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Lessons from the Abolition of Capital Punishment in Hungary: A Fortuitous Constellation Amidst and Beyond Democratic Transition

Abstract. Hungary ratified Protocol No. 13 to the European Convention for the Protection of Fundamental Rights and Freedoms concerning the abolition of the death penalty in all circumstances. This event is not a surprise since the Hungarian Constitutional Court declared capital punishment unconstitutional in 1990. Retrospectively, the development of the safeguards against capital punishment in Hungary might seem as a stretch of self-evident consequences. The present paper attempts to situate the decision of the Constitutional Court in its broader context and reflect upon the significance of symbolic founding gestures in times of democratic transition.

Keywords: Abolition of capital punishment; Hungarian Constitutional Court; Democratic transition

Introduction

Hungary ratified Protocol No. 13 to the European Convention for the Protection of Fundamental Rights and Freedoms [hereinafter: European Convention] concerning the abolition of the death penalty in all circumstances on July 13, 2003.[1] Protocol No. 13 made the important move to remove the narrow exception for the application of capital punishment in times of war or imminent threat of war left open by Protocol No. 6 (Art. 2) two decades ago. A similar exception is also familiar from Art. 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter: ICCPR], aiming at the abolition of the death penalty.[2] Thus, Protocol No. 13 became the instrument

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[1] Protocol No. 13 was adopted in Vilnius, on May 3, 2002 and entered into force on July 1, 2003 upon 10 ratifications. In respect to Hungary, it entered into force as of November 1, 2003 (currently under promulgation).

[2] UN General Assembly resolution 44/128 of 15 December 1989.

providing yet the most forceful demonstration of international commitment to doing away with capital punishment.

Hungary's ratification of Protocol No. 13 is not a surprise. Decision No. 23/1990 (X. 31.) AB of the Hungarian Constitutional Court abolished capital punishment over a decade ago, in the early days of the country's democratic transition. In the case the Constitutional Court found that capital punishment imposes a limit on the essential content of the right to life and human dignity [Art. 54(1), Constitution], thus it is not compatible with Art. 8 (2) of the Hungarian Constitution precluding any limitation on the essential content of fundamental rights.[3] The decision is one of the best known and most influential decisions of the Hungarian Constitutional Court.[4]

Since 1990 there was no serious attempt to restore the death penalty in Hungary, the restoration of capital punishment is not an issue in mainstream public discourse.[5]

Hungary's ratification of Protocol No. 13 provides an excellent opportunity to explore the interplay of strategic action and unexpected events surrounding the Constitutional Court's decision at the dawn of the transition process, and to identify the permanent traces the Court's decision left on democratic institutions and constitutional rights. A glance at the Constitutional Court's decision in its broader context is hoped to contribute to understanding better the inner mechanics of abolitionist strategies for the benefit of future applications. Indeed, two important caveats shall be emphasized from among all lessons derived from the Hungarian success story.

Retrospectively, the development of the safeguards against capital punishment might seem as a stretch of self-evident consequences. Shortly following the Constitutional Court's decision,[6] Hungary became a member of the Council of Europe and in two years, it ratified the European Convention for the Protection of Fundamental Rights and Freedoms and its eight protocols, among them Protocol No. 6.[7]

[3] References are to the Hungarian version. All translations from the Hungarian are mine.

[4] Sólyom, L: To the Tenth Anniversary of Constitutional Review. 21–47, in: *The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights* (ed.: Halmai, G.). Budapest, 2000. 22 and note 3. E.g. in the South African Constitutional Court's decision abolishing capital punishment in *S. v. Makwanyane*, CCT 3/94; 1995 (6) BCLR 665; 1995 (3) SA 391; [1995] ZACC 3 (6 June 1995)

[5] Marginal political forces did indeed resort to the rhetoric of reinstitution. Such attempts are going to be discussed in their broader context in detail.

[6] Hungary became a member of the Council of Europe on November 6, 1990.

[7] The ratification took place on November 5, 1992; promulgated in Act No. 31 of 1993. Subsequently, Hungary ratified Protocol No. 11 on April 26, 1995 (promulgated in Act No.

Thereafter Hungary ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights,[8] and finally, Protocol No. 13 to the European Convention. The decision of the Constitutional Court abolishing capital punishment in Hungary was formative of this safety net proscribing capital punishment. This is not to suggest, however, that the Hungarian Constitutional Court found the ultimate constitutional justification to keep capital punishment outside the array of state-imposed criminal sanctions. The Constitutional Court was not unanimous in its holding. Except for a lone dissenter, Hungarian constitutional justices agreed about the outcome of the case [i.e. the unconstitutionality of capital punishment], while they still differed about the reasons supporting a decision on unconstitutionality and filed concurring opinions accordingly. Indeed, the Hungarian capital punishment decision is a good example of a situation that could be characterized as a "incompletely theorized agreement" in Cass Sunstein's terminology.[9]

The Hungarian Constitutional Court's decision provides an excellent opportunity to reflect upon the significance of symbolic founding gestures of times of transition the lasting effects of which permeate constitutional and democratic processes long after the fury and fever of transition has cooled. The present paper attempts to situate the decision of the Constitutional Court in its broader context, covering numerous domestic and international political, legal, judicial and intellectual influences and trends, which have delegitimized 'death talk' in post-communist Hungary. In matters of strong and diverging public sentiment, it is especially interesting to pay attention to the interplay of strategic moves and unexpected events reflecting on each other, thus creating strains of continuity essential for legitimizing stances taken by the agents and institutions of a new democracy.

1. The immediate context of the Constitutional Court's decision abolishing capital punishment

Although in Hungary capital punishment as a criminal sanction was available until 1990, at the time of its abolition the application of the death penalty was

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42 of 1998). Hungary also signed but has not ratified yet Protocol No. 12 concerning the prohibition of discrimination.

[8] Ratified by Hungary on February 24, 1994, entered into force with respect to Hungary on May 24, 1994, promulgated by Act No. 2 of 1995.

[9] See Sunstein, C.: *Legal Reasoning and Political Conflict*, New York–Oxford, 1998. 35–62.

fairly limited. Capital punishment it was available for the most severe crimes and executions were not numerous. At the time it was abolished, capital punishment was an alternative sanction for genocide and certain war crimes, the most serious instances of homicide (murder, typically aggravated murder), terrorism, hijacking and for various military offences. The Criminal Code prescribed capital punishment altogether in 18 instances, out of which 11 constituted military offences.[10] Death penalty was not a mandatory sanction: it was always an alternative to imprisonment. One of the standard casebooks on criminal law suggested in 1980 that in society with a stabile government capital punishment may become superfluous, as life imprisonment might be an adequate alternative to capital punishment.[11] According to official records in the last 40 years, altogether 636 executions were performed, out of which 393 sentences were for political or military crimes. Between 1980 and 1989 altogether 29 persons were sentenced to death (there were 5 or less executions per year), and executions were not performed in all cases. At the time the population of the country was around 10 million and around 200 sentences were handed down for voluntary manslaughter.

These factors are not meant to trivialize the significance of the mere availability of capital punishment in a legal system. Still, it is important to see that prior to its abolition capital punishment was seen in Hungary as an extraordinary criminal sanction:[12] capital punishment was applied in a limited number of cases, capital sentences were subject to heightened judicial scrutiny, subject to executive pardon.

1.1 Capital punishment and the Roundtable Talks

The immediate context of the abolition of capital punishment in Hungary was the period of democratic transition in 1988–1989. The transition process was significantly influenced by the strategy and actions of the Communist Party

[10] Capital punishment was provided for in the *Criminal Code* [Act No. 4 of 1978]. Persons who were below 20 at the time of committing the offence could not be executed [Art. 39(1) of the Criminal Code, while in force]; for military offences the age limit was 18 years [Art. 126 of the Criminal Code, while in force]. The detailed rules on genocide and certain war crimes providing for capital punishment were contained in separate legislation.

