

Strasbourg, le 28 mai 1997
<s:\cdl\doc(97)\cdl\15.e>
N° 035 / 97

Restricted
CDL (97) 15
Or. fr.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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**

by

**Mr Gérard BATLINER
(Liechtenstein)**

**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**

**by
G rard Batliner**

On adopting its Constitution of 28 June 1996, Ukraine became legally established as a modern, democratic, social and law-based state. Compared with the former situation, the new Constitution is drafted from a totally different perspective. The state has been constitutionally transformed to become the servant of the individual citizen. The inviolability and security of the human being, recognised as the highest social value, determine the essence and orientation of state activities (Article 3)¹. Comments on weak or critical points of the new Constitution were recently expressed in the Opinion of the Venice Commission of 7-8 March 1997 (CDL-INF(97)2).

Considerations on the death penalty or its abolition from the standpoint of the new Constitution of Ukraine:

1. The first sentence of Article 27, paragraph 2, of the Constitution reads:

"No-one shall be arbitrarily [alternative rendering: voluntarily]² deprived of life."

The use of the word "arbitrarily" in the text of this official English translation seems to imply a reservation in favour of the death penalty. It amounts to saying: the right to life may be relativised to a certain degree by legislation. Under this reservation in the first sentence of Article 27, paragraph 2 of the Constitution it would therefore be possible for the legislature to make provision in a legal, non-arbitrary and equal manner for the application of the death penalty for certain crimes, despite the fact that capital punishment is otherwise, in principle, prohibited.

This raises the question of how to reconcile such a conclusion with the numerous other texts of the Constitution (and the Constitution taken as a whole) which expressly guarantee a subjective right to life:

"Every person has the inalienable right to life." (Article 27, paragraph 1);

¹ The quotations from the Ukrainian Constitution are based on an official translation in English published by the Ukrainian Ministry of Justice (the only authentic text being in the state language of Ukraine).

² Translation used by Professor Vasyl Kostytsky, Member of the Ukrainian Parliament, Deputy Chairman of the Law Policy and Legal-Judicial Reform Committee in his representations to the President of the Constitutional Court of Ukraine and the Ministry of Interior Affairs.

"The duty of the State is to protect human life." (Article 27, paragraph 2, second sentence);

"Everyone has the right to respect of his or her dignity." (Article 28, paragraph 1);

"No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity." (Article 28, paragraph 2);

"The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value." (Article 3, paragraph 1);

"All people are free and equal in their dignity..." (Article 21, paragraph 1).

See also the Preamble and the following articles: 3, paragraph 2, 21, paragraph 2, 22, 24, 92, paragraph 1, sub-paragraph 1, 102, paragraph 2, 104, paragraph 3, 116, sub-paragraph 2, 157, paragraph 1.

The special and fundamental importance assigned in the Ukrainian Constitution to the right to life and associated rights may be said to be generally in perfect harmony with the opinions expressed by eminent authorities or in major reports quoted hereafter and assembled in the recent Judgment of the new Constitutional Court of the Republic of South Africa.³ After scrupulously evaluating the issues from the standpoint of national, comparative and international law, the Court declared the death penalty to be contrary to the transitional Constitution of 25 January 1994 (the State v Makwanyane and Mchunu, case no.CCT/3/94, judgment of 6 June 1995). Reference is made in this judgment to descriptions of the right to life as being: "the supreme right", "one of the most important rights", "the most fundamental of all rights", "the primordial right", "the foundation and cornerstone of all the other rights", the "prerequisite for all other rights", one which is "basic to all human rights".

II. Construing the abovementioned texts of the Ukrainian Constitution in conjunction with the reservation expressed therein ("arbitrarily") would amount to saying that the death penalty and the death sentence as such would be not only a (permissible) exception to the right to life, but also compatible with the prohibition of cruel or inhuman treatment or punishment, in other words that the death penalty and its application would not as such be regarded as cruel, inhuman or degrading treatment or punishment that violates human dignity.

That might possibly be the approach adopted in international law in order to render compatible these contradictions and harmonise them or at least enable them as it were to coexist. And this was precisely the delicate situation confronting the European Court of Human Rights in the Soering case⁴ in the light of Articles 2 and 3 of the ECHR. If the law has ordained

³ Quoted in the article by William A. Schabas: South Africa's new Constitutional Court abolishes the death penalty, Human Rights Law Journal, Volume 16, p.133 et seq. (143).

⁴ Soering case, series A, volume 161 (1990), p.40 § 103.

that the death penalty does not in principle constitute an inhuman or degrading punishment or treatment, it becomes difficult to argue that, on the other hand, its existence, the conditions surrounding it and the effects necessarily inherent in it even when limited to what is strictly inevitable (proceedings, extensions resulting from the rights of the defence, waiting periods, uncertainty, final judgment, anguish, suffering and the ultimate extinction of a human life) are unacceptable. Where the death penalty is allowed, as a matter of principle, to constitute an exception to the right to life and where, moreover, it is not held by its nature to amount to inhuman or degrading punishment or treatment, then capital punishment is likely, in principle, to be widely regarded as tolerable.

The opinion expressed by the President of the South African Constitutional Court, Arthur Chaskalson, in the aforementioned recent judgment on the abolition of the death penalty is by comparison manifestly closer to present-day convictions and assessments of the facts:⁵

"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' (Furman v Georgia, 408 US 238, 290 (1972) (Brennan J., concurring)) 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."

This text speaks for itself. The same opinion is expressed in the Franck Report on the abolition of capital punishment adopted by the Parliamentary Assembly of the Council of Europe on 15 September 1994 (Doc.7154).

