

1949 **50** 1999



COUNCIL OF EUROPE CONSEIL DE L'EUROPE



Strasbourg, 11 February 1999

<cdl\doc\1999\cdl\1.F>

Restricted
CDL (99) 1
Or. Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

**ON THE COMPATIBILITY
OF THE DEATH PENALTY
WITH THE CONSTITUTION OF ALBANIA**

by

Mr Giorgio MALINVERNI (Switzerland)
Mrs Hanna SUCHOCKA (Poland)

**OPINION
ON THE COMPATIBILITY OF THE DEATH PENALTY
WITH THE CONSTITUTION OF ALBANIA**

1. INTRODUCTION

On 25 January 1999 the Bureau of the Parliamentary Assembly of the Council of Europe decided to consult the Venice Commission on the compatibility of the death penalty with the Constitution of Albania. The Venice Commission received the request for an opinion by letter of 27 January 1999 from the Clerk of the Assembly, Mr Bruno Haller.

Mr Malinverni and Ms Suchocka as Rapporteurs submitted their comments and their opinion was forwarded to the Bureau of the Assembly on 11 February 1999.

This opinion will be presented for adoption by the plenary Commission at its 38th meeting in Venice on 22-23 March 1999.

2. OPINION OF THE VENICE COMMISSION

Subject of the opinion

The Venice Commission has previously had occasion to examine the question of the death penalty and its application in Albania. In its "Opinion on the draft Constitution of Albania submitted for popular approval on 6 November 1994" (see Venice Commission, *Annual Report of Activities for 1994*, p. 23), the Commission criticised the provision in the draft Constitution allowing for the imposition of the death penalty on males over 18 years of age found guilty of the most serious crimes (Article 19 of the draft), referring notably to Protocol No. 6 to the European Convention on Human Rights (hereinafter ECHR). During the drafting of the present Constitution of Albania, the members of the Venice Commission advocated the adoption of a provision specifically abolishing the death penalty. In their opinions on the draft Constitution Parts I and II approved by the Constitutional Commission as at 21 April 1998, Messrs Batliner, Malinverni and Russell pointed out that both variants of Article 7 of Part II of the draft, dealing with the right to life, neither contained an express prohibition of nor gave express permission for capital punishment, and recommended that this position be clarified. (See, respectively, documents CDL (98) 50, 47 rev. and 49.) The question now is to examine the compatibility of the death penalty with the Constitution of Albania, having regard to the Constitution of 21 October 1998.

It is thus propitious to begin by examining, in the context of the Constitution as a whole, the text of the articles relating to the right to life, and notably Article 21.

The Commission further considers that, although it is not required to comment on the commitments undertaken by Albania at its accession to the Council of Europe, these must be taken into account in examining the effect of certain constitutional clauses. This is so not only because of the importance assigned to international law in the Constitution and the provisions

made for its direct applicability (Article 122), but also because of the increasing osmosis between internal and international law and the fact that, as far as fundamental human rights are concerned, it is becoming increasingly artificial to draw a distinction between a State's obligations under its own constitutional law and under public international law. In the European legal area there is a growing tendency – evidenced in the judgments of Constitutional Courts (and their equivalents) published regularly in the Venice Commission's *Bulletin on Constitutional Case-Law* – for the review of constitutionality to include and even to overlap with a review of compliance with obligations imposed by treaties.

Article 21

Article 21 of the Constitution of Albania states simply:

“The life of a person is protected by law.”

This is not so strong a statement of the right to life as that which may be found in other Constitutions, and contains no express prohibition on capital punishment. (See, for example and in contrast, the Constitutions of Croatia (Article 21), Portugal (Article 24), Romania (Article 22), Slovakia (Article 15), Slovenia (Article 17) and “the former Yugoslav Republic of Macedonia” (Article 10).)

Furthermore, it is not the Constitution but the law which is said to protect the life of a person.

Thus it might be argued that Article 21 of the Albanian Constitution, despite the protection it undoubtedly accords to a person's life, leaves room for the legislature to provide for the death penalty to be imposed in certain cases, provided certain legal protections are ensured.

This article cannot, however, be interpreted in isolation from the rest of the Constitution. Moreover, an examination of the context (both constitutional and in international law, particularly international law applicable in Europe), throws an entirely different light on the interpretation which should be given to the article.

