

PUBLIC OPINION AND DEATH PENALTY IN BELARUS

The Council of Europe's role in the creation in a "death-penalty free zone"

Tatiana Termacic, Directorate General of Human Rights and Rule of Law, Council of Europe

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I was born in a country in which – at that time - the death penalty was being used. I cannot remember when I first became conscious that the imposition of a death sentence was a cruel and inhuman one to be handed down by a State which was reputed to be the cradle of human rights. However, I remember very well a TV debate between Robert Badinter, a strong opponent to capital punishment whom some of met in Minsk in 2010, and Michel Debré, the father of the current French Constitution and an eminent politician who was a proponent of the death penalty. At 14, I was appalled that the latter - a resistant who had fought the Nazi regime - was in favour of such an indignant punishment. I also remember having a row with the friend with whom I was staying at the time and who did not see a problem in executing criminals. This was before the May 1981 election of François Mitterrand, which was happily soon followed by both an end to the death penalty in France and the opening-up of the right for individuals under its jurisdiction to apply to the European Court of Human Rights.

When France abolished the death penalty on 9 October 1981, it was the 35th country to do so. Today, 142 countries, representing 74% of the member States of the UN, have stopped using the death penalty, either by removing it from their penal code or by not carrying out executions for a long time. Unequivocally, even if the resumption of federal executions in the US in 2020 made the front news recently, the abolitionist trend is continuing, with the number of death sentences and executions also falling.

This trend started in Europe and I want to tell you about the Council of Europe's role in the creation of a "death-penalty free zone" and how this influenced the abolitionist trend beyond the continent.

When the European Convention on Human Rights was drafted and adopted in 1950, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life, so that Article 2 § 1 provided that “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”.

At the end of the sixties, there was still no European consensus on abolition. Some countries, such as Portugal and San Marino, had been pioneers in that they had already abolished the death penalty in the XIXth century but, at that time, they had yet to become members of the Council of Europe. Actually, some member States not only continued to include the aged penalty in their legislation but were applying it as well.

History or Legend has it that Sweden got the ball rolling, and more precisely, the Swedish delegation at the Parliamentary Assembly. Sweden was one of the few European states fortunate enough to have stayed out of the two world wars and to have avoided a totalitarian regime. Its society, moreover, had thrived without any need for capital punishment. It was therefore natural that the Swedish delegation should believe that their model of a death penalty free society could fit the whole of Europe.

A Swedish Rapporteur was therefore appointed to the Committee on Legal Affairs and Human Rights. An advantage was that he was a member of the conservative group and could be expected to bring some influence to bear upon his colleagues on the right side of the political spectrum. The conservative camp, after all, was where one would expect to find the most active opponents to abolition.

However, despite the rapporteur and his colleagues’ efforts, nothing had been achieved by the end of the Sixties and early Seventies. The arguments for and against capital punishment had long since been formulated and had not changed much over the years. Already at that time, academics considered the debate as “intellectually worn out” and the question had assumed a psychological and emotional rather than political nature. The time was evidently not yet ripe for a continent-wide abolition of the death penalty.

Sometime later, the tide had finally begun to turn. Public opinion was increasingly in favour of abolition in many of the member States and over the course of the Seventies, the British House of Commons rejected a motion on the restoration of capital punishment at least three times. The

majorities changed but on each occasion the vote was convincingly against its restoration. Western Europe was slowly moving towards becoming a 'death penalty free' zone.

It is in this context that the Parliamentary Assembly of the Council of Europe held a momentous debate on 22 April 1980. It confirmed, without further qualification, that the death penalty was inhuman in its Resolution 727. Furthermore, as the European Convention on Human Rights, in its Article 2 on the right to life, did not preclude use of the death penalty, the Assembly also proposed to amend this article (Recommendation 891).

One of the highlights of this historic debate took place when the Assembly's President, Hans de Koster, casually observed that he was probably the only person in the hemicycle ever to have been condemned to death. Indeed, during World War II's German occupation of the Netherlands, Mr. de Koster had been condemned in absentia by a Nazi court for his role as the leader of a Dutch resistance group. He had managed to remain hidden until the end of the war and the miracle of his physical presence during that debate was weightier than any argument could have been against the death penalty.

