actual execution until the final pronouncement of the inmate's death, the visibility of the dying process is in every way avoided. Whether the execution is carried out by electrocution in Florida, lethal gas in North Carolina, hanging in Washington or shooting in Utah, the offender's

²⁴⁷ L. Masur, *op. cit.*, p. 116.

²⁴⁸ This was for instance part of the "Electric Execution Law," introducing electrocution as a humane replacement for hanging in New York in 1888, I. Floto, *op. cit.*, p. 122.

²⁴⁹ A. Sarat, *Killing Me Softly...*, *op. cit.*, p. 51.

²⁵⁰ In some death row confinements, inmates are kept away from the death chamber, the electric chair or even that remote part of the prison, in which executions take place. This is the case in Missouri. In other accounts of life on death row, the inmates emphasise how they are given a tour of the death chamber and thus given a view of the chair upon their arrival. Being part of initiating arrival procedures, the tour is experienced as a humiliating and deliberate effort to remind inmates of their death and nurture their anxiety., remind them of the force of the law. R. Johnson, *op. cit.*, p. 83.

²⁵¹ A. Sarat, *The Cultural Life...*, *op. cit.*, p. 227.

face is covered by a hood, a mask or the like. Other obvious physical signs of death than the ones witnesses and staff can read in the eyes of a dying man, such as the release of faeces after the relaxation of the offender's muscular system,²⁵² are attempted either totally avoided (by introducing a stopper), or hidden (by using a diaper or making holes in the chair that lead the faeces into a bucket).²⁵³ As such, any reactions or visible signs of a dying and degenerating body are being eradicated from the modern execution process, preserving both the offender's dignity by dying a private and clean death and the general perception of this being a humane death. Numerous accounts of so-called booted executions are precisely reported as such because they visibly expose the dying process. Botched executions may involve the "victim's"

"...heaving chest, gasping, choking, (...) back arching off the gurney (...) blood spewing from the (.mask...), drenching his shirt with blood, (...) blood dripped from his lips (...)"²⁵⁴ or "the blood of his mouth had poured out onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even seeping through the buckle holds on the leather straps holding him to the chair."²⁵⁵

At the execution of Jessie Tafero by electrocution in 1990 in Florida, a reporter noted:

"Tafero's body didn't just stiffen when the power was switched on at 7.06 in the morning. It seemed it was thrown back in the chair. Smoke rose from the inmate's head...after a few seconds small sparks or flames were seen to the right behind the veil that covered his face."²⁵⁶

A medical examination and autopsy later showed 1st degree burns, encrustations and skin damages on Tafero's head. As noted by the prison doctor when giving his witness testimony of the execution:

"Given the difficulties that arose, the result was far from aesthetically pleasant, but apart from in a very few cases, my 40 years of experience show that few deaths are aesthetically pleasant..."²⁵⁷

One method of execution, though, seems to meet such "aesthetic" requirements: lethal injection. Now carried out in 34 states,²⁵⁸ the method was introduced as a humane alternative to electrocutions during the last decades. It is the only execution method that doesn't involve the high risk of exposing death and therefore doesn't need to hide the dying process (by beheading the

²⁵² S. Trombley, op. cit., p. 39.

²⁵³ Ibidem, p. 38.

²⁵⁴ From the execution of Lee Evans in 1990, www.deathpenaltyinfo.org, last visited 23/06-03 and A. Sarat, *Killing Me Softly...*, op. cit., p. 52.

²⁵⁵ From an article in St. Petersburg Time, in T. V. Kaufman-Osborn, op. cit., p. 82.

²⁵⁶ S. Trombley, op. cit., p. 45.

²⁵⁷ Ibidem, p. 49.