The lack of an express mention of the death penalty in the Constitution of Albania.

Article 21 of the Constitution of Albania closely resembles and may be said to be modelled on the first sentence of Article 2, paragraph 1 of the ECHR, which states, “Everyone's right to life shall be protected by law.” Significantly, however, Article 2, paragraph 1 of the ECHR goes on to deal explicitly with capital punishment and to provide for the (only) circumstances in which a person may be sentenced and put to death, “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Paragraph 2 of the same article provides for certain other cases in which deprivation of life shall not be regarded as having been carried out in contravention of the article.

No such provision is made in the Albanian Constitution, where the protection of life by law is stated without exception. Had the death penalty been contemplated, explicit mention of it should have been made in Article 21 of the Constitution in accordance with Article 2 of the ECHR, on

which it is based. This is all the more remarkable in that many of the other rights provided for in Part Two of the Constitution, on fundamental human rights and freedoms, are coupled with extensive exceptions. (See for instance, in the chapter on personal rights and freedoms, the exceptions provided for in Articles 26, 27, 29, 34, 35, 37 and 43.) The fact that no explicit exceptions to the protection of life are provided for in the Constitution whereas many other rights are clearly subject to exceptions is a clear indication that no exception, and in particular the death penalty, is intended to be allowed in the case of the protection of life.

It should finally be noted that a similar structure and logic were used in the drafting of the International Covenant on Civil and Political Rights (hereinafter ICCPR), to which Albania acceded on 4 October 1991. Here again, after the right to life is stated, express provisions are laid down concerning the death penalty (Article 6 of the ICCPR). This highlights once more the fact that express provision should have been made in the Constitution of Albania had the death penalty been intended to be permitted.

Interpretation of similar constitutional provisions in constitutional case-law

The Constitution of Lithuania contains a provision very similar to that of the Albanian Constitution concerning the right to life. Article 19 of the Constitution of Lithuania states, “The right to life of individuals shall be protected by law.” This article recently came under scrutiny before the Constitutional Court of Lithuania in case no. 2/98, concerning the compliance with the Constitution of the death penalty provided for under Article 105 of the Criminal Code. A number of other constitutional issues were raised in that case, but in reaching its conclusion that the death penalty provided for was unconstitutional, the Lithuanian Constitutional Court, having examined the other rights and exceptions to rights laid down in the Constitution of Lithuania, concluded that the wording of Article 19 of the Constitution allowed for no exception permitting the deprivation of life on behalf of the State.

Furthermore, in part five of its judgment, dealing specifically with the issue of the protection of life by the law in accordance with Article 19 of the Constitution, the Court noted that it is particularly difficult to sustain the argument that life is protected by the law when the law allows for the deprivation of life. There is always a possibility that a mistake may be made (and mistakes have been made in many States in the imposition of the death penalty), and such a mistake is impossible to rectify once it has been made. As the Court noted, the mere possibility that a person who does not deserve it in accordance with the law or who is innocent may be sentenced to death is not in line with the right to life which is guaranteed by the Constitution.

The same reasoning clearly applies to the protection of life itself that is afforded by Article 21 of the Constitution of Albania. A law allowing for the imposition of capital punishment cannot provide sufficient guarantees to ensure that the life of a person is protected by law in accordance with this article.

It should finally be noted that human life may be protected even in the absence of an explicit constitutional provision to this effect. The Polish Constitutional Tribunal in a recent decision (K 26/96 of 28 May 1997) held that human life was a constitutional value notwithstanding the lack of a constitutional provision in that country directly regarding the protection of life. The Tribunal reasoned that because the principle of the democratic state governed by the rule of law

can only be realised as a community of people, whose basic attribute is life, it may be inferred from this principle that the protection of human life is a constitutional value regardless of the fact that this is not explicitly stated in the Constitution of Poland.

