

Agata Fijalkowski\*

## THE ABOLITION OF THE DEATH PENALTY IN CENTRAL AND EASTERN EUROPE

### INTRODUCTION

Undoubtedly *abolitionists* of the death penalty have kept a watchful eye on events in Central and Eastern Europe (CEE) since the collapse of Communism in 1989. They have not been disappointed. Indeed, the developments have been breathtaking. Most of the CEE countries have become abolitionist, citing 'political will, official inquiry, and the influence of the United Nations policy' as the most important reasons for choosing this course.<sup>1</sup> The majority of CEE countries are state parties to the relevant international legal instruments, namely Protocol No. 6 of the European Convention on Human Rights (ECHR)<sup>2</sup> and the Second Optional Protocol to the International Covenant for Civil and Political Rights (ICCPR);<sup>3</sup> those

---

\* Ph.D. in Law (University of London), Europa-Fellow, Europa-Universität Viadrina (Frankfurt (Oder), Germany).

<sup>1</sup> Such was the response of Poland. See 'Crime Prevention and Criminal Justice', (March 2000), UN Doc/E/2000/3.

<sup>2</sup> Protocol No. 6 to the ECHR, concerning the abolition of the death penalty, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime; states parties may retain the death penalty for crimes 'in time of war or of imminent threat to war'. Any state party to the ECHR can become party to the Protocol. For the purposes of this chapter, it is important to note that Albania, Bulgaria, and Poland have signed but not ratified; Bosnia-Herzegovina, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia, and Ukraine are states parties. See also A.M. Gross, *Reinforcing the New Democracies: the European Convention on Human Rights and the Former Communist Countries – A Study of the Case Law*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, 7 (1996), pp. 103-111. Developments in the Russian Federation are treated in detail in this publication.

<sup>3</sup> The Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989, provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that affect at the time of ratifying or

which have not yet ratified these agreements are signatories.<sup>4</sup> Equally significant, CEE countries have substantially amended or adopted new criminal codes, in which the death penalty has been eliminated as a form of punishment, or have imposed a moratorium. Other countries have gone so far as to amend their constitutions to prohibit the reinstatement of capital punishment, such as Romania. Considering the Communist histories of these countries, and the role that the respective criminal justice systems played in controlling society (in which the death penalty had a key part), the relatively rapid and painless move to abolish the death penalty is a major achievement to this cause. It is worthwhile recalling that Communist rule generated, utilised, and eventually degenerated the law: scholars of totalitarian law have focused on various aspects with respect to the perversion of the law on the part of society and vice versa.<sup>5</sup> The point to be made, briefly, as it is outside the scope of this chapter, is that the direct and indirect legacy of Communism manifests itself in dealing with the problems of the post-Communist heritage.<sup>6</sup> This applies to the abolition of the death penalty and the discussions surrounding its reinstatement; proponents normally cite public support and attempt to reform the criminal law in ways which show that the preception of law continues to be affected by ideas sustained under the former regime.<sup>7</sup> An important factor which has curtailed these efforts has been both the direct and indirect compliance with the norms set by Western Europe. Entry into the European Union requires that certain commitments are made with respect to the recognition of basic rights and freedoms.

Without question, the first post-Communist governments were faced with a number of daunting tasks of unprecedented magnitude, none other than reintroducing credibility and legitimacy into their respective legal systems; that these systems meet European standards and international norms inevitably includes addressing the especially delicate and controver-

---

acceding to the Protocol. For the purposes of this chapter, it is important to note that Bulgaria, Croatia, Hungary, Romania, Slovakia, and Slovenia are states parties.

<sup>4</sup> See also ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE*, 2<sup>nd</sup> edn. (Oxford: Clarendon, 1996).

<sup>5</sup> See, for example, ADAM PODGÓRECKI AND VITTORIO OLGIATI, EDS., *TOTALITARIAN LAW AND POST-TOTALITARIAN LAW*, Onati International Series in Law and Society (Aldershot: Dartmouth, 1996).

<sup>6</sup> *Ibid.*, pp. x-xi.

<sup>7</sup> An example is the proposal to have a list of defence counsel at the disposal of the Minister of Justice. See Andrzej Zoll, *The New Polish Criminal Law Codification in Light of the Constitution*, *POLISH CONTEMPORARY LAW*, (1998), pp. 89-99.

sial subject of the death penalty.

The events which have resulted in the abolition of the death penalty will be the focus of this chapter. The role of the criminal law and criminal justice system will be addressed in four different time frames, beginning with the pre-war period; Stalinist period; post-Stalinist period; and post-Communist period. The purpose that the criminal justice system was to fulfil under the Communist regime is especially important, and this will be discussed in light of current discussions on the abolition of capital punishment, where an attempt will be made to explain the reasons for abolishing capital punishment in CEE countries. Where possible, further details will be provided for more clarification, as data from each country is not readily available. As the present author is most familiar with the Polish experience, most examples will refer to key developments in this country.

### 1 PRE-WAR PERIOD (1918-1939)

After the First World War, most CEE countries had their sovereignty restored or established. During the pre-war period, most of these countries accomplished progressive codification of the criminal law. While the death penalty was retained in most the CEE countries criminal codes, its scope and application was significantly reduced. With this in mind, however, it is important to note that the rapidly deteriorating political situation in Europe contributed to the adoption of more repressive measures up to the Second World War.

In Poland, for example, the government established a Codification Commission in 1919 to draft Polish legislation.<sup>8</sup> The section concerned with the codification of the criminal law originally did not envisage the death penalty in a Polish criminal code. During its work, discussions with respect to capital punishment centred around the main goals to be achieved by the death penalty; findings from the First World War were quite influential.<sup>9</sup> Not surprisingly, experts were divided on the issue. For example, the

---

<sup>8</sup> *Ustawa z dnia 3 czerwca 1919r. o Komisji Kodyfikacyjnej* (Law of 6 June 1919 Concerning the Codification Commission), *Dziennik Ustaw*, No. 44, item 315. For further information about the Commission see Stanisław Grodziski, *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej* (The Codification Commission of the Republic of Poland), *CZASOPISMO PRAWNO-HISTORYCZNE*, 33 (1991), pp. 47-81.

