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

**adopted by the Commission at its 33rd Plenary Meeting
(Venice, 12-13 December 1997)**

on the basis of comments by

**Mr Gerard BATLINER (Liechtenstein)
Mr Jan HELGESEN (Norway)
Mr Ján KLU_KA (Slovakia)
and
Mr Giorgio MALINVERNI (Switzerland)**

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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 (Messrs. 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 also had another preparatory meeting in Venice, on 11-12 December 1997.

The present opinion was adopted by the Commission at its 33rd Plenary Meeting (Venice, 12-13 December 1997). At their request, the individual opinions and comments of Messrs Batliner, Helgesen and Malinverni are appended to the present opinion.

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, the Commission has, in its proceedings, 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",¹ 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). Likewise, in its opinion on the Constitution of Georgia, it made the proposal - which was followed - that the Constitution should provide that, pending the abrogation of the death sentence, this penalty must not be passed except for the most serious crimes threatening the life of an individual.² 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 explicitly abolishing death penalty.³

¹ See Venice Commission, *Annual Report of activities for 1994*, p. 23.

² Venice Commission, *Annual Report of activities for 1995*, p. 50.

³ *Opinion on the "draft Constitution of Ukraine approved by the Constitutional Commission on 11 March 1996"*

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 Ukraine of 28 June 1996 and in particular to Article 27 which guarantees the right to life.

4. It is thus appropriate to begin by examining 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 and by the commitments it made on acceding to the Council of Europe, these points must nevertheless be considered when examining the effect of certain constitutional clauses. This is required not only due to the status assigned to international law in the Constitution (see Articles 9 and 18) but also because of the intensive osmosis between domestic and international law and the growing tendency for the review of constitutionality to overlap with the review of compliance with treaty provisions. In the European legal area "international constitutionality" or "supra-constitutionality" are increasingly frequent concepts, particularly where human rights are concerned. 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.

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 life and health of other persons against unlawful encroachments."

The relevant provision for the purpose of this opinion is no doubt the first sentence of para. 2. Whereas para. 1 safeguards the right to life, the second paragraph, by its use of the word "arbitrarily", seems to contain an exception to the guarantee in paragraph 1, an exception which would accommodate the death penalty. Despite the inalienability of the right to life established by the first paragraph and despite the State's duty to protect life, by virtue of the use of the adverb "arbitrarily", the Constitution would enable the legislator to prescribe the death penalty for certain crimes, provided it is applied in a lawful, predictable, non-arbitrary and equitable manner. As a result, this provision would allow for capital punishment to the extent that if a competent court imposed the death penalty in the cases prescribed by law, it would no longer be 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 would be such as to modify or completely invalidate this interpretation.

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

8. The Commission did not have access to the *travaux préparatoires* of the Constitution of Ukraine in their entirety and cannot therefore make use of these as a means of interpreting the above-mentioned constitutional provision. Nonetheless, the Commission closely followed the constitutional process in Ukraine and has actively participated in the preparation of several parts of the draft Constitution. It recalls in this respect that Article 22 of the draft Constitution provided that "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". The Commission concluded from this text that the death penalty was abolished (cf. CDL (96) 19). However, having regard to some doubts expressed by Mr Holovaty at its 27th Plenary Meeting (CDL-PV (96) 27), it suggested in its opinion on this draft that the Constitution should expressly state that the death penalty is abolished (CDL-INF (96) 6). This suggestion was not followed and Article 22 of the draft was incorporated without any change in the Constitution of Ukraine of 28 June 1996, in which it became Article 27. The Commission regretted this in its opinion on the Constitution of Ukraine adopted at its 30th Plenary Meeting (CDL-INF (97) 2).

9. Furthermore, the Commission 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 general rule of the right to life laid down in para. 1, this argument of general rule 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 general rule of Article 6 of the Covenant, without replicating the exception, one may assert that the Ukrainian Constitution does not countenance the death penalty.⁴

⁴ According to the logic of Article 27, the adverb "arbitrarily" appears to serve as an introduction to para. 3, which can be validly interpreted as allowing deprivation of life for the purpose of protecting one's own life or the lives of others (i.e. in cases of necessity or emergency; self-defence).

