

Strasbourg, 24 novembre 1997
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Restricted
CDL (97) 51
Or.fr.

N° 035 / 97

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**DRAFT OPINION
OF THE VENICE COMMISSION
ON THE CONSTITUTIONAL ASPECTS
OF THE DEATH PENALTY IN UKRAINE**

**prepared
on the basis of comments by**

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1. INTRODUCTION

On 10 March 1997 the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly decided to consult the Venice Commission on the constitutional aspects of the death penalty in Ukraine. The Venice Commission received the request for an opinion by letter of 12 March 1997 from the Chairman of the Assembly Committee, Mr Birger Hagard.

Mr Batliner as Rapporteur submitted his comments on the constitutional issues which might be raised by the death penalty in Ukraine in the light of the Constitution of 28 June 1996 at the 31st Plenary Meeting of the Venice Commission (Venice, 20-21 June 1997), in the presence of Mr Vitaly Rozenko, President-in-Office of the Court and Mr Volodymyr Tykhi, constitutional judge as delegates of the Constitutional Court of Ukraine (CDL (97) 15). Following discussion, the Commission instructed a working group (MM Batliner, Helgesen, Klu_ka and Malinverni) to investigate the question and report back to it. At the 32nd Plenary Meeting (Venice, 17-18 October 1997), the Commission exchanged views with Mr Rozenko on the basis of the Rapporteurs' reports (CDL (97) 15, 31, 32 and 33).

The rapporteurs subsequently met on ... December 1997 and adopted the present opinion for possible adoption by the plenary Commission.

2. OPINION OF THE VENICE COMMISSION

Subject of the opinion

1. The Commission stresses at the outset that its position on the death penalty has remained unchanged since it was set up. In full agreement with the Parliamentary Assembly's position as stated in Resolution 1044 (1994) on the abolition of the death penalty, in its proceedings it has consistently advocated the abolition of this penalty. Accordingly, in its opinion on the draft Constitution of Albania submitted for popular approval on 6 November 1994, it criticised the provision in Article 19 of the draft (allowing the death sentence to be passed in the case of males over 18 years of age for the most serious crimes), recalling inter alia the prohibition of the death penalty in time of peace in Protocol No. 6 of the European Convention on Human Rights (hereinafter ECHR; see Venice Commission, annual report of activities for 1994, p. 23). Likewise, in its opinion on the Constitution of Georgia, it made the proposal - accepted by the Georgian constitution-making body - that the Constitution should provide, pending the abrogation of the death sentence, that it must not be passed except for the most serious crimes threatening the life of an individual (Venice Commission, annual report of activities for 1995, p. 50). It now welcomes the abolition of capital punishment in this country.

2. In addition, during its work on the draft Constitution of Ukraine, the Commission proposed the adoption of a constitutional provision for the explicit abolition of the death penalty. In its "Opinion on the draft Constitution of Ukraine, approved by the Constitutional Commission on 11 March 1996", the Venice Commission suggested that in Article 22 of the draft¹, "it should be expressly stated that the death penalty is abolished" (see CDL-INF (96) 6, p. 6). in its "Opinion

¹ Which later became Article 27 of the Constitution.

on the Constitution of Ukraine", adopted at its 30th Plenary Meeting (Venice, 7-8 March 1997, CDL-INF (97) 2, the Venice Commission regretted that its proposal had not been taken up, apparently indicating that capital punishment was not abolished.

3. In this instance, however, the Commission is not required to give its opinion on capital punishment in general or as it specifically affects Ukraine, but to consider the constitutionality of the death penalty in relation to the Constitution of 28 June 1996 and in particular the provision in Article 27 securing the right to life.

4. It is thus appropriate to begin with a scrutiny of the actual wording of Article 27, also bearing in mind the spirit of the Constitution as a whole.

5. The Commission further considers that, while it need not comment on the obligations incurred by Ukraine's signature of Protocol No. 6 to the ECHR abolishing capital punishment and by its acceptance of commitments on acceding to the Council of Europe, these points must be considered when examining the effect of certain constitutional clauses. This is demanded not only by the status assigned to international law in the Constitution (see Articles 9 and 18) but also by today's intensifying osmosis between domestic and international law and by the growing tendency for review of constitutionality to overlap with review of compliance with treaty provisions. In the European legal area, particularly where human rights are concerned, "international constitutionality" or "supra-constitutionality" are increasingly frequent topics. Certain recent constitutions frankly reflect this tendency in explicit terms. Under Article 21 of the Romanian Constitution, for example, "constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence"². In the European legal area it is becoming more and more unnatural, where fundamental human rights are concerned, to make separate categories of the obligations to be met by a State under its constitutional law and under public international law.