<sup>9</sup> Marek Zubik, *Kara śmierć w Polsce* (The Death Penalty in Poland), in Monika Mitera and Marek Zubik, *KARA ŚMIERĆ W ŚWIETLE DOŚWIADCZEŃ WSPÓŁCZESNYCH SYSTEMÓW PRAWNYCH* (The Death Penalty in Light of the Findings from Contemporary Legal Systems) (Warsaw: Helsinska Fundacja Praw Człowieka, 1998), p. 96. See also Jerzy Szumski, *Dzieje polskiego abolicjonizmu* (The Activities of the

code's two main drafters, A. Moglnicki and E.S. Rappaport, supported abolition. The first three drafts of the code did not foresee the death penalty. It was by sheer fate that it was found in the 1932 criminal code by one vote – the majority of its drafters were opposed to its inclusion.<sup>10</sup>

The code contained provisions for the death penalty in five instances. Life imprisonment or a ten-year sentence was also an alternative, as was five years in one case (Article 225). Judicial discretion, in fact, rendered the punishment not mandatory. Four crimes of political nature foresaw the death penalty: threat to state independence (Article 93(1)), an attempt on the President's life or health (Article 94(1)); treason (Article 101(2)); and divisive action during war (Article 102). Murder in the first degree was the only public offence that carried the death penalty (Article 225(1)). The death penalty could be carried out on individuals of 17 years of age or older; previous absence of any regulation on the matter resulted in stipulating a minimum age limit. In practice, the Supreme Court played the interpretive role of the code which the lower courts followed. In a 1935 judgment the Supreme Court defined the purpose of the death penalty as 'eliminating the criminal from society by way of taking away his life, as required in order to protect society'.<sup>11</sup> This line of reasoning was repeated in several judgments in 1937.<sup>12</sup>

In addition to the criminal code, several statutes provided for the death penalty during the pre-war period. This included a Presidential Decree of 19 March 1928 concerning serious crimes,<sup>13</sup> which further extended the application of the death penalty in some twenty instances by the Presidential Decree of 24 October 1934, mostly relating to state security.<sup>14</sup> These Decrees called for the implementation of the death penalty and sought to curtail judicial discretion.<sup>15</sup> The fact that the death penalty was further extended by special legislation reflected the increasing political

---

Polish Abolition Movement), PANSTWO I PRAWO, (1997), No. 1, pp. 80-90.

<sup>10</sup> *Ibid.*, p. 97. See A. Moglnicki and E.S. Rappaport, *Projekt kodeksu karnego dla ziem polskich. Czêæα ogólna* (The Draft of the Criminal Code for the Polish Territories), GAZETA S'DOWA WARSZAWSKA, (1916), No. 16, pp. 181 *et seq.*

<sup>11</sup> *Ibid.*, p. 98. See also judgment of 22 July 1935, ZOSNIK, 2 (1936), item 79.

<sup>12</sup> *Ibid.* See also judgment of 8 July 1938, ZOSNIK, 1 (1938), item 7.

<sup>13</sup> *Dziennik Ustaw*, (1928), No. 33, item 315.

<sup>14</sup> *Dziennik Ustaw*, (1934), No. 94, item 851.

<sup>15</sup> See also the Presidential Decree of 22 November 1938 Concerning Certain Interests of the State, *Dziennik Ustaw*, No. 91, item 623.

tension after General Pilsudski's *coup* in 1926.<sup>16</sup> Nevertheless, judges seldom resorted to the death penalty during the pre-war period, despite the growing number of capital crimes. According to pre-war figures, in 1934, 13 were sentenced to death, nine for murder and four for political crimes.<sup>17</sup> In 1937, 16 were sentenced to death; twelve for murder and four for spying.<sup>18</sup> It is worth noting that during the pre-war period there were nine instances of amnesty in which the death penalty was replaced by the next most severe form of punishment.<sup>19</sup>

In Czechoslovakia, which was formed in 1918, the dual laws of the Austrian and Hungarian monarchy also were incorporated into the criminal system (until 1950). Under an 1858 law the death penalty was applied in cases of first degree murder. In addition, an 1885 law concerning the operation of explosives and a 1915 legislative act concerning military provisions included the death penalty.<sup>20</sup> The total number of criminal offenders executed in Czechoslovakia between 1918 and 1933 was nine.<sup>21</sup> The death penalty was supported by the country's first President, Masaryk, on moral grounds rather than for its deterrent effect.<sup>22</sup>

In Hungary, the application of the death penalty was frequently applied against political enemies, during the collapse of the Austro-Hungarian Empire in 1918, the brief existence of the Soviet Republic in 1919, and the revolution headed by Horthy. By the 1930s, the Horthy regime extended the use of the death penalty to military offences. Despite this no more than two death sentences per year were imposed by courts of regular jurisdiction during this period and a total of six death sentences was imposed in the years 1931-1941 by special courts.<sup>23</sup>

In Romania, which initially adopted an abolitionist stance towards

---

<sup>16</sup> Similar events occurred in Hungary under the Horthy regime. SEE JOSEPH ROTHSCHILD, *EAST CENTRAL EUROPE BETWEEN TWO WORLD WARS, A HISTORY OF EAST CENTRAL EUROPE, VOL. IX* (Seattle: University of Washington Press, 1974); see also Stanisław Frankowski, *Post-Communist Europe*, in Peter Hodgkinson and Andrew Rutherford (eds) *CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS*, (Winchester: Waterside Press, 1996), p. 217.

<sup>17</sup> Zubik, *Kara śmierć w Polsce*, *supra* n. 9, p. 98.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 99.

<sup>20</sup> Robert Fico, *The Death Penalty in Slovakia*, in Tanja Kleinsorge and Barbara Zatlökal (eds.) *THE DEATH PENALTY: ABOLITION IN EUROPE*, (Strasbourg: Council of Europe Publishing, 1999), p. 118.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 217.

peacetime offences, an act was passed by 1924 which reintroduced capital punishment, as a response to the rising crime rate. In 1938, the Romanian Constitution introduced capital punishment for crimes committed against the royal family and high-ranking political figures; the criminal code was subsequently amended to reintroduce the death penalty.

In Bulgaria, similar developments occurred. The 1896 Bulgarian criminal code retained the death penalty and its scope was extended by several statutes.

In sum, it can be concluded that during the early inter-war years, while the death penalty was retained its scope of application and frequency of executions was significantly reduced in CEE countries.<sup>24</sup> However, as from the late 1920s the deteriorating political situation in these countries and across Europe contributed to tendencies towards more repressive measures, including the use of the death penalty. The main impetus for reintroducing or extending the scope of the death penalty was to protect high-ranking political leaders. Interestingly, courts of regular jurisdiction, maintaining the liberal tradition established in the pre-war period, imposed the death penalty almost exclusively in cases of the most serious or heinous crimes, as evidenced in the Polish, Czechoslovak, and later in the Hungarian experiences.