10. 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.⁵

11. 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".

Interpretation of the adverb "arbitrarily" in constitutional case-law relating to capital punishment

12. In constitutional case-law, the adverb "arbitrarily" has often been interpreted as prohibiting (rather than allowing) 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 safeguards are guaranteed in criminal proceedings in a State founded on the rule of law, one cannot rule out the possibility of a mistake. These very safeguards, paradoxically, can even yield situations which from the convicted person's standpoint may be considered arbitrary (including the death row phenomenon).⁶

The Ukrainian constitutional context

13. Another issue concerns reconciling the idea that the interpretation of "arbitrarily" in the

⁵ *It does not seem that the Ukrainian Constitution making power was inspired by the African Charter on Human and Peoples' Rights which is placed in a different legal environment and whose Article 4 follows a different wording: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".*

⁶ *See the judgment of the European Court of Human Rights in the case of Soering v. UK, Series A No. 161, 1990. See also the (dissenting) opinion of Justice Blackmun in the case of Callins v. Collins before the Supreme Court of the United States (22 February 1994): "Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death (see Furman v. Georgia, 408 US, 238, 290 (1972)) 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 to the individual when considering a sentence of death. A step towards consistency is a step away from fairness". See also 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 Ukraine (Article 54 of the Hungarian Constitution provides in para. 1 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"). Several judges expressed the opinion that capital punishment was in all circumstances "arbitrary" either because it arbitrarily changes the order of the values protected by the Constitution - human life and dignity being on the top of the hierarchy of these values - (Labady and Tersztanszky), or because the right to life and dignity, in view of its special character, cannot be restricted (Solyom).*

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 highest social values". It is difficult to reconcile this idea with the overabundance of other provisions which expressly secure to everyone the inalienable subjective right to life, compel the State to protect life, enshrine the right to dignity, and prohibit cruel, inhuman or degrading treatment or punishment. The Ukrainian Constitution in fact contains a broad array of provisions attaching special importance to life⁷ and dignity which may come into play as regards the death penalty and, above all, Article 28 paras 1 and 2 of the Constitution, which reads as follows:

"Everyone has the right to respect of his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity" .

14. 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 punishment or treatment. While positive law (see the ukrainina criminal code) may conceive capital punishment *per se* not to be inhuman or degrading, the reality of the death penalty, 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 of the State v. Makwanyane and Mchunu (Judgment No. CCt/3/94, 6 June 1995):

"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."

15. In practice, Article 28 of the Constitution of Ukraine does not leave any room for the execution of the death penalty.

Consideration of the European constitutional context

16. It may be helpful to consider the European legal environment to clarify the obscure meaning of the adverb "arbitrarily". Judge Solyom, in his concurring opinion in the judgment of the Hungarian Constitutional Court,⁸ recommended that "the present international position regarding capital punishment be taken into account as an objective frame of reference by the Constitutional Court".

17. In this respect, it must not be forgotten that although Protocol No. 6 to the ECHR is an

⁷ In particular Articles 27 and 28 but also the Preamble to the Constitution and Articles 3 para. 2, 21 para. 2, 22, 24, 92 para. 1.1, 102 para. 2, 104 para. 3, 116 point 2 and 157 para. 1.

⁸ See note No. 6 above.

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 punishment.⁹ Furthermore, since Latvia's accession to the Council of Europe in 1994, all new member States 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 purpose.¹⁰ 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).

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 Europe.¹¹

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

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 of the Constitution in the light of the Constitution as a whole but also having regard to international commitments binding upon the State of Ukraine seen in the light of 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-

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.

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* of 7 September 1997, held that the same was true of the provisions of Protocol No. 6 ECHR.

