

IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS NORMS IN UKRAINIAN LEGISLATION*

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I. INTRODUCTION - HISTORICAL DEVELOPMENTS

Historically, Ukraine has had independence several times in its history and has time-honored democratic traditions. In the twelfth century, in the Ukrainian state of Kyivan Rus, Prince Yaroslav the Wise ordered all the rights written down in a code of laws known as the *Ruska Pravda* (The Rus Truth). This code illustrates that Ukrainian ancestors valued human honor, respected their elders, and punished thieves and murderers. Though there was no capital punishment, crimes were punishable with monetary fines, and the heaviest penalty was banishment (for horse theft and arson).

The Constitution of Hetman Pylyp Orlyk of 1710 included human rights norms: the right to land of childless widows, of elected and ordinary cossacks, of private persons, etc. (art. IX); the right to elected *uryadnyks* (governors) and *polkovnyks* (colonels) (art. X); and the right of cossack widows, orphans, and women whose husbands are at war or in other military

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services to be free from the burden of taxes and other common duties (art. XI).¹

The Third Universal Law of the Central Rada (Council) in 1917 abolished capital punishment and guaranteed the freedoms of speech, press, worship, assembly, association, strikes, inviolability of person and residence, and the right and opportunity to use the native language in dealing with all administrative agencies. The Russian, Jewish, Polish, and other peoples in Ukraine were granted national-personal autonomy to guarantee their own self-government in all matters of their national life.²

The Fourth Universal Law of the Ukrainian Central Rada, which proclaimed the independence of the Ukrainian People's Republic, reaffirmed all democratic freedoms of the Third Universal Law and, particularly, the right to national-personal autonomy of all nations.³ The Constitution of the Ukrainian People's Republic of 1918 proclaimed equality of citizens in civil and political rights (without any privileges of birth), worship, nationality, education, property, and taxation (ch. 2.12); equality of rights and duties of men and women (ch. 2.11); the rights to the inviolability of their home (ch. 2.15); secrecy of their correspondence (ch. 2.16); freedom of speech, press, conscience, organization, and strike (ch. 2.17); freedom of movement and residence (ch. 2.18), etc..⁴

There were other laws in the constitutional history of Ukraine. All this proves that Ukrainian democracy has deep roots and rich history. Although the Ukrainian Soviet Constitution formally provided for all internationally recognized human rights, there was little tolerance for actions and prac-

1. PACTY TA CONSTYTUTSII ZAKONIV TA VOLNOSTEY VIYS'KA ZAPOROZ'KOHO, (May 10, 1710), *reprinted in* THE HISTORY OF UKRAINIAN CONSTITUTIONALISM 10 (1996).

2. THIRD UNIVERSAL LAW OF THE UKRAINIAN CENTRAL RADA, KYIV, (Nov. 7, 1917), THE HISTORY OF UKRAINIAN CONSTITUTIONALISM (in documents) 102 (1996) [hereinafter UKRAINIAN CONSTITUTIONALISM].

3. FOURTH UNIVERSAL LAW OF THE UKRAINIAN CENTRAL RADA, UKRAINIAN CONSTITUTIONALISM, *supra* note 2, at 105.

4. CONSTITUTION OF THE UKRAINIAN PEOPLE'S REPUBLIC, (Apr. 29, 1918), UKRAINIAN CONSTITUTIONALISM, *supra* note 2, at 24.

tices incompatible with the Communist Party's ideology. Human rights were not observed.

Since the adoption of The Act of Independence of Ukraine in 1991, much has been achieved in the field of human rights and in the implementation of international human rights norms through Ukrainian legislation in particular. According to Professor Petro Rabinovych, implementation of international legal principles and norms on human rights means adoption of the system created by international organizations along with certain legal means for realizing national protection and defense of these rights in a given state.⁵ However, as J.P. Humphrey has pointed out: "[T]he most important thing that could have been accomplished by the Covenants has not been achieved: the creation of an effective system of international implementation, which originally was to have been the third part of the International Bill of Human Rights."⁶ So the mechanisms for implementation of international human rights norms provided by the covenants are weak. The regional conventions relating to the implementation of human rights recognized individuals as subjects of international law, inasmuch as they may lodge a complaint with a regional commission on human rights if their human rights are violated. But the state concerned is in a strong position since the individual must first of all have exhausted all the national procedures of appeal available. So a state plays the main role in the implementation of international human rights norms.