When, in 1981, France abolished the death penalty, it could be said that Western and Southern Europe – the part of the continent then covered by the Council of Europe – had eradicated this penalty. Even if some countries still provided for it in their law, none of them executed convicted persons any longer.

It was, therefore, time to update European law to reflect this reality. Amending the European Convention on Human Rights is not an easy operation. Nor is it without risk. Firstly, one needs the consensus of all member States on a new text and, secondly, all the contracting States would then have to ratify that text. It is therefore for this reason that the Committee of Ministers opted for another solution and in 1983 drew up an additional protocol to the Convention, Protocol No 6, which simply stated that "the death penalty shall be abolished." (Article 1) but made an exception "in respect of acts committed in time of war or imminent threat of war" (Article 2). Later, in 2002, this protocol was supplemented by Protocol No 13, abolishing it in all circumstances. Today, all member States except one have ratified Protocol No 6, and three still need to sign and/or ratify Protocol No 13.

In the meantime, the collapse of the Soviet Union led to the democratisation of Central and Eastern European States and their wish to join the European family. The Council of Europe quickly grasped the new opportunities of this situation, both for these States and for the Organisation itself.

In the beginning, the rules of procedure in the Assembly provided for the possibility of observer status to be granted to the parliaments of non-member States. Later a special guest status was given to these States as an important step towards full membership of the Council. As a result, membership of the Organisation doubled in twenty years.

The steady inflow of new member States joining the Council of Europe did not preclude the frequent political and legal arguments that arose in the course of the admission procedure. It was important, from a political point of view, to welcome the new democracies into the European house as quickly as possible. But from a legal standpoint, it was essential that the basic principles on which our Organisation was built should be respected. At the same time, one could not expect States, which had not enjoyed the respect of fundamental rights for decades, to bridge the gap from totalitarian rule to democracy in just a few years, a transition which had taken two centuries to evolve with considerable ups and downs in the countries of Western Europe. Such contradictions were difficult to resolve.

Abolition of the death penalty was a clear example of the dilemma. Practically all the States seeking cooperation with the Council of Europe had the death penalty enshrined in their penal codes – and were applying it as well. For these States total abolition was difficult. It would require a vote in their national parliaments, some of which would be reluctant to pass such an amendment. A compromise was therefore found by asking these States to introduce a moratorium on executions.

The experience of Central and Eastern countries in abolishing the death penalty has been diverse. In some cases, abolition was undertaken with enthusiasm, in others, with indifference. In a few cases, such as in Albania and Ukraine, there was resistance. In Ukraine, executions were carried out until 1997, that is two years after it joined the Council of Europe. The Council of Europe had threatened that it would suspend Ukraine's membership and eventually, it is the Constitutional Court of Ukraine which saved the day by ruling the death penalty unconstitutional in December 1999. It is only after, in April 2000, that the Verkhovna Rada introduced amendments to the then acting Criminal Code, which (finally) removed capital punishment from the law. Ukraine ratified Protocols No 6 and No 13 in 2000 and 2002 respectively.

A significant milestone was the 2nd Summit of the Council of Europe, which took place in Strasbourg in October 1997, when forty Heads of State or Government not only decided that Europe should be a “death-penalty free area” but also called for its universal abolition.

In less than three decades, an issue that was considered a “non-starter” had now become a “must” for all European democracies. And this remains valid today. This is the very reason why Belarus remains the only European country at the doorstep of the Organisation.

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The European abolitionist trend has been emulated by other continents, and every year, the number of abolitionist countries grows. The Council of Europe and the EU have joined forces to call for a universal moratorium at UN level and also to encourage all countries to join the global Alliance for Torture-Free Trade, which currently involves 62 States committed to restricting the trade in goods used to carry out torture and the death penalty.

Every year, the Secretary General and the High Representative for Foreign Affairs and Security Policy on behalf of the European Union issue a joint statement on the occasion of the World and European Day against the death penalty on 10 October. The case of Belarus is specifically mentioned on each occasion.

It is fully understandable that Belarus wishes to find its own path towards abolition, and I hope that this brief overview of the Council of Europe’s role has shown you that we can support you in this endeavour.

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