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. Moreover, the effect of Article 28 of the Constitution protecting the right to human dignity and prohibiting cruel, inhuman or degrading treatment or punishment would be to confine any possibility of instituting and carrying out the death penalty to a virtually non-existent field. It notes lastly that the death penalty is not admitted in the European legal area except on a transitional basis and that in any case its execution is no longer tolerated.

23. Having regard to:

- the absence of an explicit constitutional foundation allowing for the death penalty;
- the ambiguity of the term "arbitrarily" in the first sentence of Article 27, para. 2 of the Constitution of Ukraine;
- the fact that Article 27, para. 2 has incorporated only the general rule of Article 6 of the United Nations Covenant on Civil and Political Rights (right to life) without reproducing the exception (death penalty);
- the importance which the Ukrainian Constitution attaches to the right to life;
- the fact that the constitutional prohibition of cruel and inhuman or degrading treatment or punishment leaves practically no room for maintaining and executing the death penalty in Ukraine;
- the evolution of the European public order towards the abolition of death penalty;

the Commission considers that the death penalty cannot be deemed consistent with the Constitution of Ukraine.

APPENDIX I

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 Gérard Batliner

With the Constitution of 28 June 1996, Ukraine gave itself the legal status of a modern, democratic, socially-oriented State governed by the rule of law. Compared with the situations that prevailed in the past, the new Constitution shows a change of attitude. At a constitutional level the State has transformed itself into the servant of humankind. Serving and protecting human beings, on whom society places the highest value, is fundamental to the State's very being and gives a direction to its activities (Article 3).¹² The Venice Commission recently commented on the new Constitution's shortcomings and other points open to criticism in an Opinion of 7 and 8 March 1997 (CDL-INF (97) 2).

Considerations relating to the death penalty or its abolition in the light of the new Constitution of Ukraine

I. The first sentence of the second paragraph of Article 27 of the Constitution reads:

"No one shall be arbitrarily deprived of life."

Through the use of the word "arbitrarily", this official English translation appears to include a reservation allowing of the death penalty (deprivation of life). The inference is that the law can to some extent make the right to life less absolute. Through this proviso in the first sentence of the second paragraph of Article 27, the Constitution would seem to allow the legislature, acting in a lawful, predictable, non-arbitrary, non-discriminatory manner, to prescribe or decide on application of the death penalty for certain crimes, despite the fact that capital punishment is (as a rule) banned.

The question is how can a conclusion along these lines be reconciled with the plethora of other constitutional provisions (and the Constitution as a whole), whereby everyone is expressly guaranteed the inalienable, individual right to life (first paragraph of Article 27), to its protection (second sentence, second paragraph of Article 27) and to respect for his or her dignity (first paragraph of Article 28), whereby cruel, inhuman or degrading treatment or punishment violating that dignity is prohibited (second paragraph of Article 28), and so on.

The specific provisions are:

"Every person has the inalienable right to life" (first paragraph of Article 27);

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

¹² Articles cited from the Ukrainian Constitution are based on an official English translation published by the Ministry of Justice of Ukraine (the only authentic text is the Ukrainian version).

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

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

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

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

See also the Preamble, the second paragraph of Article 3, the second paragraph of Article 21, Articles 22 and 24, indent 1 in the first paragraph of Article 92, the second paragraph of Article 102, the third paragraph of Article 104, indent 2 in Article 116, and the first paragraph of Article 157.

The special, fundamental importance assumed by the right to life and related rights in the Ukrainian Constitution is, on the whole, entirely consistent with the leading opinions or major reports cited below, all of which were mentioned in a recent judgment of the new Constitutional Court of South Africa. After making a reasoned assessment of the issues in national, comparative and international law, the court held that the death penalty violated the interim Constitution of 25 January 1994 (*The State v. T. Makwanyane and M. Mchunu*, Constitutional Court Case No. CCT/3/94, judgment of 6 June 1995).¹³ The judgment refers to descriptions of the right to life as "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", "le droit suprême ... la condition nécessaire – l'exercice de tous les autres", "le noyau irréductible des droits de l'homme", the "prerequisite for all other rights", and a right which is "basic to all human rights".¹⁴

II. Reconciling the above-mentioned provisions of the Ukrainian Constitution with the reservation ("arbitrarily") would be a matter of recognising not only that the death penalty and execution of that penalty in themselves constituted a (permitted) exception to the right to life, but also that the penalty per se was compatible with the ban on cruel, etc., punishment or treatment, in other words that the death penalty and execution thereof were not in themselves cruel, inhuman or degrading treatment or a punishment which violated a person's dignity.