Ukraine's recovery of its independence in 1991 meant not only liberation but also new obligations. As a member of the international community, Ukraine is bound by international law, human rights law in particular. So the question arose as to how to satisfy Ukraine's treaty commitments and how to accede to new treaties. The fact that in November, 1995, Ukraine became the 37th member of the European Council means that much has been done in the sphere of human

5. Petro M. Rabinovych, *Problemy yurydychnoho zabezpechennya prav lyudyny (zahal'no-teoretychnyi aspekt)* (unpublished, forthcoming article).

6. J.P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 540 (1976).

rights, particularly through recognition of the principle of the rule of law. But much is still to be done.

Ukraine has ratified more than 50 of the International Labor Organization's (ILO) conventions directly related to human rights issues. Ukraine has also participated in the preparation and adoption of more than 60 resolutions, declarations, covenants, conventions, treaties, agreements, and other documents which created specific human rights obligations for parties. Of the 22 most important international instruments on human rights, Ukraine is a signatory to 14, and in each case was not the last to ratify them. Ukraine was among the first 20 states to ratify the International Covenant on Economic, Social and Cultural Rights (three years before it entered into force) and the International Covenant on Civil and Political Rights (seven years before it entered into force). Ukraine also ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crimes of Apartheid, the Convention Against Apartheid in Sports, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Prevention and Punishment of the Crimes of Genocide, and the Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes Against Humanity.

With the proclamation of the 1990 Declaration on State Sovereignty of Ukraine,⁷ Ukraine proclaimed its preference for universal human principles over class principles. Priority was also given to universally-recognized norms of international law over national law norms. Ukraine has ratified a number of other international treaties on human rights, including the Optional Protocol to the International Covenant on Civil and Political Rights (1966). The Ukrainian state thereby recognized the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. For Ukraine, this protocol came into force on October 25, 1991.

7. DECLARATSIA PRO DERZHAVNYI SUVERENITET UKRAYINY, July 16, 1990, PRAVA LYUDYNY 7-12 (1992).

Although the treaty has been ratified, the state mechanism for its fulfillment has not been established.

II. IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS NORMS

The implementation of international human rights norms in Ukrainian legislation is regulated by the Declaration on State Sovereignty of Ukraine, the law "On the functioning of international treaties in the territory of Ukraine" (Dec. 10, 1991),⁸ and the law "On international treaties of Ukraine" (Dec. 22, 1993).⁹ Under these laws all international treaties concluded and duly ratified by Ukraine shall become an integral part of Ukraine's national legislation and shall be applied and implemented according to the procedures envisaged for rules of the national law. But a number of questions arise. The Ukrainian national system of law operates on the principle of a hierarchy of legal acts, and this principle has not yet been established in the field of international law. So what part of the national legislation would international treaties constitute? Would they be equivalent to the Constitution, or to a statutory law? As Professor of the Ukrainian Institute of International Relations, and Chairman of the Committee on Human Rights, Ethnic Minorities and International Relations of the Ukrainian Parliament, Volodymyr Butkevych, has stated: "Without determining the ranking of such international treaties in the system of the national legislation their proper application and implementation is [sic] impossible."¹⁰ Furthermore, Ukraine's statutory law system is unlike traditional common law systems. While the English Court, for example, can make laws by adjusting them to standards of international law, Ukraine is deprived of such a possibility.