III. In Ukrainian domestic law the classic method of *lex (constitutionalis) generalis/lex specialis*, or the "rule/exception" method, has to be brought into play, using the two exceptions, in order to resolve the conflict and ensure an appropriate legal approach which is close to reality. When under international law no derogation or exception to the prohibition on inhuman or degrading treatment or punishment is tolerated (see for example the Soering judgment, page 34, § 88), a similar prohibition in domestic law, normally with fuller scope, may (by virtue of the *lex generalis/lex specialis* rule) be amenable to special relativisation insofar as this does not affect the international guarantees involved. Accordingly, Article 27, paragraph 2, first sentence ("No-one shall be arbitrarily deprived of life") contains a reservation by virtue of the term "arbitrarily" (or "voluntarily"?) which enables the legislature to provide for capital punishment in the event of certain crimes, by way of exception to the right to life and, by the same token, to Article 28 of the Constitution. Such a classic approach is more than just a methodological trick. It corresponds more closely to a faithful assessment of the sombre reality of capital punishment

⁵ Quoted in the article by William Schabas, HRLJ 16 p.136. See also, inter alia, Christoph Schreuer, Capital Punishment and Human Rights, FS Rudolf Bernhardt, Recht zwischen Umbruch und Bewahrung, Berlin 1995, p.563 ff; Thomas Giegerich, Richtermacht und Todesstrafe in den USA; Gewaltenteilung, verfassungsstatliche und völkerrechtliche Humanitätsstandards in Kollision. EuGRZ 1995,p.1 ff.

and to convictions which have evolved over recent decades, and have become more and more widespread today. Capital punishment thus constitutes a legal exception to Articles 27 and 28 of the Ukrainian Constitution.

With regard to exceptions, this particular one would not, in my opinion, come within the scope of either Article 64, paragraph 1 on constitutionally acceptable or possible restrictions, nor within the meaning of Article 22, paragraph 2 (taken either separately or in combination with Article 64, paragraph 1) which appears to guarantee a hard core of fundamental human rights, nor under Article 157, paragraph 1 which contains a sort of "eternity" clause relating to human rights. With regard to Article 27, paragraph 2, first sentence of the Constitution, the reservation introduced by the word "arbitrarily" constitutes neither a restriction nor an abolition of a guaranteed right, but rather an exception to a right, namely an exception to the right to life and to the terms of Article 28.

On the other hand, the reservation expressed by the word "arbitrarily" amounts to an exception which is unclear, indeed obscure, and unsatisfactory with regard to its possible scope, and moreover unspecified.⁶ It should nevertheless be mentioned that, at the time when the new Constitution entered into force, the prevailing criminal law permitted capital punishment for certain crimes, but that the law also had to meet the requirements of compatibility with this new Constitution (Chapter XV, Transitional Provisions, paragraph 1). Contrary to the wording of the Ukrainian Constitution, Article 6, paragraph 1 of the International Covenant on Civil and Political Rights, which also introduces the term "arbitrarily", at least offers a context which provides clarification; as for the text of Article 2 of the European Convention on Human Rights, it has the merit of precision. Under the Ukrainian Constitution, it is for the legislature of Ukraine to define the scope of the term "arbitrarily". However, being an exception compared with the two Articles 27 and 28 of the Constitution, the expression "arbitrarily" must be given a duly restrictive interpretation. This is all the more necessary as the notion of "capital punishment" or "the death penalty" does not even appear in the text of the Ukrainian Constitution (in contrast, for example, to Article 6 of the International Covenant or Article 2 of the ECHR).

In addition, in order to place this reservation correctly in its context, account must be taken of the numerous other constitutional safeguards. The reservation is to be set against a whole battery of contrary rules. The modern Ukrainian Constitution is notable for the large number of frequently repeated texts, characterised by their quality, clarity and wealth of detail, which insist on the value of human life and human dignity (see especially the other sentences of Article 27, and Articles 28, 21 and 3 of the Constitution, quoted above). And Article 28, paragraph 2 prohibits not only "cruel, inhuman or degrading treatment or punishment", but adds and reiterates (unlike other constitutional texts or international instruments), the words "that violates his or her dignity". Is this a reflection of unfortunate experiences in the past?

The Constitution of Ukraine is designed to reduce any application of the death penalty to

⁶ See Manfred Nowak, UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll - CCPR - Kommentar, Kehl am Rhein 1989, p.111 et seq. (119/120) concerning Article 6 of the International Covenant).

an extremely limited field which practically excludes the eventuality. The Ukrainian legislature would be complying in a particularly faithful manner with the spirit and whole tenor of the Constitution if it were to decide against, or make no statutory provision for, capital punishment.

It is obvious that not only capital punishment itself, but also its procedural application would require a statutory basis. Professor V. Kostytsky, in his representations to the President of the Constitutional Court and the Ministry of Interior Affairs, appears to maintain that there is currently no such legal basis for the application of the death penalty.

IV. Public international law: My comments do not take into consideration the international undertakings made by Ukraine with a view to becoming a member of the Council of Europe (see Opinion No.190 (1995) of the Parliamentary Assembly on the application by Ukraine for membership of the Council of Europe; Committee of Ministers Resolution (95)22: invitation to Ukraine to become a member of the Council of Europe; Resolution 1112 (1997) of the Parliamentary Assembly of the Council of Europe) or other commitments under international law together with the effects they may have in domestic law.

Vaduz, 28 May 1997

(signed) Gérard Batliner