The purport of Article 27 para. 2, first sentence

6. Article 27 of the Constitution of Ukraine provides:

"Every person has the inalienable right to life.

No one shall be arbitrarily deprived of life. The duty of the State is to protect human life.

Everyone has the right to protect his or her life and health and the lives and health of other persons against unlawful encroachments."

The operative provision for this analysis is no doubt the first sentence of para. 2. While para. 1 safeguards the right to life, the second paragraph, by its use of the word "arbitrarily", seems to embody an exception to the guarantee in paragraph 1, an exception which would

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This provision is modelled on Article 10 para. 2 of the Spanish Constitution. See also Article 17 of the Constitution of the Russian Federation.

accommodate the death penalty³. Despite the inalienability of the right to life established by the first paragraph and despite the State's duty to protect life, the effect of the word "arbitrarily" would enable the legislator, under the Constitution, to prescribe or to admit the death penalty for certain crimes, on condition of its being applied in a lawful, predictable, non-arbitrary and equitable manner. As a result, this provision would offer scope for capital punishment to the extent that if a competent court imposed the death penalty in the cases prescribed by law, it would be no longer possible to contend that the sentenced person was "arbitrarily" deprived of his life.

7. The Commission takes the view that the interpretation set out above isolates the substance of Article 27 para. 2 from its constitutional and international environment and therefore can be neither complete nor correct; it observes that several considerations tend to modify or even completely invalidate this interpretation.

The absence of an explicit reference to capital punishment in the Ukrainian Constitution

8. The Commission firstly observes that Article 27 para. 2 of the Ukrainian Constitution reproduces word for word Article 6 para. 1, third sentence of the United Nations Covenant on Civil and Political Rights. However, there is a major difference between the two provisions. After laying down that "no one shall be arbitrarily deprived of life", Article 6 of the Covenant explicitly mentions the death penalty (Article 6 para. 2) and precisely identifies the cases in which it can be imposed and carried out. There is, however, no such provision in Article 27 para. 2 of the Ukrainian Constitution. Whereas Article 6 of the Covenant, in para. 2, treats the death penalty as an exception to the principle of the right to life laid down in para. 1, the argument of principle and exception seems untenable as regards the death penalty in the context of Article 27 of the Constitution. If the Ukrainian constitution-making body had in fact intended to permit the death penalty, using Article 6 of the Covenant as a model, it should have reproduced the model in full and explicitly mentioned the cases where the death penalty may be imposed. As Article 27 para. 2 has incorporated only the principle of Article 6 of the Covenant, without replicating the exception, it is permissible to assert that the Ukrainian Constitution does not countenance the death penalty⁴.

9. The same reasoning can be sustained on the basis of Article 2 para. 1, second sentence of the ECHR. This provision stipulates that death may not be inflicted on anyone intentionally, save in the execution of a sentence of death. Here too, the exception to the principle of right to life constituted by the death penalty is expressly provided for. But this is not so in Article 27 of the Constitution.

³ *In another translation, the adverb "intentionally" is used instead of "arbitrarily" ("arbitrairement"). If this version is correct, the question of the constitutionality of capital punishment in Ukraine does not arise. A sentence of death intentionally and deliberately deprives a person of life. If the provision at issue is to be read as "No one shall be intentionally deprived of life", the Constitution is to be understood as purely and simply abolishing the death penalty. The Commission therefore bases its analysis on the assumption that the adverb used in the text of the Constitution is "arbitrairement" or "arbitrarily", as in the official English version.*

⁴ *Apparently the adverb "arbitrarily", according to the logic of Article 27, serves only to usher in para. 3, which can be validly interpreted as permitting deprivation of life in order to protect one's own life or the lives of others (case of necessity or emergency; self-defence).*

10. In these circumstances, it seems that the constitutionality of capital punishment in Ukraine cannot be established on a sound basis merely by interpreting the adverb "arbitrarily", especially as this basis is further weakened by the following considerations.