²⁵⁸ A.Sarat, *Killing Me Softly...*, op. cit., p. 52.

inmate, for instance). By its very nature, the method hides the dying process. The newest and most recent developments within execution material include the lethal injection machine. It meets the requirements of killing "*quickly, efficiently and with the least possible pain for the condemned, the executioners and the witnesses.*"²⁵⁹ It kills humanely by incorporating a rapidity and total invisibility of death. The procedure applies three different chemicals. Half an hour before the execution though, the inmate is given an injection of 10 centilitres of antihistamine to avoid any allergic reactions to the chemicals (such as heavy coughing, gasping, twisting and turning). Additionally, he is offered an anaesthetic solution five minutes before being brought into the execution chamber. It "*...helps calm down the condemned. It makes him blunt/apathy and less interested in resisting his destiny.*"²⁶⁰ Forty-five minutes before his execution, the condemned is strapped to the gurney and injected with a saline solution allowing the deadly doses to be injected more smoothly and rapidly into his veins. The execution itself starts by the machine injecting 15 cl of natriumpenthopal, causing the offender to loose conscience. After one minute, 15 cl. of pancuroniumbromid is injected. Another minute's pause, 15 cl. of natriumchlorid conclude the process and death occurs within two minutes.²⁶¹ Commenting on the state of Missouri's newly purchased lethal injection machine, a warden notes:

*"Lethal injections are much more humane (than lethal gas, ed.). There is no gasping, no jumping around, when using injections. It is just a question of passing away. Of closing your eyes and pass away. When you use gas, they gasp. Their eyes fall out of their heads and they try to hold their breath.... Executions by electrocution...if carried out properly...is also quite humane, if one disregards the facts that burns always will occur. It cannot be avoided. There will always be burns."*²⁶²

The quote illustrates the conception of a humane death as being a peaceful process not exposing the transition from the stage of life to that of death. Though considered the most humane and efficient way to kill, lethal injections are not free of incidents that violate the invisibility of death. In 1995, the Missouri execution of Emmitt Foster by lethal injection resulted in "*(...) the execution was halted when the chemicals stopped circulating (...) with Foster gasping and convulsing (...) the blinds were drawn so the witnesses could not view the scene.*"²⁶³ It was not until 30 minutes later, when the prolonged and obvious dying process had terminated, the blinds were reopened.

An invisible death necessarily implies a concern with the time that elapses from the moment the inmate is led to the execution chamber, to the pronouncement of his death. The shorter the

²⁵⁹ The lethal injection machine is invented and produced by Fred Leuchter Inc. The basic requirements of Fred Leuchter when inventing and producing the machine, was that it kills quickly, efficiently and humanely. S. Trombley, op. cit., p. 79.

²⁶⁰ Pronounced by Fred Leuchter, Ibidem, p. 78.

²⁶¹ I. Floto, op. cit., p. 178.

²⁶² S. Trombley, op. cit. p. 118.

²⁶³ Accounts of botched executions on www.deathpenaltyinfo.org, last visited 23/6-03.

process, the more humane it is perceived. The execution protocols and the ritualisation of American executions, sees to it that death is handled quickly and efficiently. The rapidity of the dying process varies from state protocol to state protocol, depending on method, procedure, last statements, needle injection etc. but in general, everything is done so as not to prolong the dying process in any unnecessary way. Accounts of booted executions often include an emphasis on the time elapsing until death occurred, such as the twenty-four minute long execution of Raymond Laundry in Texas in 1988 or the forty-seven minute long execution of Billy Wayne White in 1992, also in Texas.²⁶⁴ The importance of inflicting death rapidly stands in striking contrast to the very careful and extended preparations that precede an execution.²⁶⁵ The ritual of state killing is planned and prepared several years, weeks and days in advance. In relation to the long process starting days in advance with leading the offender to the death cell, providing him with his last meal, allowing for his last visits, explaining the procedure to him, agreeing on his burial arrangements, medically examining him, preparing him physically for his execution (with showering, shaving, giving him clean clothe etc.),²⁶⁶ the rapidity of the actual execution act reinforces the invisibility and practically non-happening event of a modern humane execution.

The modern execution ritual provides for a death that is kept private, not allowing the public exhibition of the offender's feelings, fears and pains; it preserves the integrity and clean appearance of a dying body and it quickly and invisibly carries out the business of state killings. The question is, whether these concerns are directed towards meeting the human needs and securing the humanity of the offender, or rather to meet the requirements of a civilised world that cannot combine the idea of their own civilised humanity and democratic world order with that of the state killing in their names, exhibiting other people's deaths. Additionally, the execution protocol may make death invisible for the public, but no matter how many hoods or how many anaesthetics are given to the condemned, his death will remain visible, physical and extremely predictable.