## 2 STALINIST PERIOD (1944-1956)

The Communist era, which lasted from the mid-1940s until the collapse of Communism, requires more comprehensive treatment in view of its relevance to recent developments in the death penalty area. The Stalinist period concerns 1944-1956 and varied between countries that were under Communist rule.

A few remarks as concerns the Soviet legal model under Stalin is warranted, as this model was imposed in the region after the war. Under Lenin, the use of terror was justified on the grounds that coercion and terror were necessary evils of the revolution, particularly during the transition from capitalism to Communism. Lenin unleashed a brutal campaign against class enemies, defined as anyone as who 'stubbornly clung to capitalist traditions'.<sup>25</sup> In order to achieve this aim quickly and effectively, an autonomous quasi-legal body, the All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage (*Cheka*), was created. Revo-

---

<sup>24</sup> *Ibid.*

<sup>25</sup> VLADIMIR ILLYICH LENIN, THE STATE AND REVOLUTION, IN SELECTED WORKS IN THREE VOLUMES, Vol. 2, 2<sup>nd</sup> edn. (Moscow: The Bodley Head, 1983), p. 41.

lutionary tribunals worked alongside the Cheka and sentenced thousands to death: they were not guided by any legal code and both organs managed to successfully eliminate many of the politically inconvenient.

The Cheka was transformed into the NKVD, or the secret police, under Stalin, who also reshaped the agency several times and at each stage employed mass terror against 'socially dangerous' persons.<sup>26</sup>

Stalin appointed his cronies well, and with the help of his top jurist, Andrei Vyshinsky, successfully debased jurisprudence. Principles were created that paved way for practices that made a travesty of the concept of a fair trial. The court could not hope to reach absolute truth, which then had to be satisfied with some degrees of probability; the evaluation was based solely on inner conviction; and the law was viewed as an algebraic formula, to be corrected in the process of application by the judge.<sup>27</sup>

Thus, three components can be said to comprise the Communist version of the criminal justice system, as succinctly described by Frankowski. Firstly, the law, especially the criminal law, is perceived and utilised in an instrumental manner. Secondly, severe punishments are believed to be highly effective in controlling criminality. Thirdly, swift criminal proceedings, free of undue technicalities, are believed to have a substantial deterrent effect.<sup>28</sup> Such a system relies on the death penalty to intimidate the population at large. The system does not pay attention to individual rights in order to strengthen the deterrent effect. Most significantly, the way in which criminal measures are applied, such as the death penalty, is not dictated by penal policy measures but rather political considerations. In other words, the death penalty is primarily a political issue rather a criminal justice issue. At the height of Stalinism, marked by show trials throughout the Soviet bloc, the repressive nature of the criminal law and system was evidenced.<sup>29</sup>

Concerning Poland, after the Second World War the 1932 criminal code was still in force for another twenty years. Yet the death penalty presented itself in a diametrically different way than before 1939, owing to

---

<sup>26</sup> See Voslensky, *ibid.*, p. 47. See also MARIA ŁOGE, COMMUNIST IDEOLOGY, LAW AND CRIME: A COMPARATIVE VIEW OF THE USSR AND POLAND (New York: St Martin's Press, 1988), pp. 12-13.

<sup>27</sup> ROY MEDVEDEV, LET HISTORY JUDGE: THE ORIGINS AND CONSEQUENCES OF STALINISM (New York: Macmillan, 1971).

<sup>28</sup> See Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 218.

<sup>29</sup> See GEORGE HODOS, SHOW TRIALS: STALINIST PURGES IN EASTERN EUROPE, 1948-1954 (New York: Praeger, 1987). See also Katarzyna Maria Piekarska, *Naruszenie zasady jawności w "s'dach tajnych"* (Violation of the Principle of Open Proceedings in the "Secret Courts"), *STUDIA IURIDICA*, 27 (1995), pp. 25-41.

the period and the factors surrounding sentencing. Until present day, inconsistencies exist in Polish legal literature as concerns the use of the death penalty in the years immediately following the war, namely to whom it was applied and which bodies were responsible for carrying out the sentences.<sup>30</sup>

The provisions of the Polish Military Criminal Code from 28 September 1944 concerning state security, which were carried over from the 1932 code, were also applied to civilians after the war. The provisions foresaw 11 crimes which called for the death penalty, which were targeted at potential political opponents. Without changing the Polish criminal code, but introducing new types of crimes to the text, the draconian manner in which the authorities wished to turn the code into a repressive tool was revealed. It is enough to add that by the end of the war the death penalty was reflected in 11 additional statutes. The Decree of 13 June 1946 Concerning Crimes that are Especially Threatening during the Period of the Reconstruction of the State,<sup>31</sup> referred to as the 'small criminal code', foresaw the death penalty in 15 cases. The death penalty was included as an alternative to life imprisonment. Capital punishment was also foreseen in the Decree of 5 August 1949 Concerning Belief and Religion;<sup>32</sup> it was called for in attempts to slander or demean individuals based on their religious convictions, if these attempts resulted in death or serious bodily harm. The death penalty was provided for as an alternative punishment in the Decree of 22 January 1944 Concerning Responsibility for the September Massacre and Fascist State<sup>33</sup> and as a mandatory sentence in the Decree of 31 August 1944 Concerning the Application of Punishment for the Fascist-Nazi Criminals Guilty of Crimes and Attacks on Civilians and Patriots and Traitors of the Polish Nation.<sup>34</sup> A quasi-criminal court was established to hear the cases brought under the August Decree.<sup>35</sup>

In addition to these already harsh provisions, the death penalty was extended to economic crimes. Capital punishment for economic crimes was

---

<sup>30</sup> See Zubik, *Kara śmierć w Polsce*, *supra* n. 9.

<sup>31</sup> *Dziennik Ustaw*, (1946), No. 30, item 192.

<sup>32</sup> *Dziennik Ustaw*, (1949), No. 45, item 334.

<sup>33</sup> *Dziennik Ustaw*, (1944), No. 5, item 46.

<sup>34</sup> *Dziennik Ustaw*, (1946), No. 69, item 377.

<sup>35</sup> The special court was created in September 1944 and dissembled 17 October 1946. The Supreme National Tribunal established by the Decree of 22 January 1946 Concerning Special Courts sentenced 631 persons to death. See Zubik, *Kara śmierć w Polsce*, *supra* n. 9, p. 100, fn. 20.