[11] Békés, I.—Földvári, J.—Gáspár, Gy.—Tokaji, Gy.: *Magyar Büntetőjog, Általános Rész* [Hungarian Criminal Law, General Part]. Budapest, 1980. 338–339.

[12] The *Criminal Code* emphasized that capital punishment was an extraordinary measure [Art. 84, while in force].

before and during the Roundtable Talks.[13] Important safeguards were introduced to protect fundamental rights already in the early days of democratic transition. Although abolition of capital punishment was not at the forefront of the Talks, the issue of abolition was notably in the air. For instance, during the debates of constitutional revision in the still-communist parliament a former speaker of the communist legislature felt it necessary to note that he was for the abolition of capital punishment. As this episode clearly suggests that abolitionist voices were present in the discourse.

As surprising as it may sound, the Communist Party was not keen on preserving the death penalty. Indeed the last Communist minister of justice, Kálmán Kulcsár—entering office in June 1988—was an abolitionist. Recently he recalled that while criminal courts still handed down death sentences in June 1988 and the last execution took place one day before he entered office, the Presidium of the Communist Party agreed to granting pardon to all offenders sentenced to death. This *de facto* moratorium lasted until the Constitutional Court abolished capital punishment in 1990. Nonetheless, while the Communist Party did not make efforts to preserve capital punishment, the Party did not propose the overall abolition of capital punishment during the Roundtable Talks either.

In the course of the roundtable negotiations the abolition of the death penalty received little attention from the opposition. Documents reveal that when drafting the new constitutional rules on fundamental rights, the Communist Party was willing to act on the proposals of the opposition.[14] Instruments of human rights protection were often consulted by the participants of the Roundtable Talks and many provisions of the Hungarian Constitution concerning rights are translations of similar provisions of international instruments. The ICCPR was ratified by and promulgated in Hungary,[15] at the time of the Roundtable Talks, however, Hungary did not belong in the Council of Europe. In addition to relying on instruments of human rights protection in the process

[13] For a concise overview of the Hungarian Roundtable Talks see András Sajó's report in: Hungary in The Roundtable Talks and the Breakdown of Communism (ed.: Elster, J.). The University of Chicago Press, Chicago, 1996. The annotated documents of the Roundtable Talks were published in Hungarian in multiple volumes in: *A rendszerváltás forgatókönyve, Kerekasztal-tárgyalások 1989-ben* [The Script of Transition, Roundtable Talks in 1989]. Budapest, 1999.

[14] The written proposal of the opposition is not available. *A rendszerváltás forgatókönyve… op. cit.,* vol. 6, 107, note 63. The consent of the Communist Party is expressed in the minutes of the meeting of August 2, 1989. *A rendszerváltás forgatókönyve… op. cit.,* vol. 6, 101.

[15] Law-decree No. 8 of 1976.

of constitution making, outside the Talks there was a movement to raise human rights awareness and to direct attention to human rights instruments and 'rights talk'. For instance, the Alliance of Liberal Democrats (an opposition movement turned into a political party) organized a rally on the occasion of the 200th anniversary of the adoption of the Declaration of Rights of Man and Citizen of 1789. Such meetings certainly had the function of keeping the public aware and informed about developments at the Talks.

The draft of the Hungarian constitution's rights chapter under preparation prohibited only the arbitrary deprivation of life and human dignity, and did not preclude deprivation of life *per se*.[16] The text was proposed by the Communist Party. Indeed, the provision is a translation of Art. 6 (1) of the ICCPR. The opposition accepted the proposal of the Communist Party and the draft was adopted as Art. 54 (1) in the democratic constitution in identical terms. The minutes of the drafting negotiations do not contain references to the abolition of capital punishment.[17] Despite the obvious limitations of its language, in the circumstances the fact that the proposed constitutional provision on the right to life and human dignity was a translation of an international instrument might have appeared as a sufficient safeguard of the right to life and dignity.

This is not to suggest, however, that the participants of the Roundtable Talks, the Communist Party and the representatives of the opposition alike, were unaware of the shadow of capital punishment. In 1988–1989, at the time when the opposition movements started to become more and more visible, most political activities directed against the hegemony of the Communist Party were illegal and the majority of them constituted a serious crime [typically treason, felony and alteration of the existing regime of governance (conspiracy, et al.)]. During the Talks, the Communist government moved to partially decriminalize acts that could affect the existing system of government. Although by the time the amendment entered into force, the Opposition Roundtable had been in session since March 1989 and the National Roundtable had already started on June 10, 1989.[18]

While capital punishment was abolished as a sanction for crimes against the state, under the existing rules of criminal law technically all participants of the Roundtable Talks and those who actively worked on behalf of the new

[16] For the text of the proposal of the Communist Party (draft of the Ministry of the Justice) see *A rendszerváltás forgatókönyve… op. cit.,* vol. 6, 115–116, note 6.

[17] In the minutes of the meeting of the experts' sub-committee [sub-committee I/1 dealing with constitutional revision] there is no record of any discussion concerning the language of Art. 54 (1).

[18] Act No. 16 of 1989 as promulgated and entered into force on June 15, 1989.

opposition could have been prosecuted for 'conspiracy'. Retrospectively it is possible to argue that participants of the Roundtable Talks most probably could not have been charged with the more serious degree of conspiracy (armed conspiracy or wartime conspiracy) that was subject to capital punishment before the amendment of the Criminal Code. Certainly, today's wisdom was not so apparent in the summer of 1989, not even in the light of the Communist government's self-imposed moratorium on executions. Still, the Communist government's move to amend the Criminal Code was regarded as a sufficient safeguard against prosecution, at least at the initial stage of the Talks. Nonetheless, even after the Criminal Code's amendment, participants of a conspiracy endangering the existing political, social or economic regime could be subject to 2–8 years of incarceration while organizers could have been incarcerated for 5–15 year (Art. 139 (1)–(2), Criminal Code). Arguably, activities like attending the Talks or assisting the Talks most probably would have sufficed for the application of these provisions. Therefore, it is not surprising that amending certain provision of the Criminal Code on crimes against the state was a major issue during the Roundtable Talks.

Indeed, participants of the Roundtable Talks—while drafting the fundamentals of a future, constitutional government—had to create a legal framework which guaranteed their personal security during the Roundtable Talks. Also, the constitutional and legal rules devised had to be such as to provide sufficient safeguards after the elections following the Talks, independent of the outcome of the first democratic elections. Experts' sub-committees negotiated and drafted new rules applicable to elections, political parties; were developing amendments to provision on crimes against the state in the Criminal Code and had to create safeguards against aggressive political actions, and constitutional amendments necessary thereto. It was clear for all sides of the Talks that the amendment of the Criminal Code on crimes against the state necessitated a constitutional amendment. The committee of experts was focusing on crimes against the state and crimes restricting the freedom of speech.[19] Apart from rules on specific crimes, procedural guarantees in criminal procedure were a major concern for the participants of the Talks.[20]

While crimes against the state were exempted from capital punishment due to the Talks, this development is best characterized as a side effect of the Round Table negotiations. Although the political forces did not prefer the retention of the death penalty, neither the Communist Party, nor the opposition forces moved

[19] *A rendszerváltás forgatókönyve… op. cit.* [minutes of a meeting on August 24, 1989 (Kutrucz, K.)], vol. 3, 375.

[20] See e.g. *ibid.* (Hack, P., Kutrucz, K.)], vol. 3, 376, 386.

to abolish capital punishment altogether. The parties agreed that the new constitution should contain a provision on the protection of the right to life (i.e. Art. 54(1)). The wording of the provision as adopted is based on Art. 6(1) of the ICCPR, a respectable international human rights instrument, although it does not preclude capital punishment *per se*. Note, however, that the provision was drafted at a time when a *de facto* moratorium on executions was already in force.