A Painless death

Apart from being invisible for the public, modern punishment, including the death penalty, is a non-physical punishment –in all senses of the word. Whatever the method, a civilised and humane punishment bans the shedding of blood, the infliction of pain, the provocation of unnecessary suffering or even physical contact between punisher and punished.²⁶⁷ Booted execution not only have to do with the time it takes to inflict death and the visibility of death; booted executions are

²⁶⁴ These were mainly due to problems in finding a suitable vein for the lethal injection. As a result, the vein is usually found and the needle injected to it, prior to the inmate's leaving the death cell, prior to the execution act itself starts. *Ibidem*, p. 75.

²⁶⁵ I. Floto, *op. cit.* p. 113.

²⁶⁶ S. Trombley, *op. cit.*, p. 239.

²⁶⁷ M. Foucault, *op. cit.*, p. 22, I. Floto, *op. cit.*, p. 68, J. Pratt, *op. cit.*, p. 29.

conceived as such if they make obvious marks or signs on the human body, violating its integrity and thus treating it inhumanely. Electrocutions leave serious burn marks on those parts of the body directly in contact with electrodes; lethal gas executions result in marks from tightly fastened restraining straps when the offender fights to avoid his last breath, and lethal injections may very well violently inflict itself on the body of a former drug addict in search for an adequate injection vein.²⁶⁸ A civilised perception of bodily integrity does not comply with executions that visibly and physically harm or impose themselves on the human body –even a body condemned to die. The tendency and absurdity of focussing on bodily integrity rather than on actual pain, was noted by a Supreme Court Judge, alluding to the guillotine as an example: such method is generally perceived as barbaric and inhuman because it mutilates and disgraces the human body, more than it actually inflicts any pain.²⁶⁹

Attempts to solve the incompatibility of punishing humanely while punishing physically, involve searching for methods of execution that avoid any contact between the condemned and the executioner. The newest developments within production of execution material have found means and material to restrain the offender, involving very little contact with him. Instead of using straps that are tightened around the ankles, wrists and head of the offender, the newest electric chair, used in Tennessee, has

"a kind of seat belt of nylon with one single buckle. The belt is pulled down over the upper body, up over the upper thighs, and is fastened on the chest of the person. This makes it easy for the executioner to get the man seated in the chair before execution. (...) The belt also makes it easier to get rid of the body after the execution...Since everything is equipped with fast-buckles, you don't have to fumble with the body (...) you don't have to fumble with straps that are filled with blood. The chair is issued with an adjustable back. The moment you release it, the body falls forward into the belt, which makes it a lot easier to get him out of the belt (...) and get him manoeuvred on to the gurney."²⁷⁰

All in all a very complex restraining method that both avoids the physical contact between the condemned and his executioner and any visible strap marks on ankles, legs, wrists of the "victim." The mentioned lethal injection machine also avoids any human contact in the sense that it replaces the executioner with a computerised and fully automatic injection system. The only human intervention necessary during the execution is that of medical personnel (nurse, physician, prison doctor etc.) permitted to find and insert the needle into a suitable vein (generally before he enters the execution chamber) and a voice to set into motion the whole process. From there on, every step of the injection process is automatic. Only in case of an emergency, a manual injection may be

²⁶⁸ S. Trombley, op. cit., p. 75.

²⁶⁹ Justice Shaw in a dissenting comment on the ruling of Provenzano vs. Moore, Case No. 95, 973 (1999). A. Sarat, *Killing me Softly...* op. cit., p. 64.

²⁷⁰ S. Trombley, op. cit., p. 39.

necessary. The ritual of execution, in its most modern and humane form is an automatic, clean, clinical and distant event. The state and its representatives, the executioner(s), sit back while watching a machine take responsibility for the death it inflicts on one of its citizens.