(and is) characteristic of Communist regimes.<sup>36</sup> Article 9(1) of the Law of 28 October 1950 Concerning the Ban on Possessing Foreign Currency, Gold Coins, Gold or Platinum as well as Making the Punishment Concerning Monetary Crimes More Severe<sup>37</sup> provided for the death penalty as an alternative punishment; in these cases the defendant was found guilty of changing money without the approval of the Monetary Commission.<sup>38</sup> In addition to economic crime, the death penalty was called for cases where public property was stolen,<sup>39</sup> and further extended in 1959 to crimes against public property.<sup>40</sup>

Finally, the Decree of 16 November 1945 Concerning Emergency Measures<sup>41</sup> and the Law of 4 February 1950 Concerning General Military Responsibilities,<sup>42</sup> later amended in 1959,<sup>43</sup> must be mentioned. The first normative act foresaw that in emergency situations the death penalty, regardless of the fact whether it was the punishment for the particular crime. The law concerning the military foresaw the death penalty in 11 circumstances, regardless of whether the offence was committed during peacetime or war. The death penalty was further foreseen in numerous other provisions of the military criminal code.

In former Czechoslovakia, the Law for the Protection of the Republic was passed in 1948. The law was applied in cases of political offences, and ultimately to liquidate the political opposition. Between 1948 and 1950, the total number of death penalties imposed for political offences was 99, and 16 for cases of murder.<sup>44</sup> Between 1950-1953, some 178 people were executed in show trials, with the National Tribunal passing 56 death penalty sentences in 1952 alone.<sup>45</sup> In Hungary, quasi-legal courts were created in 24 cities; 180 of 414 death sentences for war-related or political

---

<sup>36</sup> A good example is China, which is addressed in detail in this publication.

<sup>37</sup> *Dziennik Ustaw*, (1950), No. 69, item 377.

<sup>38</sup> Recently, details of two cases have been uncovered, which have further fueled the controversy surrounding this dark period; prosecutors have filed charges against the presiding judge in one of the cases, claiming that she adjudicated the case with the full knowledge that the defendant had not committed the crimes he was charged with. See Zubik, *Kara śmierć w Polsce*, *supra* n. 9 p. 101.

<sup>39</sup> *Dziennik Ustaw*, (1953), No. 17, item 68.

<sup>40</sup> *Dziennik Ustaw*, (1959), No. 36, item 288.

<sup>41</sup> *Dziennik Ustaw*, (1949), No. 33, item 244.

<sup>42</sup> *Dziennik Ustaw*, (1950), No. 6, item 46.

<sup>43</sup> *Dziennik Ustaw*, (1963), No. 20, item 108.

<sup>44</sup> Fico, *The Death Penalty in Slovakia*, *supra* n. 20, p. 118.

<sup>45</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, pp. 218-220.

crimes were implemented.<sup>46</sup>

In sum, it can be concluded that similar measures were implemented throughout the region. Between 1945 and 1950, the death penalty was provided for in political, military, and capital crimes.<sup>47</sup> For example, although the Bulgarian criminal code defined the death penalty as an exceptional punishment, it was provided for in 25 types of offences; this was extended to over 50 when counting crimes punishable by death or long-term imprisonment.<sup>48</sup> Similar conclusions could be drawn as concerns Romania, where two statutes dealing with war crimes were passed in 1945, based on which anti-Communist supporters were executed.<sup>49</sup>

The manner in which the penalty was imposed and implemented did not meet any standards of basic procedural rights. Frequently, the defendant's right to defence was reduced to a bare minimum. In Poland, the above noted 1945 Emergency Law exemplified the trend: an indictment was filed within 30 days of apprehension, the accused had 72 hours in which to file appropriate evidentiary motion, and the conviction could be appealed within three days and only by the government.<sup>50</sup> Furthermore, capital punishment was imposed outside the formal criminal law apparatus. Quasi-legal judicial bodies were created at various levels at military and common court levels to hear cases that were fabricated and at which evidence was presented that was procured by use of torture. It is estimated that between 1946 and 1953 between 2,000-3,000 death sentences were passed in regular courts and military courts; but the number of people executed outside the regular court system was much higher.<sup>51</sup> The exact figure of death sentences passed during this period will never be determined, although one can be certain that thousands of people were charged and executed for crimes that they had not committed. This dark chapter of Communist rule is only recently being adequately addressed, as more information is being made available in archives and court files, formally classified as secret.<sup>52</sup> It is outside the scope of this chapter to address the

---

<sup>46</sup> *Ibid.*, p. 219.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Zubik, *Kara śmierć w Polsce*, *supra* n. 9, p. 99 and Szumski, *Dzieje polskiego abolicjonizmu*, *supra* n. 9, p. 82.

<sup>52</sup> There is also very little known about the state of prisons in Poland during this period. For an excellent introduction see JAROSŁAW UTRAT-MILECKI, *WIEZIENICTWO W POLSCE W LATACH 1944-1956* (Prisons in Poland in the Years

issues concerning historical justice; what is important to bear in mind is that the arbitrary way in which the death penalty was imposed and the scope of people it affected have at least been considered to be good enough reason to fight for its abolition in the new post-Communist structure. Abolitionists in Poland, former Czechoslovakia, and Hungary have referred to this period when presenting their arguments for abolition.<sup>53</sup>

### 3 POST-STALINIST PERIOD

The post-Stalinist period is usually connected to the relaxation of Soviet control over CEE countries. With the exception of Albania and Romania, the criminal justice systems of the respective countries of the region began to operate in a more 'civilised' manner, at least in comparison to the Stalinist period.

The new criminal codes generally categorised the death penalty as exceptional and temporary, although the scope was still broad. In addition to murder, crimes against the state and state property, as well as economic crimes, were still punishable by death. For instance, in Poland, the 1945 Decree mentioned above remained in force until 1970. The 1969 criminal code, which was in force until 1998, provided for the death penalty in 10 cases, which included sabotage, armed robbery, or organising large-scale speculation. The 1962 Hungarian criminal code provided for the death penalty in nine political crimes, 13 military crimes, two crimes against property, and two public offences related to riots and hazard to public safety.<sup>54</sup> The 1961 Czech criminal code found 32 offences capital, including crime of sedition.<sup>55</sup> The Romanian criminal code found 28 crimes capital and the Bulgarian criminal code reduced the number of capital offences from 50 to 31.<sup>56</sup> The 1977 Albanian criminal code, which replaced the 1952 code, provided for over 30 capital crimes; all anti-state crimes were capital, with the exception of one.<sup>57</sup> With few exceptions, the codes retained similar provisions concerning anti-state, military, property, and economic offences.

---

1944-1956), *Studia: materiały badawcze* (Wrocław: Uniwersytet Wrocławski, 1996).

<sup>53</sup> See, for example, Tibor Horvath, *Kara śmierci na Węgrzech* (The Death Penalty in Hungary), *PANSTWO I PRAWO*, (1990), No. 1, pp. 70-73.