This approach might possibly be adopted in international law to reconcile with the contradictions, or in a way permit their co-existence. It was this kind of difficult situation which the European Court of Human Rights encountered in the *Soering* case,¹⁵ with regard to Articles 2 and 3 of the European Convention on Human Rights. If, according to positive law, the death penalty is, in principle, not an inhuman or degrading punishment or treatment, it becomes

¹³ *On the same subject see also William A. Schabas, "South Africa's new Constitutional Court abolishes the death penalty", Human Rights Law Journal, Vol. 16, pp. 133 ff.*

¹⁴ *Cited in the article by William A. Schabas, p. 143.*

¹⁵ *Soering case, Series A, Vol. 161 (1990), p. 40, § 103.*

difficult to argue that, on the other hand, the realities of this penalty, and the circumstances and consequences which it necessarily entails and which are strictly unavoidable (procedural steps, extensions of proceedings to respect the rights of the defence, waiting, uncertainties, the final decision, anguish, suffering, elimination of a human being), are not permitted. If the death penalty, which is, in principle, recognised as an exception to the right to life, is not in itself of the nature of an inhuman or degrading punishment or treatment, it may in principle be largely acceptable.

The opinion expressed by Arthur Chaskalson, President of the Constitutional Court of South Africa, in the above-mentioned recent judgment on abolition of the death penalty (§ 26) is clearly closer to modern-day beliefs and perceptions of the truth:¹⁶

"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 U.S. 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."

There is nothing to add to this. The Franck report of 15 September 1994 on abolition of the death penalty (Doc. 7154), submitted to the Parliamentary Assembly of the Council of Europe, is couched in similar terms.

III. In Ukrainian domestic law, since two exceptions come into play, the traditional approach of "lex specialis derogat legi (constitutionali) generali", or that a special provision derogates from a general rule, must be used to solve the conflict and ensure appropriate legal treatment in tune with reality. Where international law allows of no departure from or exception to the ban on inhuman or degrading punishment or treatment (see, for instance, the Soering judgment, p. 34, § 88), a similar prohibition in domestic law, in principle broader in scope, may (under the lex specialis derogat legi generali approach) be made less absolute by special provisions, in so far as this does not affect the international guarantees. The first sentence of the second paragraph of Article 27 ("No one shall be arbitrarily deprived of life") thus appears, through the use of the term "arbitrarily", to reserve the right for the legislature to prescribe the death penalty for certain crimes, by way of exception to the right to life and also to Article 28 of the Constitution. This kind of traditional approach is more than playing around with methodology. It is more consistent with a true perception of the dark reality of the death penalty and with the now increasingly widespread beliefs that have emerged in recent decades. In legal terms the death penalty is an exception to Articles 27 and 28 of the Constitution.

¹⁶ Also cited in William Schabas's article, *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, pp. 563 ff.; Thomas Giegerich, "Richtermacht und Todesstrafe in den USA: Gewaltenteilung, verfassungsstaatliche und völkerrechtliche Humanitätsstandards in Kollision", *EuGRZ* 1995, pp. 1 ff.

In my opinion, this exception does not come within the scope of the first paragraph of Article 64 on the restrictions permitted or possible under the Constitution, the rule contained in the second paragraph of Article 22 (considered separately or in conjunction with the first paragraph of Article 64), which seems to guarantee a core of human rights (in essence), or the first paragraph of Article 157, whereby human rights shall be guaranteed for all time. Under the proviso ("arbitrarily") made in the first sentence of the second paragraph of Article 27 it is not a matter of restricting or rescinding a guaranteed right, but of establishing an exception to a right, namely an exception to the right to life and to Article 28.