The place and significance of pain within modern punishment is closely bound to a scheme of thought that came with the civilising process. In the Old World, pain was understood as the concrete result of an internal strife of the soul towards the good. Originating in the soul and resulting from its struggles to separate good from evil, right from wrong, bodily pain was a primordial and intrinsic part of the human condition that allowed man to internally transcend his evil will. As such, bodily pain was viewed as an internal purifying process.²⁷¹ As opposed to this, modern prisons, deprivations of liberty and death sentences inflict a pain that is non-physical and rather directed towards the soul and the mind of the offender. Externally imposed, pain is understood as an eventual tool for obtaining a given goal. Modern punishment methods, as related to modern conceptions of pain, are those that exclude physical pain as a legitimate objective in itself.²⁷² Therefore, modern punishment, the death penalty and the laws that govern them are obsessed with a "...quest for a painless, and alleged humane, technology of death..."²⁷³ This has been the motivating factor for changes in execution methods during time, from burning offenders on the stake, via hanging and shooting them to electrocuting and finally simply putting them to sleep. The shifts from one method to the other have constantly been grounded on new technological or medical findings, inventions and arguments of being more painless, rapid and humane. From report to report, from protocol to protocol and court decision to court decision, the laws governing the imposition of death penalty have claimed themselves a further step up the ladder of civilisation, while condemning past methods and practices as uncivilised, barbaric and archaic.²⁷⁴

After the botched execution of Pedro Medina in Florida in 1997, where flames and smoke leaped from the head of the offender, even after the current had been turned off, was referred to by witnesses as "*a burning alive*," the electric chair as a method of execution was put into doubt and suggested be replaced by lethal injection in the state of Florida.²⁷⁵ This is but an example of how several Departments of Corrections tried to meet the requirements of executing humanely by introducing a method and carrying out a ritual of execution that in a medical three-step process first sedates, then paralyses the lungs and finally stops the heart.²⁷⁶ The lethal injection method and its

²⁷¹ The notions of pain in both Dante and Hegel reflect this idea of pain as a necessary evil in human life. K. Schoemaker, *The Problem of Pain in Punishment: Historical Perspectives*, in A. Sarat (ed.), *Pain, Death...*, op. cit., pp. 15-41, p. 32.

²⁷² A. Sarat, *Killing Me Softly...*, op. cit., p. 35.

²⁷³ Ibidem, p. 44.

²⁷⁴ Ibidem, p. 48.

²⁷⁵ Such legislation was passed in 1998, only allowing for electrocution if requested by the condemned, Ibidem, p. 45.

²⁷⁶ Ibidem, p. 45.

use of tranquillisers, helps the state kill swiftly, quickly and tranquilly. The physical effects are hardly felt or noted on the body of offender and in all conformity with a civilised conception of pain, all externally imposed pain is avoided. With a scientific, clinical and highly medical process, the state manages to kill without leaving any trace of its presence.

The medical nature of the execution ritual is carried out to a degree that exceeds the medical expertise necessary for the objectives of the ritual to be carried out. The execution team generally comprises medical staff (not necessarily a doctor) to conduct the medical examination prior to execution, insert the needle and pronounce the death of the offender. The participation of doctors in the ritual is a complex matter, since the American Doctor's Association explicitly forbids its members to assist in anything involving the active assistance in taking life and thus in anything else but the mere pronouncement of death.²⁷⁷ Nevertheless, for the execution procedure to be enrolled in a scientific, medical and thus humane discourse, special attention is given to secure that medical staff do assist, either by finding a willing doctor, hiring a nurse on contractual basis, using a paramedic or the like. The medical examination prior to execution is provided for in the protocols. However, it doesn't seem to have much sense, considering the near death of the offender. Apart from weighing the offender to establish the amount of chemicals or volts needed, the examination is more than anything a ritualised element of the execution that serves an official and legal declaration of the offender being alive. In addition, the final pronouncement of his death is not required to be done by a doctor. In most states, the warden and the deputy warden have the authority to do so.²⁷⁸ Nevertheless, the participation of medical staff seems more important for the legitimacy and the humanity that it brings to state killings than for the practical or legal necessity of it. Even the Court emphasises the scientific nature of the procedure, declaring that states have an obligation to replace old executing methods with

*"a scientifically developed and approved method of terminating life through appropriate medical procedures in a neutral, medical environment."*²⁷⁹

The autopsies carried out after the execution is a medical aspect that searches and reads the body for all possible signs of pain or reactions to death that it possibly can. The reports and investigations following botched executions in particular, attempt the difficult task of determining whether any pain was felt. By directing the search towards physical pain, the punishment by death ignores the mental pain and suffering that the preparations preceding the execution act may have inflicted on the offender. The intense humiliation of being subjected to ritualised shaving,

²⁷⁷ S. Trombley, op. cit., p. 117.