<sup>54</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 222.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

In general, no person under 18 years of age at the time of the commission of the crime could be sentenced to death. In Hungary and Bulgaria the minimum age limit was 20. Further, there were special restrictions concerning the application of the death penalty with respect to women. In all countries the death penalty was prohibited with respect to pregnant women. In Romania capital punishment was prohibited with respect to women with children under three years of age. In some countries, special provisions also existed with respect to the insane or mentally disturbed persons.

Surprisingly, despite the high number of capital offences, the number of death sentences that were passed and implemented was low. The caveat to be recalled, however, is the lack of information, as statistics from the Communist period can be notoriously misleading.

In Poland, between 1964-1969 33 final death sentences were rendered, and between 1970-1975 78 final death sentences were rendered by courts of regular jurisdiction.<sup>58</sup> Clemency could only be granted by the Council of State (*Rada Państwa*). Under martial law, the number of death sentences curiously was less than the previous decade. In comparison, in former Czechoslovakia, 91 final death sentences were rendered in the period 1962-1989 by courts of regular jurisdiction, which seems to be the lowest death rate in the region.<sup>59</sup> In Hungary, in the period 1962-1987, 118 death sentences were rendered by courts of regular jurisdiction, but it is not clear how many were implemented.<sup>60</sup> In Bulgaria, 155 death sentences were passed during 1984-1989, which is amazing when one considers that at the time the population was nine million.<sup>61</sup> In Romania, during 1980-1989, 77 death sentences were rendered, with at least 50 of those executed, some for murder and other for large-scale thefts of state property.<sup>62</sup>

Interestingly, in the discussions concerning the drafting of the Polish criminal code, capital punishment became the topic of serious debate among the criminal law community. Already in 1956 two prominent criminal lawyers spoke out against capital punishment,<sup>63</sup> and in 1963 in her article Maria Ossowska recalled Marxist theory and questioned the reason-

---

<sup>58</sup> Zubik, *Kara śmierć w Polsce*, *supra* n. 9, p. 103.

<sup>59</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 223.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, p. 224.

<sup>62</sup> *Ibid.*

<sup>63</sup> S. Ehrlich, *Głos przeciw karze śmierci* (A Vote Against the Death Penalty), *Nowa Kultura*, (1956), No. 28 and W. Wolter, *Znieść karę śmierci* (Abolish the Death Penalty), *Nowa Kultura*, (1956), No. 30, as quoted in Zubik, *Kara śmierci w Polsce*, *supra* n. 9, p. 101, fnn. 29 and 30.

ing behind the state's decision not to adhere to Marxist thought.<sup>64</sup> A decade later two interesting monographs were written on the subject, both from an abolitionist perspective. The first, from 1966 by the criminal law scholar Marian Ciec lak, provided a global overview of the death penalty and argued for its abolition at least during peacetime.<sup>65</sup> The second, written in 1978 by Alicja Grze kowiak, argued that the death penalty had no place in a modern, rational penal system, as the deterrent effects of the death sentence were unsubstantiated.<sup>66</sup> With the birth of the Solidarity movement, civil rights and liberties were more openly discussed, including the abolition of the death penalty during peacetime. In a thoughtful essay written in 1979, Jerzy Jasi nski argued that the utilitarian and the moral positions were necessary to distinguish when addressing the death penalty; he concluded that in the end arguments supporting this form of punishment were fundamentally weak.<sup>67</sup> The abolitionist stance in Poland gained momentum with the birth of the Solidarity movement.<sup>68</sup> The debates concerning the death penalty which were occurring in Poland coincided with the discussions that were taking place at the international level, within the United Nations and the Commission on Human Rights.

In sum, the post-Stalinist period, while it did not bring about abolition, and certainly not a decrease in capital offences in the region (although the number of executions was quite low when considering the number of capital offences), it demonstrated a marked change in the implementation of capital punishment. In general, during this period, the number of death sentences that were carried out decreased. It should be recalled that the existence of capital punishment was harder to defend during the period of socialist legality: if Marx wanted a civilised society then the problem arises in how the death penalty fits into this conception.<sup>69</sup>

Lastly, as the Communist regime was visibly weakening, the idea of a fixed moratorium seemed tangible, which eventually resulted in an indefinite moratorium and, in most cases, the eventual abolition of the

---

<sup>64</sup> Maria Ossowska, *Og lne refleksje zwi zane z projektem nowego kodeksu karnego* (General Reflections Concerning the Draft Criminal Code), PANSTWO I PRAWO, (1963), Nos. 5-6, pp. 900 *et seq.*

<sup>65</sup> Marian Cie lak, *Problemy kary  mierci*, PANSTWO I PRAWO, (1966), No. 12, pp. 833-853.

<sup>66</sup> ALICJA GRZE KOWIAK, *KARA  MIERĆ, W POLSKIM PRAWIE KARNYM* (The Death Penalty in Polish Criminal Law) (1978).

<sup>67</sup> Jerzy Jasi nski, cited in Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 225.

<sup>68</sup> Zubik, *Kara  mierć w Polsce*, *supra* n. 9, p. 105.

<sup>69</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 224.

death penalty after the collapse of Communism in 1989.

#### 4 CURRENT DEVELOPMENTS

As noted in the introduction, the collapse of Communism resulted in the abolition of the death penalty, or at least in its restriction, throughout the region. The quickness with which this was adopted varied from country to country, and depended in large part in the manner that the transition to democracy was followed, namely by negotiation (Poland, Hungary) or more violent means (Romania).

The present status of the death penalty in the CEE countries may be briefly described as follows. The Czech Republic, Slovakia, Slovenia, Croatia, and Romania have abolished capital punishment by legislation. The constitutions of these countries prohibit capital punishment under the heading or section that concerns human dignity or the inviolable right to life.<sup>70</sup> The question of the death penalty in Hungary, Lithuania, and Albania was dealt with by the countries' respective Constitutional Courts.<sup>71</sup> These countries have signed the Sixth Protocol to the ECHR, and two of them (Hungary and Romania) have also signed the Optional Protocol to the ICCPR. The death penalty has recently been abolished in Poland and Bulgaria, after a long moratorium.