Some of the constructions placed on the term "arbitrarily" in constitutional case-law relating to capital punishment

11. In constitutional case-law, the term "arbitrarily" has sometimes been construed as prohibiting (not as permitting) the death penalty. It has indeed been argued that a capital punishment system is impossible to manage without bringing a certain degree of arbitrariness into it. No judge or jury are really in a position to decide according to objective criteria whether one person deserves a death sentence and another person a sentence of life imprisonment. Moreover, whatever the safeguards surrounding criminal prosecution in a State founded on the rule of law, a mistake is not to be ruled out. These very safeguards, paradoxically, can even yield situations which from the convicted person's standpoint may be considered arbitrary (including the death row syndrome - see the judgment of the European Court of Human Rights in the case of *Soering v. UK*, Series A No. 161, 1990). The (dissenting) opinion of Justice Blackmun in the case of *Callins v. Collins* before the Supreme Court of the United States (22 February 1994) is particularly instructive in this respect:

"Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death (see *Furman v. Georgia*⁵) can never be achieved without compromising an equally essential component of fundamental fairness, ie individual sentencing. (...) Although most of the public seems to desire, and the Constitution appears to permit the penalty of death, it is surely beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all. (...) In the years following *Furman*, serious efforts were made to comply with this mandate. State legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines for determining who should live and who should die. (...) Unfortunately, all this experimentation and ingenuity yielded little of what *Furman* demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due to a defendant when life is at stake. Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step towards consistency is a step away from fairness."

12. In the decision of the Hungarian Constitutional Court of 24 October 1990 (judgment 23/1990) concerning the constitutionality of the death penalty in Hungary under a constitutional provision closely akin to Article 27 of the Constitution of Ukraine⁶, several judges expressed the opinion that capital punishment was in all circumstances "arbitrary". In their joint concurring opinion, Judges Labady and Tersztanszky contended that

⁵ *Case of Furman v. Georgia*, 408 US, 290 (1972).

⁶ *Article 54 of the Hungarian Constitution provides that "Every human being in the Republic of Hungary shall have the inherent right to life and dignity, of which no one shall be arbitrarily deprived."*

the State may not deprive a human being of life and dignity by making use of force, because by imposing the death penalty it arbitrarily changes the order of the values protected by the Constitution. It does so arbitrarily because human life and dignity are values which, in the eyes of the law, are inviolable and inalienable. This renders the death penalty arbitrary and therefore contrary to the Constitution.

Judge Solyom, President of the Hungarian Constitutional Court, argued in his concurring opinion that

the death penalty is arbitrary not because it affects the very essence of the right to life⁷ but because the right to life and dignity, in view of its special character, cannot be restricted. The concept of arbitrariness in Article 54 para. 1 of the (Hungarian) Constitution cannot be perceived as admitting of death sentences passed after due legal process. The death penalty has always been contrary to the Constitution because the possibility of restricting the right to life and dignity on any ground whatsoever is excluded.

Judge Zlinszky, while conceding that originally the drafters of Article 54 para. 1 of the (Hungarian) Constitution had not viewed the death penalty as arbitrary deprivation of the right to life, likewise held

since the need for the death penalty has not been established, its application on the basis of the legislator's intention or the intention of the authorities to whom the legislator's powers are delegated must be ruled out. It is arbitrary.

The Ukrainian constitutional context

13. Another issue concerns reconciling the idea that the interpretation of "arbitrarily" in the first sentence of paragraph 2 of Article 27 may permit capital punishment with the fundamental provision of Article 3 of the Constitution that "the human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the

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The conclusion of the judgment was that the death penalty was prejudicial to the very essence of the right to life. As the constitutional provision prohibiting interference with the essence of certain fundamental rights post-dated the provision in Article 54 para. 1, the Court found that the death penalty had been abolished by operation of the rule "lex posterior derogat priori", without adverting to the interpretation of the word "arbitrarily". Presiding Judge Solyom's concurring opinion advocates a different approach.

highest social values". How is this idea to be reconciled with the superabundance of other provisions which expressly secure to everyone the inalienable subjective right to life, compel the State to protect life (Article 27), enshrine the right to dignity, and prohibit cruel, inhuman or degrading treatment or punishment (Article 28)?

14. The Ukrainian Constitution in fact contains such an array of provisions attaching special importance to life⁸ and dignity that the constitutional context can be readily likened to that of South Africa's transitional Constitution of 24 January 1995. The Constitutional Court of South Africa regarded this context as a sufficient basis on which to find that the death penalty was abolished (judgment in the case of the State v. Makwanyane and Mchunu, No. CCT/3/94, 6 June 1995).

15. What is more, the constitutionality of the death penalty in the Ukrainian constitutional context presupposes that the penalty and its execution are permitted in the light of the provision prohibiting cruel and degrading punishment. While the intent of the law may have allowed capital punishment as such to be considered a penalty which is not inhuman or degrading, on the other hand its reality, its conditions and its effects which are even inherent and inevitable (proceedings, extensions, delays, uncertainties, anxieties, torments and destruction of the human being) have on some occasions been regarded as prohibited types of treatment. The Soering judgment of the European Court of Human Rights is a familiar example of this approach. Another is the opinion of A. Chaskalson, President of the South African Constitutional Court in the case quoted above:

"Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person's humanity and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."