²⁷⁸ Ibidem, p. 245.

²⁷⁹ Campbell v. Wood, 18F.3d (1994), A. Sarat, *Killing me Softly...*, op. cit., p. 60.

showering, isolation, beheading or needle injection, or the long term confinement, with several years of negation of one's humanity, are psychologically painful experiences. For neither being visible, externally imposed or inflicted directly on the body, psychological pain is not adequate for assessment within the scientific and medical discourse that governs the death penalty system.²⁸⁰ Psychological pain is generally not something that can put the death penalty into a legitimacy crisis: The Supreme Court has deliberated as to whether the state of Louisiana could electrocute a condemned inmate twice without amounting to cruel and unusual punishment²⁸¹ (during the first execution, technical problems arose after the switch had been turned on: the execution procedures were interrupted and the offender survived.) The issue in court was not so much whether the pain of being put through the process twice amounted to cruel and unusual punishment, but whether "*his flesh did show electrical burns*". This not being the case, the court ruled that the constitutionality of being electrocuted twice was secured.²⁸² The case illustrates the tendency to see the human body as a legible text, in which to search for visible signs of pain and thus evaluate the amount of suffering inflicted by the state.²⁸³ Psychological and emotional pain is obviously invisible and incomprehensible if it occurs in other people's minds. It doesn't have any linguistic expression, neither is it a concrete and definable feeling. Unless sensory experienced, visually represented or linguistically articulated, pain remains incomprehensible to other people.²⁸⁴ With such a concept of pain forming the basis for assessing the suffering related to death penalty, the body of the criminal offender is reduced to a mindless container, an empty form with no connection to the person and mind inside.²⁸⁵ By viewing criminal offenders as abstract bodies, ascribing them no more than an empty legal personality or a scientific object, the ritual of execution executes humanely.

A mechanical and bureaucratic death

Civilised punishment is rational, useful, lawful, proportionate, systematic, foreseeable and non-arbitrary. It is in principle detached from any supernatural reference punishment and not inflicted by God's hand. The responsibility of punishing by death is solely placed on the shoulders of man²⁸⁶ In order to execute in a civilised world, live with and justify the executions, man has to find other means than God to free himself from the burden of having taken another human being's life. Therefore, an execution has to be carried out in an increasing bureaucratic way, be deprived of any

²⁸⁰ Ibidem, p. 51 and I. Floto, op. cit., p. 116.

²⁸¹ Francis v. Resweber, 329 U.S. 459 (1947).

²⁸² A. Sarat, *Killing Me Softly...*, op. cit., p. 56.

²⁸³ Ibidem, p. 57.

²⁸⁴ This is the idea of Elaine Scarry, *The Body in Pain: Making and Unmaking of the World*, New York, Oxford University Press, 1985. A. Sarat, *Killing Me Softly...*, op. cit., p. 65 and T. V. Kaufman-Osborn, op. cit., p. 83.

²⁸⁵ T. V. Kaufman-Osborn, op. cit., p. 86.

²⁸⁶ The argument of Inga Floto is precisely that for no longer being founded on a religious system, punishment had to become clinical, sanitised, mechanical, effective, painless and hidden. This would free man of his burden of being a deliberate executioner.

personal or human aspects; it is subject to very effective, quick and functional methods, carried out strictly and professionally by state officials.²⁸⁷

As noted previously, the extreme ritualised character of the execution, its rule governance, high formalism and precise timing gives the execution a mechanical and automatic nature, which by executing personnel is emphasised as the primary source and first condition for an execution to be carried out successfully and therefore humanely. Both for the sake of the offender, but also for the sake of the executioner and the surrounding staff, the execution protocols need to provide for a certain degree of automatism that turns state killings into an institutionalised practice, leaving the involved parties as professionals that play their part in the procedure, without feelings, personal touches or thoughts about the legitimacy of their acts. The lethal injection machine represents the ultimate mechanisation of the execution ritual.