The first country to abolish the death penalty was Romania. This was done immediately following the violent revolution of December 1989, when the Ceausescu regime was overthrown by the National Salvation Front. On 27 February 1991 Romania ratified the Second Protocol to the ICCPR, and the new Constitution which was adopted 8 December 1991

---

<sup>70</sup> The Czech Republic's Constitution of 16 December 1992 is interesting from several points of view. It has a separate Charter for Fundamental Rights and Freedoms and in Article 10 of the Constitution it is declared that human rights treaties are superior to law. Article 10(3) of the Slovakian Constitution of 1 September 1992 prohibits capital punishment; Article 17 of the Slovenian Constitution of 23 December 1991 declares that there will be no capital punishment in the country; Article 21(2) of the Croatian Constitution of December 1990 claims that there is no capital punishment. All documents can be found in English on [http://www.uni-wuerzburg.de/law/index\\_html](http://www.uni-wuerzburg.de/law/index_html).

<sup>71</sup> The Hungarian Constitution of 20 August 1949, with amendments from 1996, declares an innate right to life and dignity of man (Article 54) and the Lithuanian Constitution of 25 October 1992 declares a right to life (Article 93) and that the private life of an individual shall be inviolable (Article 22).

prohibits the death penalty (Article 22).<sup>72</sup> In May 1994, the Sixth Protocol to the ECHR was ratified.

In the former Czechoslovakia, an informal moratorium was imposed and, in 1990, the then Czech and Slovak Republic amended the criminal code and abolished the death penalty for all offences, despite public support for retaining capital punishment. On 18 March 1992 the Sixth Protocol to the ECHR was ratified.

As of 1997, Poland has a new criminal code, which entered into force 1 January 1998.<sup>73</sup> It is significant for criminal law to note that the 1997 Constitution gives precedence to international agreements (ratified by Parliament) over laws.<sup>74</sup> Article 38 of the Polish Constitution declares that everyone has a right to life, which can be interpreted as prohibiting the introduction of the death penalty into ordinary legislation. This provision is further supported by Article 40, which forbids the application of corporal punishment: it can be argued that capital punishment could be included in this category. Yet, the prohibition of the death penalty as such is not mentioned in the Constitution (as opposed to, for example, the Romanian case). This can be attributed to the debates that centred around the drafting of the document and the subsequent referendum on the Constitution. Despite this, scholars see little room for the reintroduction of the death penalty, especially with the combined reading of Articles 38 and 40.<sup>75</sup> As international agreements ratified prior to the consent of the Parliament have precedence over laws Polish criminal legislation inconsistent with such agreements cannot be applied and, further, should be eliminated from the legal system (Article 188(2)). Ratified international agreements should also guide the mode of interpretation of domestic legal provisions.

In addition, Article 30 of the Constitution imposes an obligation on state bodies and on the legislator to protect the dignity of the individual not only against threats on the part of the state but also by other persons. The law maker is responsible for ensuring the protection of this dignity against

---

<sup>72</sup> Article 22 falls under the Chapter concerning the right to life, to physical and mental integrity. An English version of the Romanian Constitution can also be found on <http://domino.kappa.ro/guvern/constituia-e.html>. See also Tiberu Dianu, *The Romanian Criminal Justice System*, in Stanislaw Frankowski and Paul B. Stephens III (eds.), *LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN* (Dordrecht: Martinus Nijhoff, 1995), pp. 257-273.

<sup>73</sup> *Dziennik Ustaw*, (1998), No. 88, item 553.

<sup>74</sup> See Zoll, *The New Polish Criminal Law Codification*, *supra* n. 7, pp. 89-99.

<sup>75</sup> *Ibid.* See also Pawel Sarnecki, *Opinie: Dopuæczalnoææ kary æmierci w æwietle obowi'zuj'cych przepisów konstytucyjnych* (Opinion: Retention of the Death Penalty in Light of Constitutional Provisions), *PRZEGL'Ð SEIMOWY*, 3 (2000), pp. 77-85.

any transgressions. Thus the provisions of Article 3 of the criminal code are extended by this constitutional provision; the subject is no longer only a subject of criminal law protection. The provisions are extended to the imposition of punishment and punitive actions by criminal law and the right to respect the dignity of the person must be addressed.<sup>76</sup> The prohibition of subjecting anyone to torture or inhuman treatment (Article 40) is relevant in this case.

The role of the Catholic Church is interesting with respect to the abolition of the death penalty. In Polish society, which is predominantly Catholic, the stance of the Church is quite significant. The position of the Church in Poland with respect to capital punishment has been one characterised by inconsistency to say the least. The signing of the 'catechisms' by Pope John Paul II in 1992 resulted in a heated debate in Poland, especially as it coincided with discussions on the codification of the criminal law. Various scholars have speculated as to the Church's position on the subject of capital punishment. On the one hand, it appears that the Church has left the question of capital punishment in the hands of the state, as a matter of legislation, which finds favour among retentionists; on the other hand, it seems to be suggesting that states can do without the death penalty. According to Jasiński, there is no conflict between these two positions.<sup>77</sup> In any event, life imprisonment (or a 25-year sentence) has replaced the death penalty in the criminal code.

The position of Poland with regard to capital punishment is similar to Bulgaria, where a moratorium was imposed in 1990 and as of 1998 a new criminal code was promulgated in which capital punishment was replaced by life imprisonment. Bulgaria has struggled with the question of retention of capital punishment as a means to control the increasing crime rate.<sup>78</sup>

Since the collapse of Communism, disillusionment with the inefficient nature of the criminal justice system and inability to combat crime was evidenced in the CEE countries. The crisis was (as still is) further fueled when politicians choose to manipulate discussions concerning the ineffectivity of the criminal law, thereby trumpeting the call for the reinstatement of capital punishment.<sup>79</sup>

---

<sup>76</sup> See Zoll, *The New Polish Criminal Law Codification*, *supra* n. 7, pp. 90-91.

<sup>77</sup> Jerzy Jasiński, *Kościół wobec kary śmierci* (The Church with respect to the Death Penalty), *PANSTWO I PRAWO*, (1995), No. 7, p. 56.

<sup>78</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 228.