The Committee on Human Rights, Ethnic Minorities and International Relations of the Supreme Rada (Council) of

8. Law of Ukraine, *Pro diyu mizhnaradnykh dohovoriv na terytoriyi Ukrayiny*, Dec. 10, 1991, PRAVA LYUDYNY 16-17 (1992).

9. Law of Ukraine, *Pro mizhnarodni dohovory Ukrayiny*, Dec. 22, 1993, 5 POLITYKA I CHAS 87-92 (1994).

10. Volodymyr Butkevych, *Human Rights in Ukraine*, 1 POLITICAL THOUGHT 188 (1993).

Ukraine, and in particular, its subcommittee on human rights, analyzes the legislation in force in Ukraine concerning human rights from the point of view of its conformity to the norms of international law, and analyzes new bills which are submitted for consideration by the Supreme Rada with a view to securing through them the universally-recognized human rights.

According to Volodymyr Butkevych, there are several directions in which the committee works. One of them is bringing the legislation of Ukraine into compliance with the international instruments which are concerned with human rights. Bills are submitted for the consideration of the Supreme Rada concerning changes and supplements to Ukrainian legislation. The other direction of the committee's activity is connected with situations in which Ukraine is not a party to certain international instruments. The committee analyzes the possibility of joining them and also tries to submit new bills concerning human rights for review by international experts. For instance, international experts highly valued the law "On Citizenship of Ukraine" and other documents.¹¹

The speaker of the Supreme Rada of Ukraine, Olexandr Moroz, states that as a rule, bills concerning human rights are submitted for consideration after they have been subjected to a detailed examination by international law specialists. With respect to complicated bills on such matters as foreign adoption, citizenship, and the like, expert advice is sought from the international organizations concerned with those subjects, particularly the United Nations Organization (UNO).¹²

An additional consideration is how Ukrainian legislation receives international human rights norms. According to Article 3 of The Universal Declaration of Human Rights: "[E]veryone has the right to life, liberty and security of person." Article 5 in the development of this principle states that: "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In the draft Constitution

11. See Volodymyr Butkevych, *Prava Lyudyny-ponad use*, 1 HOLOS UKRAYINY 4 (1995).

12. *Ukrayina i prava lyudyny* (O. Moroz answers the questions), 235 HOLOS UKRAYINY 3 (1994).

of Ukraine, it is laid down that everyone has an inalienable right to life and cannot be arbitrarily deprived of it. The defense of this right is first of all the responsibility of the organs of internal affairs and the militia, which should build their relations with citizens taking into account the defense of human life and health. The law of Ukraine, "On militia" (Dec. 20, 1990),¹³ sets forth the responsibilities of the militia in observing citizen rights (*i.e.*, absence of prejudice, keeping to the law, ensuring that no emergencies or officials' instructions can be considered grounds for violating human rights, humane treatment of a person, respect for the dignity of a human person, etc.).

Some principles of the act as regards the militia such as those pertaining to the detention or arrest of a person do not correspond to international standards of human rights. The international norm for this situation is:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or should be released. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.¹⁴

In the view of Ukrainian lawyers Volodymyr Kopeychuk, Olexandr Oliynyk, and others, such a principle should be fixed in the law "On militia" which currently deals only with the power of militia to take some actions against citizens for violat-

13. Law of Ukraine, *Pro militsiyu*, Dec. 20, 1990, 4 VIDOMOSTI VERKHOVNOYI RADY UKRAYINY 95-111 (1991).

14. See Articles 9, 2-5, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (*entered into force* 1976).

ing public order or committing serious offenses. But the law does not include the right of the citizen to appeal against an unlawful detention or arrest.¹⁵ The new draft Constitution of Ukraine contains a provision that anyone who is deprived of his liberty by arrest or detention should be brought promptly before a judge or other officer authorized by law to exercise judicial power.

Of great importance in this connection is Article 11.1 of The Universal Declaration of Human Rights, according to which: "[E]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law."¹⁶ This norm is included in both the Constitution in force in Ukraine and the Draft Constitution.