On the other hand, the proviso inherent in the term "arbitrarily" is an exception that is lacking in clarity, if not outright confused, and scarcely satisfactory in the light of its potential scope, and one which has not been put into effect.¹⁷ It should nonetheless be said that under the criminal law that existed when the new Constitution came into force the death penalty could be imposed for certain crimes, but that law is subject to the rules on compatibility with the new Constitution (Chapter XV, Transitional Provisions, point 1). Unlike the text of the Constitution of Ukraine, the first paragraph of Article 6 of the International Covenant on Civil and Political Rights, where the term "arbitrarily" is likewise used, at least provides a context, which clarifies the situation. The wording of Article 2 of the European Convention on Human Rights differs on account of its precision. In the light of the Ukrainian Constitution, it is for the Ukrainian parliament to give concrete meaning to the term "arbitrarily". However, as an exception to two articles (Articles 27 and 28), the expression must indeed be interpreted restrictively. This is all the more necessary in that the concept of the "death penalty" or "capital punishment" is not even mentioned in the Constitution of Ukraine (in contrast to Article 6 of the International Covenant or Article 2 of the European Convention, for example).

What is more, to put this reservation properly into effect, it is necessary to bear in mind the mass of constitutional counterbalances. There is a whole series of rules with which it clashes. It is a feature of Ukraine's present constitution that it lays emphasis, through the many repetitive, well-drafted, clear, detailed provisions it contains, on respect for human life and dignity (see, above all, the other sentences of Article 27 and Articles 28, 21 and 3 previously cited). The second paragraph of Article 28 not only bans "cruel, inhuman or degrading treatment or punishment" but (unlike other constitutions and international instruments) also adds and reiterates the words "that violates his or her dignity". Is this a response to the unhappy experiences of the past?

The tendency of the Ukrainian Constitution is to place extremely narrow limits on any application of the death penalty, if not to virtually rule out such a decision, and the Ukrainian parliament would be particularly true to the spirit of the Constitution, and to the text as a whole, if it did not avail itself of the possibility of prescribing or deciding on application of the death penalty.

It is clear that not only the death penalty, but also the procedure whereby it is executed, must be given a legal basis (see Articles 1, 6 and 8 (first and second paragraphs) of the Constitution).

¹⁷ See Manfred Nowak, *"UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll – CCPR – Kommentar"*, Kehl am Rhein 1989, pp. 111 ff. (119 pages) (on Article 6 of the International Covenant on Civil and Political Rights).

IV. Public international law: My comments do not take into consideration the international commitments made by Ukraine with a view to its accession to 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, Resolution (95) 22 of the Committee of Ministers on the Invitation to Ukraine to Become a Member of the Council of Europe, and Resolution 1112 (1997) of the Parliamentary Assembly of the Council of Europe) or other undertakings under international law and their potential impact in domestic law.

Vaduz, 28 May 1997

APPENDIX II

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 J. Helgesen

- 1) As will be recalled, I was asked, at the meeting in Venice in June, to submit my reflections on document CDL (97) 15 regarding the issue of capital punishment in Ukraine. The document is drafted by Mr Gerard Batliner.
- 2) I basically share the views and the conclusions drawn by Mr Batliner in his report. There is no need for me to repeat his reasoning in my paper. I shall, for practical purposes, restrict myself to supplement some of his arguments.
- 3) Like Mr Batliner, I shall restrict myself to analyse the given mandate within the domestic legal framework of Ukraine. I shall not enter into a discussion on the legitimacy of capital punishment under international law.
- 4) The obvious point of departure of our analysis is Art. 27, para. 2: "No one shall be arbitrarily deprived of life". From this point of departure, I shall pursue two avenues (infra. 5 and 6).
- 5) One option is to argue that the word "arbitrarily" indicates that capital punishment is **permissible** under the new Constitution, the legal rationale being, as expressed by Mr Batliner, that capital punishment is an exception from the general prohibition (with the obvious interpretative implications following from such a conclusion).