<sup>79</sup> Since 1989, the crime rate in CEE countries has been on the rise, and crimes previously unknown under the former Communist structure have emerged. For a brief overview, see Wojciech Cebulak, *Rising Crime Rates Amidst Transformations in Eastern Europe: Socio-Political Transition and Societal Response*,



In Albania, for example, where instability and mass corruption have prevailed during most of the post-Communist period, an appeal was made in 1998 by the Minister of the Interior to the Council of Europe for Albania to temporarily reinstate the death penalty.<sup>80</sup> Albania has as of 1 June 1995 adopted a new criminal code and code of criminal procedure,<sup>81</sup> however many problems have not been resolved with respect to significant points of procedural law; several persons have been charged with the same crime twice – one can only speculate as to the consequences should the death penalty be reinstated.<sup>82</sup> International norms emphasise the need for the most careful procedure to be followed in death penalty cases.<sup>83</sup> With this in mind, Albania adopted a new Constitution on 21 October 1998, in which it is declared that no one may be punished or tried for the same crime twice (Article 34). It should be noted that the Albanian Constitution declares that no one may be subjected to cruel, inhuman, degrading torture, punishment or treatment (Article 25). In December 1999, the Constitutional Court ruled that capital punishment is unconstitutional. This decision will be discussed shortly. Needless to say, the Council of Europe has placed enormous pressure on Albania to amend its laws with respect to capital punishment.<sup>84</sup>

The Polish Constitutional Tribunal has not addressed the question of the death penalty, as have its Hungarian and Lithuanian counterparts, the former of which ruled, already in 1990, that the death penalty violated the 'innate right to life and dignity of man', in breach of Article 54 of the Hungarian Constitution.<sup>85</sup> In Lithuania, five executions were carried out in 1994, the last one in 1995, after an appeal for clemency was denied.<sup>86</sup> On 29 July 1996 President Brazauskas signed a decree to abolish the death

---

INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE, 20 (1996), pp. 77-82.

<sup>80</sup> See *Survey of East European Legislation*, (1998), Vol. 9, No. 1, p. 11.

<sup>81</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1996), Vol. 4, No. 2, p. 4.

<sup>82</sup> For the 'double jeopardy' problem, see *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1996), Vol. 5, No. 1, p. 3.

<sup>83</sup> See Amnesty International, *The Death Penalty: No Solution to Illicit Drugs*, INTERNATIONAL REVIEW OF PENAL LAW, (1996), Nos. 3-4, pp. 655-701.

<sup>84</sup> See *Survey of East European Legislation*, (2000), Vol. II, No. 2, p. 8.

<sup>85</sup> The decision of the Hungarian Constitutional Court is treated in detail in this publication.

<sup>86</sup> For details see *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1995), Vol. 4, No. 1, p. 17; also *ibid.*, (1995), Vol. 4, No. 3, p. 15.

penalty.<sup>87</sup> In 1998, the Constitutional Court ruled that the death penalty violated the right to life (Article 22(1)) and the constitutional provision prohibiting cruel and unusual punishment (Article 21(3)), and it called upon legislators to amend the criminal code accordingly, namely Article 105, which provided for the death penalty in cases of first degree murder.<sup>88</sup> The ruling of the Albanian Constitutional Court with respect to the death penalty was based on the violation of the constitutional provision ensuring the protection of human life (Article 21), alongside the protection of human rights and freedoms (Article 15). The Court further noted that although Article 21 did not specifically prohibit capital punishment, it should not be assumed that it should be permitted.<sup>89</sup> In anticipation of the ratification of the Sixth Protocol to the ECHR, the Court further emphasised that Article 21 must be read in tandem with Article 17(2), which stipulates that limitations to human rights must not exceed the limitations provided for in the European Convention on Human Rights. As noted in the Polish case, international agreements that are ratified (in this case the Sixth Protocol to the ECHR) are immediately incorporated into the legal system and superior to normative acts (although it may be the case that Albania ratifies the Sixth Protocol sooner than Poland).

On 18 May 1998 a new Latvian criminal code was adopted by Parliament.<sup>90</sup> Although the former Soviet-era code had retained the death penalty, President Ulmanis declared that he would pardon any appeals for clemency. The government proposal retained the death penalty.<sup>91</sup> The proposal was adopted on 17 June 1998 despite having been returned to Parliament by the President, who requested that the death penalty clause be deleted. The President was not able to veto a second time, according to Article 71 of the Constitution; thus the new code was promulgated, to the dismay of the international community. Latvia, to appease their concern, eventually signed the Sixth Protocol to the ECHR, but argued at the time that it could not envision abolition until after 2001 when certain prison

---

<sup>87</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1996), Vol. 5, No. 4, p. 17.

<sup>88</sup> The decision of the Lithuanian Constitutional Court can be found (in English) on [http://www.lrlt.lt/index\\_en.htm](http://www.lrlt.lt/index_en.htm).

<sup>89</sup> The decision of the Albanian Constitutional Court can be found (in English) on <http://www.ipls.org/services/court/cn65.html>.

<sup>90</sup> For information about the Latvian criminal code in English see <http://www.jm.gov.lv/eindex.htm>.

<sup>91</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1998), Vol. 7, No. 2, p. 17.

reforms would be concluded.<sup>92</sup>

Another country that has retained the death penalty in its criminal code is Belarus.<sup>93</sup> The Constitution of the Republic of Belarus of 15 March 1994 declares that everyone has a right to life (Article 24(1)) and that no one shall be subjected to torture or cruel and inhuman or undignified treatment or punishment (Article 25(3)), however, the death penalty may be applied until its abolition in accordance with the law as an exceptional penalty for particularly serious crimes (Article 24(3)).<sup>94</sup> Considering that the current president has blatantly ignored the rulings of the Constitutional Court,<sup>95</sup> one can only speculate as to the outcome should the question of the death penalty reach this body.

In the remaining Baltic state, Estonia, the Minister of Justice called for the abolition of the death penalty in 1995 to bring the country into conformity with European practice and called for the country to become 'morally mature'.<sup>96</sup> It took five years for Estonia to eventually codify the ban into law, and on 18 March 1998 it ratified the Sixth Protocol to the ECHR.

There have been cases where ratification of the Sixth Protocol to the ECHR has not resulted in total compliance. For example, in the Ukraine, which was obliged to abolish the death penalty further to ratifying the Sixth Protocol on 6 October 1997, problems arose when it failed to do so.<sup>97</sup> In mid-1998 the President submitted a proposal to the Parliament to introduce a moratorium. This resulted in a conflict over competence; the head of the parliamentary administration declared that the President was outside his scope of power in submitting such a proposal. Subsequently, the parliamentary chairman instructed the Parliament instructed to prepare a draft law on imposing a moratorium.<sup>98</sup> Hopefully, essential steps will be taken further to the recent judgment of the Constitutional Court, which

---

<sup>92</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1998), Vol. 7, No. 3, p. 18.

<sup>93</sup> For information about the Belarussian criminal code in English see <http://www.belarus.net>.

<sup>94</sup> Article 17 of the Armenian Constitution of 5 July 1995 contains a similar provision with respect to the death penalty.

<sup>95</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (2000), Vol. 9, No. 3, p. 6.

<sup>96</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1995), Vol. 4, No. 4, p. 7.

<sup>97</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (1998), Vol. 7, No. 1, p. 42.