"It is a fully computerised machine...It is a highly complicated machine. It is not just an ordinary syringe and a needle. It's different, completely different. It almost removes...practically all human mistakes. And it also removes the doubts of who actually pushes the button because it works through a computerised, rotating mechanism..."²⁸⁸

The system is constructed so as to remove even the function of an executioner from the executing business. By installing a system that computerises the timing and the choice of which syringe actually performs the injection of lethal chemicals, almost all human interference and thus responsibility is removed from the ritual of state killings. As noted by a prison psychologist in Missouri,

"The lethal injection machine and the Missouri protocol have their saying in reducing the level of stress related to executions. The specific training, the fact that the process is split up in different parts, the clear knowledge of the staff of what their role is, all that results in a process you could call competent, professional and without stress."²⁸⁹

Only a very limited staff presence is allowed during an execution. The execution team, put together by the warden or superintendent in conformity with protocol rules, comprises an impressive number of specialised people; apart from the warden, deputy warden and correctional officers, the team consists of escort personnel, security personnel, electricians, technicians, engineers, doctors, nurses, priests etc., all thought to be essential for the execution to proceed professionally.²⁹⁰ The execution protocols ensure administration of the personnel, controlling who is in the execution

²⁸⁷ A. Sarat, *The Cultural Life ...*, op. cit., s. 228. This applies especially for executions of the death penalty but also for prison management in general.

²⁸⁸ S. Trombley, op. cit., p. 211.

²⁸⁹ Ibidem, p. 218.

²⁹⁰ The precise composition varies in every state, but generally consist of a wide range of different specialists. *A Monitor*, op. cit.

chamber, whether they are authorised to be there, who does what, when and how.²⁹¹ The professional nature of the execution team is an element, which highlights the state's monopoly on punishment. It is a system that doesn't allow for the public to participate anymore than for the sake of witnessing the exclusive state violence.²⁹² Besides that, the extreme specialisation of the execution team and the act itself illustrates the extreme bureaucratic and anonymous nature of the death penalty. As typical bureaucratic characteristics, the executions are accurate, rapid, unambiguous, discretionary, consistent and without conflicts, material or personal expenses.²⁹³ The very nature of bureaucracy is precisely to remove all human interference from professional life. As such, the dehumanisation of the ritual of execution paradoxically becomes part of its very humanisation. By proceduralising and turning the process into a mechanical procedure, each involved sees his role and function in relation to the process, not in relation to the meaning or result of a state killing.²⁹⁴

With the preceding, I have analysed the ritual of execution as one that attempts to secure the humanity of state killings. The laws, the execution protocols and the whole practical imposition of the death penalty reflect an unending search for new forms and methods of killing humanely and hence meet the requirements of a modern civilised world. By guaranteeing and providing the offender with reasonable living conditions and fundamental rights, death row tries to be a friendly regime. By executing privately and invisibly, the offender's death is kept to himself and witnesses are not confronted with the eventual horrors of a dying process. Using scientific, technological and medical materials and methods the offender is freed of any physical pain or body mutilation. Carried out promptly and clinically by professional experts or computer programs that know what there are doing rather than why they do it, the state executes its criminal offenders quickly and efficiently.

²⁹¹ Ibidem and S. Trombley, op. cit., p. 206.

²⁹² J. Pratt, op. cit., p. 25.

²⁹³ I. Floto highlights these terms as Max Weber's characterisation of bureaucracy, op. cit., p. 182.

²⁹⁴ S. Trombley, op. cit., p. 244.

VI. A Paradoxical Execution: Conclusions and Perspectives

A wish to fully understand the ambiguous phenomenon of executing humans to save humans and thereby refute the apparent legitimate grounds on which death penalty still rests in the United States, has motivated this thesis to understand the inherent meaning and function of the death penalty. With an anthropological perspective and an analytical framework pertaining to the world of ritual theory, the thesis has aimed at demonstrating the American death penalty and its imposition as a symbolic representation of the sovereignty and the humanity of the American state.