Article 7 of The Universal Declaration of Human Rights guarantees all people equality before the law and equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. According to Article 11.1, everyone has all the guarantees necessary for his or her defense. One of the first among the states of the former Soviet Union, Ukraine adopted the progressive law, "On advocacy" (Dec. 19, 1992),¹⁷ which foresees binding guarantees of the right of citizens to defense, as fixed in international instruments. The participation of the advocate in the process from the moment of detention of a person is now legally regulated. In some cases in practice, however, the advocate does not take part in the process because the person detained has no money to pay for the service. The practice of democratic societies indicates a solution to this problem, *i.e.*, the creation of municipal advocacy or the institution of public defenders. As a member of the European Council, Ukraine is obliged to create such service. This law extends the rights of advocacy and legal protection of citizens and guarantees the obligatory participation of the advocate at any stage of the criminal proceeding, including

15. V. Kopeychikov, et al., *Rol' mizhnarodnykh standartiv z prav lyudyny u diyal'nosti militsii po zabezpechennyu zakonnosti*, 7-8 PRAVO UKRAYINY 27 (1993).

16. G.A. Res. 217 (III), (1948).

17. Law of Ukraine, *Pro advokaturu*, Dec. 19, 1992, 4 PRAVO UKRAYINY 52-56 (1992).

the initial stages of the trial. But as the President of the Union of advocates of Ukraine, Volodymyr Medvedchuk, noted, the adoption of the law, "On preventive detention of persons" (July 29, 1994),¹⁸ violated the constitutional guarantees of the right of defense of a person, universal civil and political rights of citizens, and international norms of human rights and freedoms.

It is also important to examine implementation of international norms of the rights of citizens in Ukrainian legislation. According to Article 15 of The Universal Declaration of Human Rights: "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." A few words about the terms "nationality" and "citizenship" should be mentioned here. Normally nationality coincides with citizenship. In the former Soviet Union, however, two notions were used and a separate column in our passports called "nationality" indicated ethnicity, such as Ukrainian, Russian, Jewish, German, etc.. New passports issued by Ukraine do not contain this column; all are simply considered to be citizens (*i.e.* nationals) of Ukraine. The law of Ukraine, "On citizenship of Ukraine" (Oct. 1991),¹⁹ confirms this international norm: "The right to citizenship is an inalienable right of a person. Nobody can be deprived of citizenship nor denied the right to change citizenship." In keeping with the requirements of international human rights law, the Ukrainian law on citizenship lays down the conditions under which foreigners and persons without any citizenship can acquire Ukrainian citizenship. Voluntary abandonment of Ukrainian citizenship is possible and is in consonance with international law. However, in specific circumstances, where a citizen fails to fulfill his or her duties before the state, as for example obligations relating to property in which substantial interests of other citizens, state organizations, or cooperative or public associations are involved, voluntary abandonment of citizenship may not be granted. Furthermore, persons who are being prosecuted as defendants under the State Criminal Law may

18. Law of Ukraine, *Pro zapobizhne zatrymannya osoby*, July 29, 1994, 33 URYADOVYI KURYER 10 (1994).

19. Law of Ukraine, *Pro hromadyanstvo Ukrayiny*, Oct. 8, 1991, 219 HOLOS UKRAYINY 12-13 (1991).

not abandon their citizenship voluntarily, particularly if there is a court decision the execution of which is still pending.

The correspondence of the law "On citizenship of Ukraine" to international law principles in this sphere is also proved by the straightforward provision that grants Ukrainian citizenship to women who are married to Ukrainian citizens and that corresponds to the Convention on the Nationality of Married Women. It provides as follows:

Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.²⁰

Article 4 of the Ukrainian Law "On Citizenship" provides that if an international treaty of Ukraine calls for other rules than those contained in this Law, international treaty takes precedence over the rules of this Law. The documents on citizenship should take into account recommendations of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. Under this Convention each state determines the status of its nationals in accordance with its laws. These laws shall be recognized by other states as they agree with international customary law and universally recognized principles of nationality. One such principle which is contained in Article 2 of the above Convention lies in the fact that all the questions on nationality of a natural person are solved in accordance with the legislation of that state.

During recent years Ukraine has taken many measures to implement international norms on human rights which guarantee the right to work, proclaimed in Article 23 of The Universal Declaration of Human Rights; Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights; and various Conventions of the International Labor

20. See Article 3.1, Convention on the Nationality of Married Women, *adopted* Jan. 29, 1957, 309 U.N.T.S. 65, G.A. Res. 1040 (XI) (*entered into force* Aug. 11, 1958).