Two issues present themselves for further discussions under this alternative.

Firstly, one shall have to establish whether "arbitrarily" is the correct translation of the authentic text. If, as indicated by Mr Batliner in his report, the concept might rather be translated into English by the word "voluntarily", I feel somewhat hesitant to accept that capital punishment is a legitimate exception from Art. 27.

Secondly, one shall have to raise the obvious question why one single concept, "arbitrarily", is the operator which - alone - opens the door to the constitutionality of capital punishment. I tend to believe that the reason is that this phrase normally, at the international arena, is construed to permit capital punishment. If so, one should immediately add, however, that in the international human rights normative system, the legitimacy of capital punishment is normally secured through an explicit reference to capital punishment (see for instance ECHR art. 2 and CCPR art. 6). One might therefore ask whether the legitimacy of capital punishment is weakened by the fact that the Constitution of Ukraine does not state explicitly that Art. 27 allows this ultimate form of punishment. In other words, one might even dare to ask whether a pure textual interpretation (which is the only method I am able to apply in this case) defends the conclusion envisaged by Mr Batliner, that capital punishment is an exception from the general prohibition against the deprivation of life.

6) Another opinion is to argue that the word "arbitrarily" indicates that capital punishment is **not permissible**, since the effective use of such punishment necessarily constitutes "arbitrariness". This reflects a discussion which has been going on for decades in those states which still apply the death penalty. The opponents have persistently argued that it is impossible to administer a system of capital punishment without any arbitrariness, in one way or the other. They would argue that no judge or no jury might decide with the necessary objectivity that one person "deserves" to be executed, while another person is sentenced to spend the rest of his life in prison. Furthermore, a legal system in a state, irrespective of the most sincere efforts to pay attention to the guarantees inherent in a state governed by the rule of law, will from time to time commit mistakes. In addition - paradoxically - the legal guarantees involved before the person sentenced is actually executed, might create situations which, seen from the point of view of the convict, appear to be an arbitrary nature (the "death-row phenomenon"). Finally, this side would argue that any legislation, imposing the death penalty for certain crimes, will be of an arbitrary nature, since certain segments of the population are more likely to commit these serious offences, and that the likelihood of doing so is intimately linked to social factors outside of the control of the person himself.

In the United States, such hesistance is expressed - among many others - in the dissenting opinion of Justice Harry Blackmun in the Supreme Court in *Callins v. Collins* (February 22, 1994):

"Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia*, supra, can never be achieved without compromising an equally essential component of fundamental fairness - individual sentencing.

.....

Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is 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 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".

7) An argument which leads in the opposite direction, is the observation that, according to Art. 64 of the Constitution of Ukraine, the rights and freedoms protected in a number of articles, including Art. 27, shall be restricted even "under conditions of martial law or a state emergency". One might claim that if Art. 27 is construed so as to prohibit capital punishment,

Art. 64 would extend this limitation on state authority to a degree which needs to be carefully analysed. One issue is to ban the death penalty during peaceful circumstances. Quite another issue is to restrict the application of this ultimate penalty during the most sinister periods in the life of the democratic state. Such a step is definitely a radical step, also compared to the international efforts aiming at the elimination of capital punishment. So far, the main approach is to fight against the death penalty as a reaction to "ordinary" crimes.

In those states which, at present, have abolished the death penalty even during war-times, some of the more sceptical politicians may have felt some comfort in the fact that the legal situation - if need be - may be amended by a statutory provision. If capital punishment is excluded by a constitutional provision, this option is more cumbersome, since the process of introducing amendments is more complicated. In the situation of the Ukraine, however, I shall have to recall the fact that "[t]he Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency" (Art. 157, para. 2). This door is therefore effectively closed in the Constitution of Ukraine; it may be opened only through an amendment of the Constitution during peaceful circumstances.