As a demonstration of its sovereignty, the American state selects "the worst of the worst" criminal offenders and in a sacrificial act puts into effect its ultimate legal sanction. By imposing itself physically on its subjects and dealing with death in an ordered, institutionalised and ritualised way, the state carries out an exceptional violence. During years of death row confinement, as well as throughout the execution procedure, an extreme control, discipline and custodial regime physically and mentally internalises itself and its values on its subjects - systematically degrading and depriving them of their humanity. The physical imposition of sovereign power culminates during the "extraordinary" seconds, in which the criminal offender finds himself being tightly strapped to a chair or a gurney and facing the public, awaits either a miracle of mercy or a very concrete application of the rules and regulations (the Law) of an otherwise abstract sovereign. From this perspective, the exceptional violence of the state, i.e. the ritualised execution of criminal offenders, is a political message demonstrating the decisive will and all-powerful ability of the state to deal with disorder, uphold its values and protect its very existence.

As a demonstration of humanity, the laws, the constitutional rights and the many procedural guaranties related to the death penalty, attempt to restrict the violence of the state and thereby protect and secure the humanity of the victims, the witnesses, the offenders and the executioners. Time on death row as well as the execution procedures provide for a disciplined and civilising atmosphere, in which the regime cares, nurtures and secures the health, well being and basic human needs of its inmates. It offers a certain degree of normality in life as well as perspectives for the future. The execution of a criminal offender is carried out scientifically, quickly, privately, painlessly and humanely. For the sake of all implicated parties and in order to execute in conformity with Western civilised values, the death penalty in the United States is depending on a continuous search for ever new techniques and better scientific executing methods.

The above-mentioned dichotomy between sovereignty and humanity is an intrinsic part of American executions and as such, the death penalty is inherently a paradoxical phenomenon. However, the ritualisation of the executions plays a crucial part in attempting to unite these two somehow contradictory aspects. Through the act, the ritual does practically succeed in uniting the two concepts (since the executions do exist and are carried out as legitimate acts).

*"Rites put heaven and earth in harmony, make the sun and moon shine, and order the four seasons, the stars, and the constellations. They regulate people's 'likes and dislikes, their joys and their hates'. They are 'the highest expression of the hierarchical order (of the cosmos)'" and as such they are the basis for the strength, authority, and legitimacy of the state. In ritual, human action is brought into harmony with the principles that govern the cosmos itself*²⁹⁵

However, the ambiguity of the phenomenon remains on all thinkable levels. The death penalty is both an institutionalised and extremely exceptional violence; it is a violence that is restricted in its methods (by the law), but not in its principle. Death penalty is a disciplinary and dehumanising regime, while at the same time nurturing a civilising atmosphere; it is a regime that deprives criminal offenders of their present and future responsibilities, while demanding that they be responsible for their past actions. Torn between its obvious finality and future perspectives, the system legally judges inmates on their past while morally values them for their present. The state executes its criminal offenders quickly, but only after having kept them in custody for several years; it executes painlessly and without marking the human body, while inflicting extreme emotional pain and psychological distress. All in all, the state and its faceless bureaucrats execute efficiently and anonymously without touching or leaving any trace of its own presence – except of course for a dead human body!

In order to demonstrate its sovereignty and at the same time legitimise the extreme violence of executing, the ritual serves the purpose of differentiating the death penalty from other kinds of violence. By ritualising, the state manages to inflict death on its subjects humanely. However, the ritualisation and humanisation of state killings transforms the act into one that neither touches, sees, nor feels the impact of its actions. Thereby, state executions actually end up being the most impersonal, mechanical and inhumane acts of all. While the humane elements of the execution in principle secure and respect the offender and his death, they also and maybe even more so, secure the humanity of the state's sovereign action. Precisely to demonstrate its humanity in a modern and civilised world and thus legitimise state killings, punishment by death becomes humane by being cleared of all humanity! It thus seems that the on-going quest for new humane execution methods somehow only reinforces and reaffirms the violence and inhumanity of sovereign executions. In

²⁹⁵ According to Xunzi, a Confucian philosopher, C. Bell, *Ritual: Perspectives...*, op. cit., p. 147.

using a ritual to inflict an otherwise illegitimate act with humanity, the death penalty does not respect humanity for the sake of humanity, but rather for its political value and utility.