Organization. Though the Constitution in force in Ukraine declares the right to work, in international legislation, that right is much broader. This right is not only declared, but also the court's protection of this right is guaranteed. If the person is authorized to work, he should have just and favorable conditions of work. But quite often we cannot boast of just and favorable conditions of work. Ukraine has the highest accident death rate of miners in the world. In 1995, more than 300 miners were killed, and so far this year, 40 have died in accidents at the workplace.²¹ The norms of international instruments are taken into account in the draft Constitution of Ukraine, Article 38 of which proclaims the right to work. Though, as Judge of the U.S. Court of Claims Bohdan A. Futey has observed, the government will not have the financial ability to implement this positive right and a court would be powerless to instruct the government to fulfill this guarantee. Such constitutional aspirations only weaken the Constitution as they do not preserve the credibility of either the judiciary or the government. A better place for such guarantees of positive rights, as Judge Futey reflects, would be the Preamble or Declaration of Purpose, where they would be viewed as goals for which the nation strives.²²

Ukrainian labor legislation adopted a more logical and systematic procedure for the settlement of individual labor disputes: a forty-hour work-week according to ILO Convention No. 47, 1935²³ (this Convention was ratified by Ukrainian Soviet Republic 30 years ago), and the right to conduct collective negotiations (bargaining) not only by trade union committees but also by other representative organs or simply by authorized representatives of workers.²⁴ It was declared that worker's salaries are determined only by the results of their work. There currently exist no restrictions for part-time work.

21. OMRI (Open Media Research Institute, Prague) DAILY DIGEST, No. 52, pt. 2 (Mar. 13, 1996).

22. Bohdan A. Futey, *Rule of Law: Draft Constitution Fails to Establish Strong Judiciary*, (Intelnews) 2.12 ECON. REV. (Feb. 12, 1996).

23. Convention Concerning the Reduction of Hours of Work to Forty a Week, No. 47, 1935, ILO 19th Sess. (entered into force June 23, 1951).

24. Convention Concerning the Promotion of Collective Bargaining, ILO 67th Sess. (June 3, 1981).

In February, 1994, as a member of ILO within UNO, Ukraine ratified its fiftieth Convention of the ILO, No. 158 of 1982,²⁵ on termination of employment at the initiative of the employer. Also, the Supreme Rada of Ukraine has taken some steps to coordinate separate norms of the Code of Laws on Labor with the ratified ILO Convention. For instance, in July, 1994, the discriminatory norm was cancelled which gave owners or their agents the right to terminate labor agreements with workers after they reached retirement age and had the right to full old age benefits. Many other cases of implementation or attempts to implement international norms in the sphere of labor relations could be mentioned, but still much is to be done in the direction of really safe and sound employment.

The passing of new laws in the sphere of health protection also evidences the Ukrainian will to protect human rights. The main law in this sphere is the 1992 Foundations of Ukrainian Legislation on Health Protection.²⁶ In accordance with Article 6.a of these Foundations, every citizen of Ukraine, as the subject of the right to health protection, has the right to a standard of living adequate for his or her health and well-being, including food, clothing, housing, medical care, social services, and security. This norm comprises the principles of international legal acts which were ratified by Ukraine, *i.e.*, Articles 3 and 25 of The Universal Declaration of Human Rights; Article 12 of The International Covenant on Social, Economic and Cultural Rights; Article 24 of The Convention on the Rights of the Child; and others. The Foundations determine and uphold the right of the citizens of Ukraine to a safe environment, qualified medical assistance, and the right to defense against any illegal forms of discrimination connected with health conditions. Of course, we do not have cases like the one in Japan in which a court ordered that a worker receive compensation of 6 million yen for his dismissal because of AIDS.

25. Convention Concerning Termination of Employment at the Initiative of the Employer, No. 158, ILO 68th Sess. (1982).

26. Law of Ukraine, *Osnovy zakonodavstva Ukrayiny pro okhoronu zdorovya*, Nov. 19, 1992, 4 VIDOMOSTI VERKHOVNOYI RADY UKRAYINY 19 (1993).