Consideration of the European legal environment

16. Indisputably, the Constitution of Ukraine and in particular the term "arbitrarily" in Article 27 are unclear, not to say obscure, where the death penalty is concerned. Such being the case, it may be helpful to consider the international legal environment. Judge Solyom, in his opinion concurring with the judgment of the Hungarian Constitutional Court, recommended that the present international position regarding capital punishment be taken into account as an objective frame of reference by the Constitutional Court and assessed at its own discretion.

17. In this respect, it must not be forgotten that although Protocol No. 6 to the ECHR is an optional protocol, the intention to ratify it has become one of the conditions of a State's accession to the Council of Europe. In Resolution 1044 (1994), the Parliamentary Assembly issued an unequivocal appeal for the abolition of capital punishment⁹. Furthermore, since

⁸ *In addition to the above-mentioned provisions: Preamble to the Constitution and Articles 3 para. 2, 21 para. 2, 22, 94 para. 1.1, 102 para.2, 104 para. 3, 116 para. 2 and 157 para. 1.*

⁹ *See also the Resolution adopted in Geneva by the 53rd session of the United Nations Commission on Human Rights on the question of the death penalty ((E/CN.4/1997/1.20) and the European Parliament Resolution of 12 June 1997 on the abolition of the death penalty.*

Latvia's accession to the Council of Europe in 1994, all new member countries have undertaken to sign and ratify not only the ECHR but also the Protocols thereto including Protocol No. 6 concerning the death penalty. Ukraine, when it acceded on 9 November 1995, undertook to place a moratorium on executions and to abolish the death penalty without reservations within three years by ratifying Protocol No. 6 to the ECHR. On 5 May 1997 Ukraine signed the protocol and is consequently obliged to refrain from acts which would defeat its object and purpose¹⁰.

18. In its *Mc Cann v. UK* judgment (Series A, No. 324), the European Court of Human Rights stresses that the safeguarding of the right to life is one of the Convention's most fundamental provisions. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe¹¹. Still more recently, the Heads of State and Government of the Council of Europe member countries solemnly issued an appeal for the universal abolition of the death penalty, insisting on the maintenance, in the meantime, of existing moratoria on executions in Europe (Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe, Strasbourg, 11 October 1997).

19. The Commission therefore feels able to assert that European law, in its national and international dimension, tends towards complete abolition of the death penalty and that this evolution is apt to become a basic component of European public order. If the death penalty is still countenanced, it is only countenanced within a strict logic of transition. At all events, its execution is no longer tolerated. This position must necessarily be taken into consideration in interpreting the Constitutions of Council of Europe member countries.

3. CONCLUSIONS

20. The Commission finds that the Constitution of Ukraine contains no provision expressly prescribing the death penalty; nor does it contain any provision for its explicit abolition.

21. The question of the constitutionality of the death penalty must therefore be addressed by interpreting the relevant provisions in the light of the Constitution as a whole but also having regard, to some extent, to relevant international developments.

22. The Commission notes the outstanding importance which the Ukrainian Constitution attaches to the right to life and the right to respect for human dignity. It also draws attention to the obscurity of the term "arbitrarily" in the first sentence of Article 27 para. 2, re-emphasising that this term does not necessarily introduce an exception to the right to life and that on occasion it has served as a legal basis for abolitionist contentions. It notes lastly that the death penalty is not tolerated in the European legal area except on a transitional basis and that in any case its execution is no longer tolerated.

¹⁰ *Under the terms of Article 18 of the Vienna Convention on the Law of Treaties, "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) it has signed the treaty ..."*.

¹¹ *The Human Rights Chamber of Bosnia and Herzegovina, in its decision of 7 September 1997 in the case of Damjanovic v. the Federation of Bosnia and Herzegovina, held that the same was true of the provisions of Protocol No. 6 ECHR.*

23. In these circumstances, the Commission considers that the death penalty cannot be deemed consistent with the Constitution in the absence of an explicit constitutional foundation.

24. The Commission further considers that if the adverb "arbitrarily" appearing in the first sentence of para. 2 of Article 27 of the Constitution were to be construed as allowing the death penalty to be contemplated, the effect of the other constitutional provisions on the right to life and human dignity would be to confine any possibility of instituting and carrying out the death penalty to a very restricted and indeed virtually non-existent field. The Ukrainian legislator, intent on faithfully upholding the spirit as well as the letter of the Constitution, is therefore bound to remove the death penalty from Ukraine's statutory penalties.