1.2 Beyond the Roundtable: strategic action and unintended consequences

Despite all promising developments, in the course of the Roundtable Talks the participants did not move to abolish capital punishment altogether. At this time the issue of *de iure* abolition of capital punishment was addressed by a single-issue pressure group formed predominantly by lawyers: the League Against Capital Punishment [Halálbüntetést Ellenzôk Ligája].[21] In the beginning of 1989, immediately after such political movements were legalized,[22] the League Against Capital Punishment became very visible in mainstream press. Newspapers ran short notes on the first session of the League, published interviews and essays by the founders of the organization. These pieces presented a variety of arguments known from the international abolitionist discourse. It was also reported in the news that the League petitioned the Presidium of the Communist Party about the *de iure* abolition of the death penalty. The significance of the actions of the League Against Capital Punishment was also acknowledged on the international scene.[23] In the meantime, papers also ran views from the retentionist side.

It is interesting to note that the League Against Capital Punishment placed the abolition of capital punishment in the context of the Hungarian liberal tradition. References were made to the works of 19th century legal academics

[21] Körösényi, A.: *A magyar politikai rendszer* [The Hungarian Political System (in Hungarian)]. Budapest, 1998. 181. Besides the League Against Capital Punishment a number of single-issue organizations appeared on the political scene in 1988–1989. For the problems of the formation and operation of political associations in Hungary before such political associations were expressly legalized at the beginning of 1989 see Halmai, G.: *Az egyesülés szabadsága, Az egyesülési jog története* [Freedom of Association, The History of the Freedom of Association]. Budapest, 1990.

[22] That happened when the Communist Parliament passed Act No. 3 of 1989 on the freedom of association in early 1989. See also Elster, J.—Offe, C.—Press, U. K. et al.: *Institutional Design in Post-communist Societies, Rebuilding the Ship at Sea.* Cambridge, Cambridge University Press, 1997. 70.

[23] See e.g. Amnesty International, AI-index: ACT 50/006/1997 at http://www.web.amnesty.org/ai.nsf/index/ACT500061997 [last visited on March 2, 2004].

and politicians committed to liberal ideals (Ferenc Deák, Bertalan Szemere). For instance, in 1990 the League against Capital Punishment published, more precisely, reprinted Szemere's essay, an elegant and brilliant exposition of abolitionist views originally written in 1839 for an essay competition organized by the Hungarian Society of Sciences. Szemere's abolitionist essay won the competition and had a major influence on the understanding of criminal law and justice in the second half of the 19th century in Hungary. The draft criminal code of 1843 is an example of that development. Although the draft code was never enacted into law, it is noteworthy, that it did not contain capital punishment among criminal sanctions.[24]

While the League Against Capital Punishment had a well-planned and straightforward abolitionist strategy, unforeseen and unintended developments had a major positive effect on the success of their case. In the public discourse the reconsideration of the 1956 revolution and the need to serve justice to the victims of 1956, primarily to Prime Minister Imre Nagy, became strongly associated with the abolitionist cause. The execution of Imre Nagy and his accomplices became the most exposed unjust execution of the Communist regime, giving thrust to arguments promoting the abolition of capital punishment.

Without discussing the details and the vast literature of the subject, it is important to point out the relevance of the 1956 revolt and the execution of Imre Nagy from the perspective of democratic transition in Hungary. During the Communist era the events of 1956 revolt were usually characterized as a 'counter-revolution'. In the course of the Communist Party's reform attempts, the Party moved to evaluate the past 30 years of its operation. It was in this context that Imre Pozsgay, the chairman of the sub-committee dealing with historical inquiry, stated in a talk on the radio on January 28, 1989 that "based upon recent research the events of 1956 constituted a popular revolt". The position taken by Pozsgay—a high ranking Communist Party politician—clearly indicated a reversal in the Communist Party's long-held position regarding the significance of the events of 1956. Reactions followed promptly. Independent political organizations were welcoming the Communist Party's re-evaluation of the 1956 events in a memorandum.[25] As it turned out later, the memorandum was signed by all major political organizations that later took part in the

[24] Szemere, B.: *A büntetésről s különösebben a halálbüntetésről* [On Punishment and in Particular, on Capital Punishment]. Budapest, 1990.

[25] See the memorandum of February 18, 1989. *A rendszerváltás forgatókönyve… op. cit.,* vol. 1, 50–51.

Roundtable Talks. Public discourse on the reconsideration of the events of 1956 immediately started to flourish and continued all along the Talks.

The failed 1956 revolution was transformed into a symbol of democratic transition.[26] In 1989, the essence of 1956 was represented by the execution of Imre Nagy and his accomplices. The rehabilitation of Prime Minister Imre Nagy evolved into a political issue of considerable significance. Over 200 000 people were present at the public funeral (reburial) of the unjustly executed. The funeral was one of the first instances when the Communist Party refrained from interfering with the large-scale assembly in a public space organized by the opposition forces.[27] Irreparable injustice committed by a branch of government in the name of law has never been more apparent than at the reburial ceremony.

Over the years the reburial of late Prime Minister Imre Nagy has been transformed into a 'narrative' shared by many political movements. It became a complex symbol of democratic transition in Hungary and as a symbol it helped establish continuity in public memory within Hungarian history via repositioning (re-emploting) the 1956 revolt. The formation of the new democratic government was announced on October 23, 1989, on the anniversary of the 1956 revolution and October 23 also became one of the three major national holidays. Academic institutions were founded to investigate the events of 1956. Furthermore, as government agencies and civil organizations relied on the events of 1956 in the course of demanding and designing restitution, it was also institutionalized in a more indirect sense. Numerous victim groups were formed and they became very visible in the media, their action and inaction was also attributed meaning.[28]

In the long run the discourse and re-evaluation of 1956 left its imprint on the fundamental structures of post-Communist politics in Hungary.[29] While the League against Capital Punishment did not refer to the 1956 revolution and the executions, the reburial and the rehabilitation of the executed directed attention

[26] See e.g. Fletcher, G. P.: Searching for the Rule of Law in the Wake of Communism, *Brigham Young Law Review,* 1992. Vol. 1992, 146–150.

[27] The reburial of Imre Nagy's companions took place on June 16, 1989. On July 6 of 1989 the Supreme Court acquitted the executed prime minister and his accomplices.

[28] Körösényi: *op. cit.*, 180. (Note that the scope of the restitution legislation covers crimes committed in the period of 1944–1990.)

[29] Also see Éva Kovács finding that the 'Imre Nagy narrative' shifted over the years from being a victim narrative to a perpetrator narrative and was then inflated into an alibi to support political endeavors. According to Kovács this transformation (inflation) was fueled by revenge. See Kovács, É.: Íme az Istennek ama báránya, aki elveszi a világ bűneit. Etüd a rendszerváltó mítoszokról [Essay on the Myths of Transition]. *Világosság*, 2000. Vol. 41/6–7, 28, 35.

on the cause of abolition of the death penalty. Although these developments were not calculated by the League, the re-evaluation of the events of 1956, and the reburial of Imre Nagy and his accomplices served as the strongest argument against retaining capital punishment.

In Hungary the impact of the 1956 revolution and Imre Nagy provided unexpected, yet, significant in fueling the abolitionist cause in the public discourse. History and reflection on history created a context that prompted political actors to remove capital punishment from the system of criminal justice and to prevent the restoration thereof in Germany as well.[30] Memory of past injustice, however, does not command an evident case for abolition of capital punishment. In South Africa capital punishment was regarded my many as a symbol of terror and political oppression.[31] Death penalty was applied disproportionately, primarily against black South Africans.[32] Being mindful of this history of capital punishment one might have expected strong resistance against the death penalty. When the South African Constitutional Court abolished capital punishment under the interim constitution in *R. v. Makwanyane*, the terms of the final constitution were still in the making. 200 000 petitions—one tenth of all petitions—requested the drafters of the final constitution to restore capital punishment. The amount of petitions is still shocking in itself as the restoration of capital punishment was the third item on the top-list—following the petition to preserve Afrikaans as an official language and keeping the parliament in Cape Town.[33] The contrast between the Hungarian, German and South African experiences, therefore, is an important warning for movers of national abolitionist movements when it comes to tying the ropes of past injustice, memory, hopes and expectations into an applicable strategy.