The question remains whether a modern civilised world can justify a phenomenon, which has an inherently paradoxical meaning and whose function it is to differentiate and legitimise a sovereign demonstration of power. Can a modern civilised nation justify a phenomenon that would lose its legitimacy if it weren't for its humane ritualisation? Can a modern civilised world justify a phenomenon that by its very nature reinforces the sovereign violence, which it also tries to avoid, and furthermore uses a humane scheme of reference (including concepts such as humanity, dignity and human rights) as an instrument to legitimise and reinforce such sovereignty? Whatever its form and whatever its cultural setting, sovereignty may constantly need to express and demonstrate itself in order to legitimise its existence. However, would it not be more compatible with a civilised world, if sovereignty and state power in the United States displayed itself differently than with this last remaining rite that takes and gives lives? Are there not other ways for a sovereign power to express and display itself, than by acting contradictory to the usual perception of what comprises a civilised world? To ask in rather provocative terms: why does a yearly celebration of the 4th of July, the American pledge of allegiance, the President's inauguration speech or an equally ritualised (i.e. humanised!) warfare method not represent sovereignty expressively and powerfully enough?

Without having neither the means nor the intentions of presently answering these questions, they exemplify the need to further inquire on the existence of death penalty in precisely the United States -as opposed to other cultures, which generally also are referred to as modern and civilised. While this thesis has suggested that the ritual of death penalty represents sovereignty and serves the purpose of legitimising such sovereignty, it hasn't shed any light on the reasons and necessity for such apparently growing sovereign expression in the United States. Which factors are decisive in the American tendency not to abolish, but to expand the scope and application of the death penalty? Is there something to American state sovereignty that makes it more important and/or in greater need for powerful expression than is the case for French, Canadian or Namibian state sovereignty? To briefly put some perspective and actuality to these questions, the following could be emphasised as being partly significant:²⁹⁶ the United States may have a very different culturally and historically founded perception of the relationship between the state and its individuals. A federal system, which by definition is decentralised and dispersed and furthermore has the size of the American federation, may result in a very distant relationship between the state and its individuals and therefore entail the need for a forum to collectively display an otherwise invisible state authority. Additionally, the globalisation of the world entails an extreme mobility, liberalisation, privatisation

²⁹⁶ The following has been emphasised by W. E. Connolly, s. 198.

and deregulation in economic, social and political life, especially generating and affecting the United States. The responsibilities and duties of the state are increasingly transferred to other institutions, agencies and mechanisms (international law, civil society, intergovernmental organisations, free market economy, international courts etc.) and the state may thereby be threatened on its very existence, provoking it to react to the deficit with compensating means. To demonstrate its efficiency, accountability and power, the American state firmly holds on to this last bastion of state power.

Alongside an intense pressure from international community, evolving standards of international law, serious efforts within crime prevention and ongoing political, academic as well as public debate on the issue, the acknowledgement of executions being sovereign expressions as well as an understanding of the causes related to such necessary expression, is a prerequisite for any movement towards final abolition of the death penalty in the United States.

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Abstract

With an anthropological perspective and an analytical framework pertaining to the world of ritual theory, this thesis has aimed at demonstrating the American death penalty and its imposition as a symbolic representation of the American state's sovereignty and humanity. In a modern and civilised world, the death penalty and its actual imposition is a phenomenon inherently torn between an extreme demonstration of state power and a fundamental concern for humanity. In a ritualised act, the state executes its worst criminal offenders with a firm hand, politically signalling its efficiency, power, control and ultimate will to deal with disorder, uphold its values and protect its very existence. However, to justify such a political message -by definition deprived of all humanity - the state needs to execute its criminal offenders with a concern for the humanity of all implicated parties. In order to execute in conformity with Western civilised values, the death penalty in the United States is depending on a continuous search for ever new techniques and scientific executing methods. However, in the attempt to humanise its acts, the ritualised executions end up being more bureaucratic, anonymous, distant, clinical, efficient –and thus inhumane - than ever.