<sup>98</sup> *Ibid.*

ruled that the death penalty is unconstitutional according to Article 27 of the Constitution (which recognises the right to life) and recalled the obligations that the Ukraine bound itself to in 1995 upon joining the Council of Europe.<sup>99</sup>

Last, with respect to the remaining territories of the former Yugoslavia, it should be mentioned that the Constitution of Yugoslavia of 27 April 1992, in Article 21(1) declares that the right to life is inviolable and that (2) criminal offences prescribed by federal legislation may not carry the death penalty. The Constitution of Bosnia-Herzegovina of 1 December 1995, adopted as Annex 4 to the Dayton Peace Agreement, states in paragraph 3(a) that everyone has a right to life and that (b) no one shall be subjected to torture or cruel and inhuman or undignified treatment or punishment.

In sum, the influence of the international community and future membership in the European Union clearly have been decisive factors in the move towards abolition. It can be concluded that most CEE countries are abolitionist; where this is not the case the road to the eventual abolition of capital punishment seems to be paved.

## 5 CONCLUDING REMARKS

In this chapter, an overview of the abolition of capital punishment in CEE was presented. The role of the criminal law and the criminal justice system was examined in four different time periods, beginning with 1918 until present day. The pre-war period was marked by an increase in capital crimes by the mid-1930s, corresponding to the turbulent events in Europe and the rise in authoritarian-style regimes. Nonetheless, courts almost always chose the next alternative punishment, as noted in the Polish, Czech, and Hungarian cases. The Stalinist period was characterised by terror and repression; the Soviet model which was imposed in the CEE countries made a travesty of the criminal law and ignored basic procedural rights; the death penalty was used as a tool to eliminate political opponents and to this day the extent of individuals affected is still unknown. The post-Stalinist period represented a relaxation in the Soviet grip over CEE countries; the drafting of new criminal codes was undertaken in the region, although the catalogue of capital offences was quite extensive. Having said this, the number of final death sentences rendered was quite low, at least in the Polish, Czech, and Hungarian cases, but not in the cases of Bulgaria or

---

<sup>99</sup> See *Constitutional Watch*, EAST EUROPEAN CONSTITUTIONAL REVIEW, (2000), Vol. 9, Nos. 1-2, p. 43.

Romania. Once again, statistics collected in all CEE countries are unreliable, but one can assume that the death sentences imposed in this period in Bulgaria were much higher than the figures actually indicate.<sup>100</sup> The weakening of the Communist structure ushered in more open discussions concerning abolition and unofficial moratoriums were recognised.

Since then, most CEE countries are abolitionist, and have reached this point through different avenues. Hungary and Lithuania had the death penalty addressed by their respective Constitutional Courts. The Czech Republic, Slovakia, Slovenia, Croatia, and Romania abolished the death penalty in legislation and specifically in their respective Constitutions. These countries (and Estonia) have ratified the Sixth Protocol to the ECHR. Poland and Bulgaria have eliminated the death penalty from their respective criminal codes, while Latvia has not, although it has signed the Sixth Protocol to the ECHR, but unlike Poland, has not ratified it. The Ukraine, which has ratified the Protocol, is still in the process of drafting legislation on imposing a moratorium. The Republic of Belarus and Latvia have retained the death penalty, but in the latter case abolition is foreseen in the very near future.

Whereas the tendency in the pre-war period was to extend the scope of capital punishment to protect high-ranking political figures, in the post-Communist period CEE countries argue that the death penalty is an effective solution to combat organised crime and other types of offences, as seen in the Albanian and Bulgarian experiences, but not excluding other countries in the region. Obviously one of the most central dilemmas in the transition from an illiberal to a liberal society is 'to what extent this shift is guided by conventional notions of the rule of law' and how the law advances the transition as opposed to its role in adherence to conventional legality.<sup>101</sup> As Teitel rightly observes, criminal justice in transition raises profoundly difficult questions as concerns punishment and the balance that must be achieved between a transitional form of criminal justice and one that is guided by established notions of the rule of law of established democracies.<sup>102</sup> These are not easy questions, to say the least, nevertheless, issues that concern punishment must be clear and predictable and the death penalty should most certainly not be used solely as a political tool.

Of course, whether the process is irreversible is of speculative nature. The Polish case was explored above with respect to the Constitution. Considering that the European Union has placed abolition as a condi-

---

<sup>100</sup> Frankowski, *Post-Communist Europe*, *supra* n. 16, p. 224.

<sup>101</sup> RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (Oxford: Oxford University Press, 2000), p. 27.

<sup>102</sup> *Ibid.*

tion for membership, at least this criteria influences future decisions. This makes the decision a politically-motivated one, rather than a crime control issue. Very few politicians actually believe in the deterrent effects of the death penalty, although in some cases, such as Poland and Albania, such arguments have been presented to the public.<sup>103</sup> It is clear that the death penalty is used by political leaders as a means to ease social tension. In other cases, the abhorrent events of totalitarian rule have undoubtedly had some influence on arguments for abolition, but this too is not directly related to crime control issues.

In any event, domestic courts fulfil the essential function and crucial role in the transition and in the relationship between international and national law. This places the national court in a particularly sensitive position. A detailed discussion about monism-dualism is outside the scope of this chapter, however, if we take the Polish, Czech, or Albanian cases as examples, suffice it to say that the judge in the monist system, where international law is directly incorporated into the legal system, assumes a functionary role in applying international law within the domestic legal order.<sup>104</sup> This recalls the observations made by Zoll,<sup>105</sup> and at least provides some assurance that any legislation incompatible with the Constitution must be immediately eliminated. In the cases of most CEE countries, constitutional provisions specifically prohibit the death penalty, and in others cases constitutional clauses exist that protect the right to life or prohibit cruel and unusual punishment, or both. This may be the key, should the question of the death penalty be (re-) examined in one of the courts of the CEE countries in the future.

In closing, it can be said that the progress that has been made with respect to the abolition of capital punishment in CEE is not only rapid, but one which has gained momentum as the international community continues to strive towards worldwide abolition. With any hope, total abolition throughout the region will be reached before too long.

---

<sup>103</sup> The present Polish Minister of Justice seems to be an advocate of deterrence. See *Łagodność rozzuchwa'a przestêpców* (Relaxation [of the Criminal Code] Encourages Criminals), RZECZPOSPOLITA, 16 October 2000, pp. C1-C2.

<sup>104</sup> Of course, the judge will have to determine the self-executory nature of the provisions. See, for example, PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW*, 7<sup>th</sup> revised edn. (London: Routledge, 1997), pp. 63-65 and literature cited therein.

<sup>105</sup> See Zoll, *The New Polish Criminal Law Codification*, *supra* n. 7, pp. 89-99.