[30] See Art. 104 of the Basic Law precluding capital punishment.

[31] Bogie, D.: Life or Death? The Death Penalty in the United States and the New Republic of South Africa. *Tulsa Journal of Comparative and International Law,* 1996. Vol. 3, 229, 230 and 233.

[32] Bouckaert, P.: Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa. *Stanford Journal of International Law,* 1996. Vol. 32, 287, 313.

[33] Gloppen, S.: *South Africa, The Battle over the Constitution.* Aldershot, Darthmouth-Ashgate, 1997. 257.

2. The Constitutional Court's decision abolishing capital punishment: the essential content of the right to life and dignity

The decision abolishing capital punishment is one of the first major judgments of the Hungarian Constitutional Court.[34] The challenge against the constitutionality of capital punishment did not surprise the justices: the abolitionists made their case visible in the public discourse. Indeed, by the time the justices of the Constitutional Court entered office, the petition filed by the League Against Capital Punishment was already awaiting them.[35] For the benefit of the Constitutional Court the League Against Capital Punishment

> "set forth in detail the European traditions of the movement against capital punishment, offered a survey of the state of capital punishment and its abolition, respectively, in the world, treated the history of capital punishment in Hungary, and discussed the reason for its abolition".[36]

Although the procedure of the Constitutional Court is not constrained by deadlines, the constitutional justices decided the case within 9 months.

(a) The case reached the Constitutional Court in the period when the Court's procedure was still under formation. Before deciding the case the Constitutional Court requested the expert opinion of various prominent lawyers.[37] The law professors argued that capital punishment was cruel and unusual punishment and urged the Constitutional Court to abolish capital punishment on substantive grounds. It was also submitted that the availability of capital punishment has no effect on crime in society.[38] The Chief Justice of the Supreme Court and the

[34] An English translation of the decision is available in Sólyom, L.–Brunner, G.: *Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court,* Ann Arbor, University of Michigan Press, 2000. 118–138.

[35] With five justices, the Constitutional Court started its operation in January, 1990. The first judgment was handed down on February 12, 1990. The League Against Capital Punishment submitted its petition on January 17, 1990 challenging the constitutionality of the death penalty. By the time the death penalty case was decided, the Constitutional Court had 9 justices on the bench.

[36] Horváth, T.: Abolition of Capital Punishment in Hungary. *Acta Juridica Hungarica,* 1991. 153, 155.

[37] Since the early cases it has been the general practice of the Constitutional Court to request expert opinions from a wide variety experts, or to request the opinion of relevant government agencies. See Holló, A.: *Az Alkotmánybíróság, Alkotmánybíráskodás Magyarországon* [The Constitutional Court, Constitutional Review in Hungary]. Budapest, 1997. 98. Professors Tibor Horváth and András Sajó who were requested by the Constitutional Court to provide expert opinions were also founding members of the League Against Capital Punishment.

[38] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

Attorney General appeared in a hearing in front of the Court. The Chief Justice of the Supreme Court submitted that according to his moral and legal convictions the death penalty is unacceptable and it cannot be justified as a criminal sanction.[39]

While taking a clearly abolitionist position, the Attorney General also mentioned that the constitutional provision on the right to life and dignity (Art. 54(1)) did not form a sufficient ground for deciding the case. The Attorney General argued that the Constitution's right to life provision should be read in conjunction with the clause on permissible limitations on fundamental rights. The Attorney General also submitted that the most legitimate forum for taking a decision on the constitutionality of the death penalty would be the parliament, nonetheless, the Constitutional Court has sufficient legislative authorization to decide the case.[40]

(b) The Constitutional Court's decision is very concise: following the assessment of the relevant constitutional provisions, the reasoning itself hardly exceeds two printed pages. Eight out of nine constitutional justices concurred in judgment, while one justice filed a dissenting opinion.[41] The Constitutional Court read the constitutional provision on the right to life and dignity [Art. 54(1)][42] in conjunction with the Constitution's limitation clause which prohibits the tampering of the essential content of constitutional rights [Art. 8(2)].[43] The Constitutional Court found that as the imposition of capital punishment allows for the total and irreparable extinguishing of the right to life and human dignity, capital punishment constitutes a limitation on the essential content of the right to life. Thereupon the Constitutional Court established that capital punishment was unconstitutional.[44] The Constitutional Court thus abolished capital punishment upon general, substantive considerations. This way the Court did not review the procedural safeguards guiding the application of capital punishment, and the

[39] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

[40] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

[41] Dissenting opinions are authorized in Art. 26 of the Act on the Constitutional Court [Act No. 32 of 1989]. The dissent shall be filed with written reasons. Justices may also submit concurring opinions to the judgment as a matter of Court practice. The capital punishment case was the first decision in which the justices filed concurring opinions.

[42] Art. 54(1) of the Constitution provides that "in the Republic of Hungary everyone has the right to life and dignity, of which no one shall be arbitrarily deprived of".

[43] Art. 8(2) of the Constitution provides that "in the Republic of Hungary fundamental rights and obligations shall be regulated in act of parliament, the essential content of fundamental rights may not be limited".

[44] 23/1990 (X. 31.) AB decision, ABH 1990. 92.

Court also refrained from analyzing the details of the practice of death sentencing.

(c) The aspect of the judgment which subjected the reasoning followed by the Constitutional Court to criticism was indicated by the Constitutional Court's reasoning.[45] The justices pointed to that the tension between the Constitution's provision on the right to life and dignity [Art. 54(1)] on the one hand, and the general limitation clause [Art. 8(2)] on the other. The majority opinion makes it clear that while the Court relied on its interpretation in abolishing the death penalty, it was the duty of the parliament (in its capacity of a constitution-maker) to resolve the tension within the constitutional text.[46]

In his dissent Justice Schmidt argued that it was *ultra vires* of the Constitutional Court to resolve this tension via interpretation, since an interpretation of this kind amounts to constitution-making. Dissenting Justice Schmidt, did not question the legitimacy of judicial review as a means of deciding about the abolition of capital punishment. The dissent is based on the argument that it is beyond the jurisdiction of the Constitutional Court to resolve a contradiction within the text of the constitution. According to the dissent, the most the Constitutional Court could do when facing such a textual deficiency is calling the attention of the constitution maker (parliament in the Hungarian case) to the problem. According to the dissent, lack of jurisdiction would however not preclude the Court from disclosing its arguments against capital punishment.[47] Justice Schmidt unfortunately did not elaborate on the possible implications of this position. In this context it is important to note that although the Hungarian Constitutional Court has a power to hand down advisory opinions in cases of abstract constitutional interpretation, following the decision abolishing capital punishment the Court has construed this jurisdiction narrowly.[48]

(d) The tension generated by the relevant constitutional provisions is easy to trace.[49] Art. 54(1) on the right to life clearly allows for instances of non-arbitrary

[45] 23/1990 (X. 31.) AB decision, ABH 1990. 93. Note that this finding is in the reasoning of the decision, and not in the holding.

[46] 23/1990 (X. 31.) AB decision, ABH 1990. 93.

[47] 23/1990 (X. 31.) AB decision, ABH 1990. 94–95.

[48] Arts. 1(g) and 21(6) of the Act on the Constitutional Court. See 31/1990 (XII. 18.) AB decision holding that upon a request for constitutional interpretation the Court is going to answer a constitutional question in the context of an actual problem. Note also that standing to request abstract constitutional interpretation is limited.