The Albanian constitutional context

There is a series of provisions in the Albanian Constitution other than Article 21 that have a close bearing on the right to life. In particular, paragraph 2 of Article 17 states that the limitations on the rights and freedoms provided for in the Constitution “may not infringe the essence of the rights and freedoms”. The right to life is the most essential of all the rights and freedoms provided for in the Constitution, and indeed may be said to be the very essence of all the other rights and freedoms, for without it, these are worth nothing. The primordial importance of the right to life is recognised in the Albanian Constitution by its position as the first of the personal rights and freedoms guaranteed in Chapter II of Part Two, on the Fundamental Human Rights and Freedoms and by its inclusion in the hard nucleus of rights from which no derogation can be made even in time of war (Article 175). It may thus be asserted that capital punishment, which is the denial of the right to life, cannot be imposed without infringing the essence of the other rights and freedoms provided for in the Constitution of Albania, in conflict with the requirement of Article 17.

Furthermore, the Preamble states that the Constitution is established “with the pledge for the protection of human dignity”, thus elevating the protection of human dignity to a position of particular importance, as the tenor of this pledge prevails over the entire Constitution. Indeed, the fundamental nature of the pledge is revealed in Article 3, where the dignity of the individual is affirmed as one of “the bases of the State”. The protection of human dignity is of particular relevance to the application of capital punishment, and is discussed further below.

Article 25 of the Constitution states in its entirety, “No one may be subjected to cruel, inhuman or degrading torture, punishment or treatment.” The prohibition on such treatment is contained in many international documents, notably in Article 3 of the ECHR and in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, to both of which Albania is a party.

The parallel between the death penalty and the infliction of torture and inhuman or degrading treatment or punishment has frequently been drawn. Indeed, a powerful statement of the inseparable link between the two is to be found in the Constitution of Romania, by their inclusion in the same article (Article 22 on the right to life, to physical and mental integrity), which reads as follows:

- “1. The right to life, as well as the right to physical and mental integrity of a person are guaranteed.
2. No one may be subjected to torture or to any kind of inhuman and degrading punishment or treatment.
3. The death penalty is prohibited.”

The reasons behind such a close association between the death penalty and the infliction of cruel, inhuman and degrading treatment as well as the deprivation of dignity were evoked by the South African Constitutional Court in the case of *State v Makwanyane and Mchunu* (Judgment No. CCt/3/94, 6 June 1995, cited with approval by Gleeson CJ of the New South Wales Supreme Court, Court of Criminal Appeal in *R v Boyd* No. 60605/94). As Chaskalson P put it:

“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.”

The Franck report of 15 September 1994 on the abolition of the death penalty, submitted to the Parliamentary Assembly of the Council of Europe (Doc. 7154), evinces the same arguments.

The European Court of Human Rights also examined the question in detail in its *Soering v. UK* judgment (Series A, no. 161), in which it was held that extradition to a country where there was a risk of exposure to the “death row phenomenon” could constitute a violation of Article 3 of the ECHR. Similar concerns underpin the prohibition of extradition contained in many extradition agreements in circumstances where there is a risk that the extradited person may be exposed to the death penalty and the inevitable suffering it induces.

The underlying concern is that although the internal law of a country may not acknowledge capital punishment to be cruel, inhuman or degrading in and of itself, the reality is quite different. The death penalty exposes those on whom it is imposed to lengthy proceedings, uncertainties, anxieties and torments and eventually deprives them of their very humanity, and these inherent and inevitable conditions and effects may clearly be seen to be prohibited treatment. In practice, therefore, Article 25 of the Constitution of Albania leaves no room for the execution of the death penalty.

The European constitutional context

Finally, more light may be thrown on the constitutionality of the death penalty in Albania by an examination of the European legal environment in which it figures. Solyom J, in the concurring judgment he delivered as part of decision 23/1990 of the Hungarian Constitutional Court (24 October 1990) on the constitutionality of the death penalty in Hungary, recommended that “the present international position regarding capital punishment be taken into account as an objective frame of reference by the Constitutional Court”. Similarly, the Constitutional Court of Lithuania examined the European context in its ruling of 9 December 1998, and reached the conclusion that “the abolition of the death penalty is becoming a universally recognised norm”.