8) My conclusion tends to be similar to the conclusion submitted by Mr Batliner. The answer to the question presented to us, cannot be reached by absolute certainty. There is obviously room for doubt and differing views. I do not hesitate, however, to follow Mr Batliner when he advises the Ukrainian legislature that they "would be complying in a particular 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".

APPENDIX III

Brief comments on the lawfulness of the death penalty under the Ukrainian Constitution of 28 June 1996

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At the last meeting of the Venice Commission (June 1997), I was asked to make brief comments on the lawfulness of the death penalty under the Ukrainian Constitution of 28 June 1996 (CDL 97 (15)).

The Ukrainian Constitution contains a whole series of provisions designed to protect human life (Article 27 para. 1, Article 27 para. 2, second sentence, Article 3 para. 1) either indirectly, by stating the right to respect for human dignity (Article 28 para. 1) or by prohibiting inhuman or degrading treatment (Article 28 para. 2).

The key question is therefore whether or not, in view of such a broad array of provisions, the Ukrainian Constitution can still be interpreted as allowing the death penalty.

The provision at issue is Article 27 para. 2 of the Constitution and, in particular, the adverb “arbitrarily” which is used there (“No one shall be arbitrarily deprived of life”). Is it possible to allow this provision to leave the door open to the death penalty to the extent that, if a competent court inflicts the death penalty in the cases prescribed by law, it can no longer be contended that the person sentenced to death is “arbitrarily” deprived of his/her life.

If we take the view that the adverb “arbitrarily” renders the true meaning of Article 27 para. 2 of the Ukrainian Constitution in its original version, it is not certain that this provision can be interpreted as implicitly authorising the death penalty.

Article 27 para. 2 of the Ukrainian Constitution reproduces word for word the 3rd sentence of Article 6 para. 1 of the United Nations Covenant on Civil and Political Rights. However, there is one major difference between the two provisions as a whole.

After stating that “no one shall be arbitrarily deprived of his life”, Article 6 of the UN Covenant explicitly mentions the death penalty (Article 6 para. 2), clearly stating the cases in which the death penalty may be imposed and carried out. There is, however, no such provision in Article 27 para. 2 of the Ukrainian Constitution. Whereas Article 6 para. 2 of the Covenant considers the death penalty as an exception to the principle of the right to life provided for in para. 1, the argument of a “general rule/exception” seems to me to be untenable as regards the death penalty in the context of Article 27 para. 2 of the Ukrainian Constitution, precisely because Article 27 does not expressly mention the death penalty.

In other words, it can be argued that if the Ukrainian constitution-making body 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 in which the death penalty may be imposed. As Article 27 para. 2 has merely reiterated the general rule of Article 6 of the

Covenant, without including the exceptions, it is possible to consider that the Ukrainian Constitution does not condone the death penalty.

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

My third observation concerns the role and place of international law in the interpretation of the Constitution.

In view of the increasingly intensive osmosis between national and international law, the growing tendency for the review of constitutionality to overlap with the review of compliance with treaty provisions and the fact that “international constitutionality” and “supra-constitutionality” are increasingly frequent concepts, it appears to me to be difficult to uphold the idea of examining the lawfulness of the death penalty purely from the point of view of the constitutional law of a particular State.

The link between constitutional law and international law is particularly obvious in the human rights field, as can be seen in even the recent constitutions of certain States. For example, Article 20 of the Romanian Constitution of 1991 stipulates that “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 the 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 international law, the international regulations shall take precedence”.

This article, which is based on Article 10 para. 2 of the Spanish Constitution, has been incorporated into other constitutions, for example Article 17 para. 1 of the Russian Constitution of 1993.

In conclusion, it seems to me that, as far as fundamental human rights are concerned, it is becoming increasingly artificial to distinguish between a State’s obligations under its own constitutional law and under international public law. The question of the death penalty in Ukraine should therefore also be examined in the light of the growing tendency in international law to proscribe the death penalty (see Protocol No. 6 to the ECHR concerning the abolition of the death penalty) and the 2nd Protocol to the United Nations Covenant, which aims to abolish the death penalty.

Geneva, 16 September 1997