[49] For a detailed analysis of this tension and the possibility of its resolution see Kis, J.: Az első magyar Alkotmánybíróság értelmezési gyakorlata [The First Hungarian Constitutional Court's Practice of Interpretation], 48–98, in: *The Constitution Found?* (ed.: Halmai). 52–58.

deprivation of life. The limitation clause [Art. 8(2)] at the same time precludes any limitation on the essential content of constitutional rights. In the case the Court found that any deprivation of life is arbitrary *per se*.

János Kis argues convincingly that the construction chosen by the Court violates basic rules of constitutional construction and in essence alters the text of the constitution.[50] Furthermore, according to Kis the Court could have relied on the narrow reading of both the right to life provision and the limitation clause.[51] Although this solution would have eliminated the tension within the constitutional text, it does not resolve the issue of constitutionality of capital punishment. More precisely, it does not offer a general, substantive resolution. Instead, it would have directed the Constitutional Court to test the arbitrariness of the rules of procedure and the practical application thereof. As another viable alternative Kis submits that the justices could have argued that the Court's perception of the right to life as an inviolable, absolute right is based on generally accepted moral grounds. This solution would have accounted for yet another problematic premise of the decision. As Kis notes concerning the nature of deprivation of the right to life, it is important to see that all intentional acts resulting in the deprivation of life are 'total and irreparable' in the sense used by the Constitutional Court.[52]

(e) The Constitutional Court's reasoning did not enter into an analysis of moral considerations and shared beliefs about capital punishment in this manner. However, Chief Justice Sólyom's concurring opinion is a helpful guide in understanding how the Constitutional Court reached its interpretation of conflicting constitutional provisions. The introductory part of the Chief Justice's concurring reasons is entitled "The Liberty of the Constitutional Court in Concluding its Judgment".[53] The Chief Justice argued that the Constitutional Court shall develop its own interpretation of the right to life and human dignity. This interpretation should be part of a coherent jurisprudence, a jurisprudence that is beyond the reach of daily politics, transcending the written constitution. This 'invisible constitution' shall be the standard of constitutionality applied by

[50] Kis: *loc. cit.*, 57. The Court equates 'arbitrary deprivation' with 'deprivation' of life. The concurring opinions dealt with the meaning of arbitrariness in detail. See the concurring opinion of Justices Lábady and Tersztyánszky at 23/1990 (X. 31.) AB decision, ABH 1990. 96 and Chief Justice Sólyom at 23/1990 (X. 31.) AB decision, ABH 1990. 107.

[51] Kis: *op. cit.*, 58.

[52] Kis: *op. cit.*, 56.

[53] 23/1990 (X. 31.) AB decision, ABH 1990. 96. Chief Justice Sólyom's concurring opinion also appeared as a separate article as Sólyom, L.: A halálbüntetés ellen [Against Capital Punishment]. *Világosság,* 1990/12, 908–915.

the Court. In creating the invisible constitution the Constitutional Court is constrained only by the requirements of constitutionalism.[54]

The concept of the invisible constitution immediately became subject to criticism.[55] Although the concept is one of the most-known jurisprudential premises developed by the Hungarian Constitutional Court, in its practice the Constitutional Court did not rely on this technique of interpretation extensively.[56] Nonetheless, the Chief Justice's concurring opinion explains at least in part the Court's perception of its own role and its attitude towards the inconsistency faced in the abolition case.

3. The aftermath of the Constitutional Court's decision

The above analysis focused on the central argument of the abolition decision: on the Constitutional Court's interpretation of the right to life and dignity. The Court decided about the unconstitutionality of capital punishment in abstract terms and the relevant part of the reasoning is concise. Although the essence of the decision may be summarized very briefly, numerous additional points were made in the reasoning of the Court and in the concurring opinions. Most of these issues are relative to the broader context of the abolition of capital punishment and will be analyzed in the context of future developments.

To begin with, the Constitutional Court's decision abolishing capital punishment was formative of constitutional jurisprudence: the lasting effects of the Court's reasoning have become traceable in constitutional decisions ever since. Thus, the capital punishment decision—initially a benchmark of the success of democratic transition—slowly permeated constitutional jurisprudence thus triggering effects that last well past the early days of democratic institution building.

[54] 23/1990 (X. 31.) AB decision, ABH 1990. 97–98.

[55] In the literature the concept of the invisible constitution was associated with sheer reliance on natural law. For a comparative analysis of the concept of the invisible constitu—tion as a technique of interpretation see e.g. Trang, D. V.: Beyond the Historical Justice Debate, The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary, *Vanderbilt Journal of Transnational Law,* 1995. Vol. 28, 33.

[56] According to Kis it is possible to show that the Constitutional Court gave up on a natural law based theory in 1992 in the course of reviewing restitution legislation. Kis: *op. cit.,* 64–65. Giving up on this approach, however, did not set back the Court's rights-activism.

Furthermore, note that the decisions of the Constitutional Court are final and binding, they have an *erga omnes* effect.[57] All provisions regulating capital punishment and listed in the Constitutional Court's decision were omitted from the books accordingly. In this sense, the judgment of the Court was self-executing.[58] The Constitutional Court's decision, however, took the cooperation of the other branches while also supplying them with useful perspectives in a number of respects. To being with, the decision pointed to an inconsistency within the text of the Constitution, a matter awaiting resolution that might also require constitutional amendment. Second, with removing capital punishment from among criminal sanction, the Constitutional Court added new points of consideration for the coming reform of the Criminal Code. The Court's decision provided a set of principled underpinnings for governmental responses to a wave of violent crimes, an undesirable phenomenon to be dealt with in a newly emerging democracy. Outside the immediate context of criminal law and criminal policy making the Constitutional Court's decision also contributed to Hungary's entry into international organizations and undertaking international obligations that are conditioned upon a domestic observance of the dictates of the rule of law and respect for human rights.

It is not to suggest that the Constitutional Court's decision set the course of events as a grand plan of action. Although some of the steps to be undertaken in pursuance of the Constitutional Court's decision were more or less foreseeable, the Court did not prescribe a strategy to be carried into execution by the political branches. Rather, the Constitutional Court's decision permeated the open discussion of public affairs and supplied the participants of the public discourse both with a framework of argument and a set of premises, infusing the ongoing exchange of ideas with a rhetoric of constitutionalism and rights talk. Participants of the discourse were free to rely on these premises and often responded to each other's moves using the Court's decision as a yardstick. The Constitutional Court's decision and international engagements undertaken by Hungary in its aftermath were used routinely and efficiently to undermine (otherwise marginal) attempts to restore capital punishment. These developments were crucial for democratic institution building and have been instrumental ever since as they

[57] Art. 27 of the Act on the Constitutional Court.

[58] In the course of the restitution process Act No. 17 of 1993 extended the scope of crimes exempt from the statute of limitations. Among the newly included crimes there were crimes which were already barred before 1993 and were subject to capital punishment. Act No. 17 of 1993 however abolished capital punishment for these crimes [Arts. 81–82]. Affirmed by the Constitutional Court in dictum in 2/1994 (I. 4.) AB decision, ABH 1994. 49.

clearly demonstrate the force of safeguards in curbing attempts to limit rights in the name of unsubstantiated fears and public sentiment.

Due to the multiplicity of issues, it would be impossible to provide a detailed analysis of all potential aspects and consequences of the capital punishment decision. Instead, the following part attempts to draw a sketch of the development that arose upon and in response to the Constitutional Court's decision abolishing capital punishment.

3.1 Tension within the text of the Constitution

In the capital punishment decision, the Constitutional Court pointed to a textual inconsistency within the Constitution itself. In addition, the Court noted that it was the duty of the legislative to resolve this tension. Although since 1990 numerous constitutional amendments were passed, the Constitution's Art. 54(1) on the right to life and dignity allowing for a non-arbitrary deprivation of life has not been amended.[59] Thus, the inconsistency of the constitutional text persists. This fact, however, should not be interpreted as a sign of the parliament's hesitance to commit to the abolition of capital punishment. From the perspective of the abolition of capital punishment the relevance of this tension, or the non-conclusive constitutional language has been minimized in 1993, when Hungary became a member of the Council of Europe, ratified the European Convention on Human Rights and its Protocol No. 6 and was practically eliminated with the ratification of Protocol No. 13. As for the elimination of the tension that has been lingering around the text of the constitution ever since Art. 54(1) was formulated, the bold spirits hope for more compelling language to appear in the new constitution to be adopted, the latest.