The Declaration of the Rights of Nationalities of Ukraine, the law of Ukraine pertaining to national minorities²⁷ of June 25, 1992, served to implement international instruments on the rights of ethnic minorities. In fact, this law exceeds everything that is included in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by the 47th session of the UN General Assembly in December, 1992, which was prepared on the basis of Article 27 of the International Covenant of Civil and Political Rights. Ukraine guarantees all national minorities the rights to national-cultural autonomy, including the rights to: use and be educated in one's native language in state educational institutions or through national cultural societies; develop and nurture national cultural traditions; use national symbols; recognize national holidays; practice one's religion; satisfy one's needs in literature, the arts, and mass media; create national, cultural, and educational institutions; and participate in any other activity that does not contradict legislation in force (art. 6). In the operation of state organs, public organizations, enterprises, institutions, and organizations situated in places where the majority of the population constitutes a certain national minority, the minority's language can be used alongside the Ukrainian state language (art. 8). The state budget of Ukraine presupposes special allocations for the development of national minorities (art. 16) and a special organ "The Ministry of Nationality" is created in the sphere of intra-national relations as a central organ of the state executive power; and, in the Parliament of Ukraine, there exists a standing committee on human rights, national minorities, and international relations (art. 5).

III. STATUS OF CURRENT UKRAINIAN LEGISLATION PROTECTING HUMAN RIGHTS

All the cases mentioned above attest to the fact that Ukrainian legislation does implement international human rights standards. Ukraine has adopted many laws which correspond to international instruments on human rights, and numerous others of its laws include norms which refer to interna-

27. Law of Ukraine, *Pro natsional'ni menshyny v Ukrayini*, June 25, 1992, 36 VIDOMOSTI VERKHOVNOYI RADY UKRAYINY 1187-1189 (1992).

tional instruments. So, we may speak of a body of Ukrainian Human Rights Law. Still, that body remains rather weak. Many elements of the old legal system managed to survive and are still included in the new Ukrainian legislation. Among such survivals Butkevych points to the rhetorical character of former Soviet legislation which was overloaded with values of a political, moral, and ideological nature.²⁸ What should one make today of the following legal clause:

Workers . . . ought to have high moral qualities, to be principled and intolerant to violations of law, to combine the performance of their professional duties with civil courage, justice, and incorruptibility. They personally ought to abide strictly by the rules of law, show initiative in work, improve the quality and efficiency of their work, and contribute with their activities to the supremacy of law, molding the legal consciousness, respect for legal acts, norms and rules, all for the enhancement of democracy.²⁹

This refers to the Procurator's Office workers, though one could very well apply it to any other organization. Regardless of where they are applied, these phrases sound like principles of their former "Moral Code of the Builder of Communism."

Another shortcoming of the legal system of Ukraine is its overburdening with "norms-definitions." Thus, the law "On Foreign Economic Activity" is more like an encyclopedic dictionary rather than a law, as Article 1 alone contains more than 40 definitions and more than half of the norms of this law consist of definitions. It is not surprising that it has not been implemented.³⁰

Among other factors contributing to the weakness of Ukraine's legal system, and, in particular, the human rights legal system, Butkevych mentions corruption with vague legal presumptions, legal fictions, obligations, and planned work agendas:

28. Butkevych, *supra* note 10, at 188-189.

29. Art. 15, No. 4, VIDOMOSTI VERKHOVNOI RADY UKRAINY, at 79 (Jan. 28, 1992).

30. Butkevych, *supra* note 10, at 189-190.

A legal system functions properly when it contains no more than 2 to 5 percent of atypical normative indications such as: legal definitions, presumptions and fictions. However, Ukrainian legislation contains ten times that percentage, and in some legal acts they make up well over 50 percent A legal system functions adequately if it has 5 to 10 percent "prohibitive" norms and 5 to 10 percent "obligative" norms. At present, the legislation of Ukraine contains three times those numbers As for "permissive" norms (the only ones which make it possible to ensure that individuals have the freedom to pursue and achieve their wishes) only about twenty percent of Ukraine's legal acts contain them.³¹

The situation is changing but the legal system of Ukraine is still in a state of deep crisis that can only be stopped by adopting a new Constitution.