In the context of the Council of Europe, Protocol No. 6 to the ECHR is especially pertinent. Although this is an optional protocol, the intention to ratify it has become a necessary condition for a State’s accession to the Council of Europe. The Parliamentary Assembly of the Council of Europe, by its Resolution 894 (1988), placed Protocol No. 6 on a list of conventions of which the

signature and ratification were to be considered a matter of high priority. It subsequently called unequivocally for the abolition of capital punishment in its Resolution 1044 (1994) – an appeal which was reiterated just as unequivocally in its Resolution 1097 (1996). Since Latvia's accession to the Council of Europe in 1994, all new member States have undertaken to sign and ratify the ECHR as well as the protocols thereto, including Protocol No. 6 on the abolition of the death penalty. Albania, when it acceded to the Council of Europe, undertook to sign, ratify and apply Protocol No. 6 in time of peace within three years of accession and to place a moratorium on executions until the total abolition of capital punishment. The Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe (Strasbourg, 11 October 1997) again called for the universal abolition of capital punishment and insisted that existing moratoria be maintained in the meantime. Resolutions 1111 (1997) and 1145 (1998) condemned the violations of these moratoria that had occurred in two member States of the Council of Europe.

The European Court of Human Rights has stressed that safeguarding the right to life is one of the most fundamental of the provisions of the ECHR. The importance of the right to life and the prohibition of torture (Article 3 of the ECHR) was recently reaffirmed by the European Court of Human Rights in its judgment of 9 October 1997 in the case of *Andronicou and Constantinou v. Cyprus* (Reports 1997-VI, no. 52, p. 2059 ff., § 171), where the Court underlined that:

“Article 2 ranks as one of the most fundamental provisions of the Convention... Like Article 3 of the Convention it enshrines one of the basic values of the democratic societies making up the Council of Europe. As such its provisions must be strictly construed. This is particularly true of the exceptions delineated in paragraph 2 of that Article...”

See also the judgment in *McCann v. UK* (Series A, no. 324). These preoccupations also underpinned the Court's decision in *Soering*, as discussed above.

It can therefore be asserted, and with confidence, that the national and international dimensions of European law tend both independently and together towards the abolition of capital punishment. The evolution in this direction is clear and is becoming a cornerstone of European public order. The execution of the death penalty is no longer tolerated, and where provision for the imposition of such a sentence still exists, it is only accepted within the strict confines of the logic of transition. The Constitutions of the Council of Europe member States cannot be interpreted in isolation from these considerations.

3. CONCLUSIONS

The Commission finds that the Constitution of Albania contains no provision which either expressly allows for or expressly prohibits or abolishes the death penalty.

It is therefore necessary to examine the question of the constitutionality of the death penalty through an analysis of the relevant provisions of the Constitution read in the light of the Constitution as a whole and taking into account the international commitments that are binding on Albania as well as relevant international developments.

The Commission notes the positions of particular importance in which the Constitution of Albania places the right to life, although the terms in which this right is expressed are not as categorical as they could be, and the protection of human dignity. It also underlines the absolute lack of provision for exceptions to the protection of the right to life, with the strong inference that can be drawn from this, especially in view of the fact that clear exceptions are provided for in the case of other rights and freedoms, that no exception was intended to be provided in the case of the right to life. Moreover, the effect of Article 25 of the Constitution, which lays down a prohibition on torture and other cruel, inhuman or degrading punishment or treatment, combined with the fundamental importance accorded to the dignity of the individual in Article 3 of the Constitution and the pledge to protect it contained in the Preamble, is to make it practically impossible to apply and execute the death penalty without contravening the requirements of the Constitution. Finally it takes note of the fact that the death penalty is now no longer an acceptable punishment in the European legal field, except within the strict confines of the logic of transition, and that its execution is no longer tolerated.

Having regard to:

- the absence of an explicit constitutional basis for allowing the death penalty;
- the absence of an exception (express or implied) to the protection of life provided for in Article 21 of the Constitution, which has incorporated only the general rule of Article 2 of the ECHR (right to life) without also incorporating the exception (death penalty);
- the important position given to the protection of life by its placement at the top of the hierarchy of rights laid down in the Constitution;
- the requirement that any limitations on rights and freedoms laid down in the Constitution may not infringe the essence of these rights and freedoms;
- the fact that the constitutional prohibition of cruel, inhuman or degrading torture, punishment or treatment and the fundamental importance of the dignity of the individual enunciated in Article 3 of the Constitution and its Preamble leave no room, in practice, for imposing and carrying out the death penalty in Albania;
- the evolution of the European public order towards the abolition of the death penalty;

the Commission considers that the death penalty must be deemed to be inconsistent with the Constitution of Albania.