3.2 The relevance of the decision in jurisprudence building: references to international trends and the multi-layered understanding of human dignity

The decision of the Constitutional Court in the capital punishment case became formative for a number of techniques of constitutional reasoning and jurisprudential concepts over the years. From the very start of its operation, the Constitutional Court consciously undertook a project of jurisprudence building. The decision abolishing capital punishment is a clear example of this endeavor, the traces of which are easy to identify in the Court's reasoning. On the one hand, in underscoring their conclusion the justices relied on sources of inter-

[59] Pursuant to Art. 24(3) of the Hungarian Constitution, Parliament may amend the Constitution with the concurrence of 2/3 of all MPs.

national human rights law. This methodological move was crucial in legitimizing the outcome reached in the case. As for the substantive aspect of the decision, in the case the Court continued to build the foundations of a constitutional jurisprudence heavily informed by the protection of human dignity. As more recent decisions suggest, while the protection of human dignity is still of significance in Hungarian Constitutional jurisprudence, the Court's approach to human dignity has not been without uncertainties.

(*International instruments of human rights protection.*) At the time of the Constitutional Court's decision in the capital punishment case the ICCPR was the only major international instrument of human rights protection was that was ratified and promulgated in Hungary. As was mentioned before, the provision in the Hungarian Constitution protecting the right to life and human dignity against arbitrary deprivation (Art. 54(1)) follows the language of the ICCPR's Art. 6(1). Note, however, that in the capital punishment decision in addition to various provisions of the ICCPR the Constitutional Court did refer to European instruments of human rights protection which Hungary did not ratify at the time. Sure, membership in the Council of Europe was literally days away, but it took almost an additional two years to ratify the European Convention itself. Therefore, it is interesting to investigate the reasons behind the Constitutional Court's reference to such international instruments of human rights protection.

The Constitutional Court's reliance on the European Convention and Protocol No. 6 at the time cannot be explained with mounting international pressure. It was only in 1994 that the Council Europe made imposing a moratorium on executions a condition of accession for aspiring members, the moratorium being the first step on the road to abolition.[60] Expectations were nowhere near what for instance Russia is exposed with regard to adopting Protocol No. 6,[61] and it was years before abolition of capital punishment could have been presented as a silent precondition of EU accession, as was the case with regard to the Baltic republics.[62] Thus, lacking international pressure the Court's references to international instruments are even more curious.

[60] See Resolution 1044 (1994) of the Parliamentary Assembly of the Council of Europe.

[61] For an insightful analysis on the relationship of Russia and the Council of Europe in the context of the death penalty see Ritter, K. H.: The Russian Death Penalty Dilemma: Square Pegs and Round Holes. *Case Western Reserve Journal of International Law,* 2000. Vol. 32, 129.

[62] Capital punishment was abolished by legislative action in Estonia (1998) and Latvia (1999). In Lithuania capital punishment was abolished by the Constitutional Court (ruling of December 9, 1998).

Note that the Constitutional Court did not apply these international instruments to the issue before the Court. Rather, the justices referred to these instruments as indicators of an international trend towards the abolition of capital punishment.[63] This finding might be a strong hint towards abandoning the view that the Court used these international human rights instruments as mere decorations. One has to keep in mind that the Constitutional Court was struggling with a prima facie tension between relevant constitutional provisions in one of its first major decisions.

Whether it is permissible for a constitutional review forum to resolve a tension between relevant constitutional provisions is a question that runs to the core of any theory on constitutional adjudication. Interestingly, the Hungarian Constitutional Court is not the only constitutional review forum that took a rather pragmatic approach avoiding such theoretical problems. In a recent case the South African Constitutional Court was of the opinion that

> "… A court must endeavor to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonize the relevant provisions, and give effect to all of them. …"[64]

In the capital punishment case the Hungarian Constitutional Court harmonized this tension in part via resorting to international human rights instruments. This solution might be seen as an example of the justices' aspiration to build a coherent jurisprudence, in conformity with foreign and international law and jurisprudence. The Hungarian Constitutional Court is certainly not the only "new" constitutional court to rely extensively on comparative analysis. In South Africa the drafters of the interim and then the final constitution regarded foreign and international examples as a source of guidance and external constraint on the interpretation of the constitution.[65] The jurisprudence of the South African Constitutional Court is often informed by careful comparative analysis.

In Hungary, in the constitutional jurisprudence of an emerging post-communist constitutional democracy, international standards became important on the domestic scene as they provide an external reference point which is hard

[63] 23/1990 (X. 31.) AB decision, ABH 1990. 93.

[64] *United Democratic Movement v. President of the Republic of South Africa and others*, (CCT23/02) 2003 (1) SA 495; 2002 (11) BCLR 1179; [2002] ZACC 21 (4 October 2002), para 83.

[65] See Art. 35(1) of the interim Constitution, and Art. 39 of the final Constitution. Webb, H.: The Constitutional Court of South Africa. *University of Pennsylvania Journal of Constitutional Law,* 1998. Vol. 1, 205, 208.

to question for those who intend to stay in mainstream public discourse.[66] As Chief Justice Sólyom explained:

> "The adoption of constitutional notions and doctrines has not only provided a legitimate basis for the Constitutional Court but it has also compelled the challengers of a decision to enter into an internationally endorsed discourse with internationally impartial definitions."[67]

In its jurisprudence the Hungarian Constitutional Court have ever since consulted foreign and international sources at some length, even in cases where the justices decided not to make explicit mention of the foreign example. Since the ratification of the European Convention the Constitutional Court routinely reviews the jurisprudence of the European Court of Human Rights and also pays attention to leading cases from established democracies. A detailed analysis of cases in which the Hungarian Constitutional Court consulted foreign or international jurisprudence, and the implications thereof, would far exceed the limits of the present analysis. The approach followed by the Constitutional Court in the capital punishment case nonetheless remains an important example of a conscious judicial effort of jurisprudence building in a democratic transition. As the Hungarian example shows, international human rights instruments can provide sound grounds for such an exercise even in such cases where international conventions cannot but stand as evidence on emerging international trends in the field of human rights.

(*Human dignity in Hungarian constitutional jurisprudence.*) Reliance on international human rights instruments was not the only means of early jurisprudence building applied by the Hungarian Constitutional Court in the capital punishment decision. It was also in this case that the Constitutional Court established an important pillar of its jurisprudence on human dignity. Over the years the Constitutional Court established a 3-level system for the protection of constitutional rights which was followed by the Court until the late 1990's. Interestingly, in its initial form all three levels of rights protection were connected with an aspect of the right to human dignity. A gradual erosion of this tripartite system, an important cornerstone of which was laid down in the capital punishment case can be sensed in more recent decisions on homosexual sodomy[68] or physician assisted suicide.[69]

[66] On the significance of international sources in East European constitutional adjudication see *Trang, op. cit.*, 1.

[67] Sólyom: *To the Tenth Anniversary of Constitutional Review*. *op. cit.*, 22.

[68] Decision 37/2002 (IX. 4.) AB

[69] Decision 22/2003 (IV. 28.) AB

In its jurisprudence the Constitutional Court distinguished three types of constitutional rights from the perspective of constitutionally permissible limitations (standards of review). In a sense the concept introduces a hierarchy of constitutional rights.[70] On top of the imaginary hierarchy is the right to human life in indivisible unity with human dignity [Art. 54 (1), Constitution] that cannot be limited or restricted.[71] This is how the Constitutional Court constructed the unity of right to life and dignity in the capital punishment case. And it was on this ground where the Constitutional Court held that capital punishment amounts to the total and irreparable annihilation of the right to life and human dignity.