In general, Ukrainian legislation has implemented international human rights norms up to 70 percent. But if actual practice is taken into account, especially that of the national Court of Ukraine, this percentage is much less. Within the framework of the European legal system, it is obligatory for member-states of the European Council to recognize the jurisdiction of the European Court of Human Rights, which relies heavily on national courts. However, as Butkevych states, this cannot be the case for Ukraine because:

1. There is no strong and independent judiciary in Ukraine;
2. The national Court of Ukraine is incapable of acting independently of the legislative and executive branches of the government;
3. Until recently, the Court's concern was with punishment rather than protection of human rights and interests;

31. *Id.* at 194.

4. For Ukraine, the European Court of Human Rights can become secondary only after the primary system (*i.e.* the Ukrainian courts) begins to function on the same legal basis, and up to now no court in Ukraine has taken into account any international instrument on human rights; and

5. The mechanisms for control and verification of facts provided by the European Court of Human Rights are not available in Ukraine with regard to many decisions by national courts.³²

Unfortunately, the November 15, 1995 draft Constitution of Ukraine fails to embrace, in full, the principle of separation of powers. As Judge Futey has noted, the Nov. 13, 1995 draft of the Law of Ukraine on Juridical System (Court System) goes much farther than the draft of the Constitution. For example, Article 1, Paragraph 2 gives the court the exclusive authority to interpret the law. Article 6 contains language reminiscent of *Marbury v. Madison*,³³ an early case in the United States that articulated the courts' power of juridical review - the power to declare unconstitutional both legislative statutes and executive acts. The draft law on the judiciary also supports a unified court system. The Supreme Court of Ukraine is at the apex of this system, with the Constitutional Senate as a part of this Court. In addition, the draft Constitution addresses the Constitutional Court separately, not as a part of the court system of Ukraine, but independent of the legislature, the executive, and the judiciary. Thus, despite separation of power among the three branches of government, there now seems to be a fourth independent body. Another problem with the working group's draft Constitution is its failure to address the right to a jury trial.³⁴

Many people in Ukraine are still not aware of international instruments on human rights because they were not published in the quantity needed. The state continues to play the role of "benevolent benefactor," granting people rights as if they were not inherent. The new Draft Constitution of Ukraine

32. *Id.* at 196-197.

33. 5 U.S. 137 (1 Cranch), 2 L. Ed. 60 (1803).

34. Futey, *supra* note 22.

does something else. The chapter on human rights encompasses everything included in international instruments on human rights; as the Director of Programs East-Central Europe, the former Soviet Union and Asia, Professor Juliana Geran Pilon has commented that: "[T]heir [Ukraine's] Constitution is enumerating countless rights as if implying that anything not thus enshrined does not exist."³⁵ My response to Professor Pilon is that human rights were neglected in the former Soviet Union for such a long time that it is appropriate to remind people of their existence.

IV. CONCLUSION

Questions arise as to the reason why Ukraine, which gave people its first democratic constitution in 1710, is not able to adopt a new democratic Constitution,³⁶ and why the state which abolished capital punishment in the 12th century cannot abolish it at the end of the 20th century. In a recent unofficial opinion poll in Kiev as to attitudes toward the institution of capital punishment, about ninety percent of those polled expressed support for its retention. Their arguments were mainly based on the old principle: "an eye for an eye, a tooth for a tooth." But, not to be overly pessimistic, one has to remember that modern-day Ukraine is very young, only four and a half years of age.

35. Juliana Geran Pilon, *Feminine Reflections on Crafting Ukraine's Constitution*, (unpublished, forthcoming article based on the proceedings of the International Law Forum [devoted to crafting Ukraine's Constitution], Huta, Synyohora, Ukraine, (January, 1996), in which Professor Geran Pilon participated.

36. Ukraine has a new Constitution adopted on June 28, 1996, and established the new Constitutional Court in October, 1996.