Note that the Hungarian Constitutional Court is not the sole constitutional review forum of the view that the constitutionality of capital punishment should be seen as a deprivation of human dignity. Justice Cory of the Canadian Supreme Court argued in *Kindler v. Canada* that

> "[t]he death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity."[72]

Also, the justices of the South African Constitutional Court found in *Makwanyane* that capital punishment violated the constitutional right to human dignity.[73] Such a view is not unprecedented even in the U.S. where Justice Brennan of the U.S. Supreme Court famously said in his concurring opinion in *Furman* that

> "Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated *whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death*."[74] (emphasis added)

[70] Despite some similarities, the Hungarian concept is distinct from the German Constitutional Court's doctrine of objective hierarchy of values.

[71] See also Holló, A.: Az Alkotmánybíróság létrejötte és hároméves működése [The Establishment of the Constitutional Court and its First Three Years of Operation]. 63–107, in: *Alkotmánybíráskodás* [Constitutional Adjudication] (ed.: Kilényi, G.). Budapest, 1993. 102.

[72] *Kindler v. Canada*, [1991] 2 S.C.R 779, 817 (Cory, J.).

[73] *S. v. Makwanyane*, CCT 3/94; 1995 (6) BCLR 665; 1995 (3) SA 391; [1995] ZACC 3 (6 June 1995).

[74] *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Justice Brennan, concurring) In 4 years, Justice Brennan repeated his views in dissent in *Gregg v. Georgia*, 428 U.S. 153

In these cases, justices formulated their objections against capital punishment in the context of human dignity. The most important difference between these positions and the understanding followed by the Hungarian Constitutional Court is that unlike the other justices, the Hungarian justices understood the human dignity in unity with the right to life to be absolute and not allowing for any constitutionally acceptable limitation. In essence, the position developed by the Hungarian Constitutional Court is echoes the words of Art. 1(1) of the German Basic Law declaring human dignity as inviolable. The major difference between the Hungarian and the German approach is that while the inviolability of human dignity is stated clearly in the German Basic Law, in Hungary Art. 54(1) of the Constitution proscribes only arbitrary deprivations of the right to life and human dignity: the principle of inviolability of human dignity was established by the Constitutional Court.

Except for the right to human dignity read in conjunction with the right to life, constitutional rights are subject to limitations in accordance with Art. 8(2) of the Constitution. Under the limitation clause the Court first reviews whether the challenged norm infringes the essential content of the right. If the limitation does not touch the essential content of the right in question, the Constitutional Court determines the constitutionality of the limitations by the so-called 'necessity-proportionality' test. This approach is essentially similar to proportionality analysis widely applied by such courts as the German Federal Constitutional Court, the Canadian Supreme Court (Oakes test), the European Court of Human Rights or the European Court of Justice.

In Hungarian jurisprudence the proportionality test applies not only to constitutional rights mentioned expressly in the text of the Constitution, but also to constitutional rights that were derived from the so-called 'comprehensive (general) personality right' (a 'mother right') recognized by the Constitutional Court. The Constitutional Court derived the 'comprehensive (general) personality right' from the right to human dignity before the capital punishment decision.[75] The comprehensive personality right was derived from the right to human dignity read in conjunction with the right to life and was construed by the Court to protect the persons' decisional autonomy or self-determination. The comprehensive personality right has a subsidiary character: it may be invoked to

(1976), the case in which the U.S. Supreme Court upheld the constitutionality of capital punishment.

[75] 8/1990 (IV. 23.) AB decision. At the time of the decision of this case, the petition for the abolition of the death penalty was already filed with the Court.

protect personal autonomy if there is no specific right enumerated in the constitution.[76]

Although in the capital punishment decision the Constitutional Court did not mention the comprehensive personality right, in its jurisprudence of the Court applied a concept of human life and dignity which includes elements from the understanding of human life and dignity developed therein.[77] The Constitutional Court relied on the broader concept of right to life and dignity also known as 'comprehensive personality right' and 'right to personal autonomy' in a wide range of cases including the right to retain control over motions in civil cases,[78] to the right to privacy[79] or the right to establish fatherhood in a civil case.[80] The Court also used the concept to establish its jurisprudence regarding religious freedom[81] or freedom of speech.[82] One may find that the Constitutional Court used the concept of right to life and dignity to widen the scope of rights protection via defining and redefining constitutional rights.

Rights not belonging to the above mentioned categories may be limited at the wide discretion of the legislative. Limits imposed may not be arbitrary and shall treat persons as subjects with equal dignity [Arts. 54(1) and 70/A (1), Constitution)].[83] This standard is lower than the proportionality review applied under the limitation clause, essentially it calls for simple reasonableness review. The standard of treatment of persons as subjects with equal dignity is typically applied in cases where the law draws a distinction on a ground that is not mentioned expressly in the Constitution's non-discrimination clause [70/A(1), Constitution] or where discrimination was not made with regard to a constitutional right.

[76] Cf. Arts. 1 and 2 of the German Basic Law. See also the German Constitutional Court's decision in the *Elfes* case.

[77] The Constitutional Court referred to these two decisions as founding decisions of the concept of 'comprehensive personality right' e.g. in 36/1994 (VI. 24.) AB decision

[78] 9/1992 (I. 30) abolishing the prosecutor general's right to appeal for review of a final judgment in the interest of legality; 1/1994 (I. 7.) AB abolishing the prosecutor's right to intervene in civil procedures in the interest of legality.

[79] 56/1994 (XI. 10.) AB decision. In the case the Court noted that although the constitution does not mention a right to privacy, it follows from the comprehensive personality right.

[80] 75/1995 (XII. 21.) AB decision.

[81] 4/1993 (II. 12.) AB decision.

[82] E.g. in 36/1994 (VI. 24.) AB decision; 20/1997 (III. 19) AB decision.

[83] See the concurring opinion of Chief Justice Sólyom in 35/1994 (VI. 24.) AB decision on agricultural lands, ABH 1994. 215–217. Also Kukorelli, I.: *Az alkotmányozás évtizede* [The Decade of Constitution-making]. Budapest, 1995. 96–97.

The interplay between dignity as a constitutional right and equal dignity as a constitutional standard is best demonstrated by the Constitutional Court's approach towards restitution. The Court ruled in one of its first decision on the constitutionality of restitution, that restitution is an *ex gratia* donation and not a matter of constitutional right [e.g. dignity].[84] Throughout its jurisprudence the Court has been consistent about this premise.[85] In the restitution cases the Court was of the view that when paying restitution the state does not settle claims in a legal sense, rather, it offers a grant. The government has a wide discretion in distributing such *ex gratia* donations. From a constitutional perspective this discretion is limited by the requirement of treating people as subjects with equal dignity. Partial restitution clearly satisfies this criterion, and so does periodical distribution of the amounts.[86] The limits of legislative discretion were, however, revealed in a recent case where the Constitutional Court held that providing 1 000 000 000 HUFs to one group of persons and 30 000 HUFs to the others violates the standard of treatment of equal dignity.[87]

The standard of review in non-discrimination cases becomes problematic, when the Constitutional Court does not specify clearly its reasons for interfering with legislative discretion. This is what happened in the following cases: although the justices hinted that the challenged rules violated an aspect of human dignity, the Court did not offer a more detailed reasoning thus leaving considerable room for doubt. In the incest case of 1999[88] the Constitutional Court found that the incest provision of the Criminal Code was unconstitutional to the extent it prohibited consensual homosexual sodomy between siblings. The challenged rule did not prohibit sodomy between heterosexual siblings. The decision of the Court in the incest case was based on the premise that the distinction drawn between homosexual and heterosexual siblings amounts to discrimination on "another ground' under Art. 70/A of the Constitution. In the

[84] 16/1991 (IV. 20.) AB decision.

Note that as a rule the justices do acknowledge monetary relief as compensation for the infringement of dignity and for other non-material (non-pecuniary) damages. The Constitutional Court heavily relied on its dignity jurisprudence in abolishing the statutory restrictions imposed by the Civil Code on the recovery for non-pecuniary damages. 34/1992 (VI. 1.) AB decision.

[85] 28/1991 (VI. 3.) AB decision; 15/1993 (III. 12.) AB decision; 26/1993 (IV. 29.) AB decision; 1/1995 (II. 8.) AB decision; 22/1996 (VI. 25.) AB decision, 36/1998 (IX. 16.) AB decision; 46/2000 (XII. 14.) AB decision.

[86] 16/1991 (IV. 20.) AB decision.

[87] 46/2000 (XII. 14.) AB decision.

[88] Decision 20/1999 (VI. 25.) AB.

1999 decision the Court found that the distinction in the Criminal Code was not based an objective and reasonable justification.

Thereafter, in the homosexual sodomy case[89] the Constitutional Court was dealing with a challenge concerning provisions of the Criminal Code setting a different age of consent for homosexual and heterosexual. The Court found that the in the sodomy provisions the distinction based upon sexual orientation. Sexual orientation pertains to the core of human dignity, thus, any distinction between persons in this respect shall be justified by particularly serious reasons. Still, the Constitutional Court held that the applicable standard of review is not the one under the necessity—proportionality test, instead, the Court decided to follow its approach in the incest case and applied a "reasonableness" test. Thus, while the Constitutional Court did place sexual orientation in the context of human dignity, keeping the standard of review at the lowest level is a clear sign of hesitation as to the proper approach to be followed. Such an uncertainty was preserved despite the unique significance of the protection of human dignity once emphasized by the Constitutional Court.

The tripartite approach, providing different levels of constitutional protection to various aspects of human dignity is not without further problems. It was in the abortion cases[90] where the Constitutional Court acknowledged the collision between the right to autonomy (self-determination) and the state's interest to protect the life of the fetus. In the abortion cases the Constitutional Court refused to follow the language absolutes used in the capital punishment case, as such an approach would have resulted in a complete ban on non-therapeutic abortions. This solution was in part reached on the ground that the Constitutional Court was not ready to declare that the fetus was a person under the Constitution with all rights protected therein. Instead, the Constitutional Court emphasized that this decision was for the constitution-maker or the legislator to take. In the case, the Court performed a balancing act between the woman's self-determination derived from her human dignity on the one hand, and the state's duty to protect the life of the fetus on the other hand. The state's duty to protect unborn human life was derived from Art. 8(1) of the Constitution and is commonly associated with the state's duty to provide for (institutional) guarantees necessary for the enjoyment of constitutional rights (institutional protection).

The limits of this balancing act applied successfully in the abortion cases without compromising the absolute of human dignity as recognized in the capital punishment decision were nonetheless highlighted in the Constitutional

[89] Decision 37/2002 (IX. 4.) AB.
[90] 64/1991 (XII. 17.) AB and 48/1998 (XI. 23.) AB.

Court's recent decision concerning the constitutionality of physician assisted suicide.[91] In the euthanasia case the Constitutional Court found that the decision to end one's life with the active participation of a physician does not belong to the essential content (core) of the right to self-determination (autonomy). The limitation imposed by this prohibition must be in line with Art. 8(2) and shall be tested under a necessity-proportionality test. According to the longstanding jurisprudence of the Constitutional Court, the limitation of a fundamental right is acceptable if the protection of another fundamental right or liberty, or the protection of a constitutional value cannot be achieved by other means.[92] In the case of euthanasia the limitations imposed on the right to self-determination (autonomy) derive from the obligation of the state to protect human life, as expressed in Art. 8(1) of the Constitution. It is the duty of the state to establish such procedures (safeguards) that protect the integrity of the terminally ill patient's decision and eliminate the effects of potential interference by family members, friends and medial professionals on the patient's decision. The appropriateness of the procedure established by law depends on the current state of human medicine, the overall quality of health care infrastructure and the availability of well-trained professionals to examine the patient's decision and to carry it out.

Note that in the euthanasia case the Court departed from its jurisprudence and found that the unity of the right to life and human dignity does not apply in contexts where one's life is taken by another person. In the context of euthanasia this approach is problematic. Although referring to the accomplice might seem as an obvious observation, it seems to avoid the core of the intellectual and constitutional problem presented by the relationship of the right to life, human dignity and self-determination (autonomy) in the euthanasia context. In the long-standing jurisprudence of the Constitutional Court, the right to self-determination was derived from the unity of the right to life and human dignity, and not from human dignity alone. It was the inviolable unity of the right to life and human dignity that made it possible for the Court to declare capital punishment unconstitutional in its historic decision. After all, the very wording of Art. 54(1) of the Constitution securing protection for the right to life and dignity provides not only that these rights are inherent, but also that they might be subject to deprivations other than arbitrary ones. In the capital punishment case the Constitutional Court indicated an inherent tension in the language of Art. 54(1) of the Constitution, a tension which has not been resolved yet. This textual

[91] Decision 22/2003 (IV. 28.) AB.
[92] See decision 30/1992 (V. 26.) AB.

uncertainty could be yet another reason for constitutional anxiety, when the Court is departing from its long established jurisprudence with such ease.

3.3 Criminal law after the abolition of capital punishment

In addition to calling for the amendment of the constitution, the Constitutional Court remarked in its decision that the abolition of capital punishment necessitates the reconsideration of the system of criminal sanctions.[93] The Constitutional Court was not the first to raise the idea of recalibration. As that was already mentioned, the reform of the criminal justice system was under consideration since the Roundtable Talks and the democratically elected political forces also found it necessary. When talking about the potential abolition of capital punishment before the Constitutional Court's decision, Minister Balsai also mentioned the need to reform the system of criminal sanctions as a logical consequence of removing death penalty. The large scale, strategic reform of criminal sanctions and sentencing along with adjustments called for by the Constitutional Court's decision abolishing capital punishment did not commence until 1993.[94]

The Criminal Code provides that while observing the aim of criminal punishment, sentences should correspond with the seriousness of the offence, the degree of culpability and other aggravating and mitigating factors [Art. 83, Criminal Code]. Depending on the personality of the offender and the motive of the crime committed, the judge may depart from the provisions prescribing the form of incarceration [Art. 45(2), Criminal Code]. Prior to 1993, as an exception, the judge was entitled to apply a sentence lower than the one prescribed in the Criminal Code, provided, that even the lowest sanction was too sever in the circumstances [Art. 87, Criminal Code]. In 1993 criminal judges were granted more discretion in sentencing: the rule for reducing sentences below the level prescribed by the Criminal Code was made a rule of general application.[95] The amendment was expected to result in more individualized criminal sentences.

[93] 23/1990 (X. 31.) AB, ABH 1990. 93–94. See also the concurring opinion of Justice Szabó at 23/1990 (X. 31.) AB, ABH 1990. 109.

[94] Act No. 17 of 1993

The criminal law reform is a comprehensive one and far exceeds the reconsideration of the system of sanctions and transitional justice legislation. For the purposes of the present paper the changes in the system of sanctions and sentencing are the most relevant aspects of the reform.

[95] Act No. 17 of 1993, Art. 19 (1). As in other cases, the discretion of criminal courts is guided by the decisions and guidelines of the Supreme Court.

The legislature intended to rely on the internal mechanisms of the criminal justice system in readjusting the system of criminal sanctions.[96]

According to the chief prosecutor for the capital city, Hungarian criminal sentences are harsh compared to similar sentences in Western Europe, although in the meantime Hungarian crime rates are lower compared to Western democracies. He added that in Hungary, unlike in many Western states criminal sanctions other than incarceration are not regarded as punishment in the public eye. However, the government's survey of the effects of the 1993 amendment made in 1997 suggested that criminal sentences were still very light.[97]

The government believed that elevating already existing terms of imprisonment in the Criminal Code was not going to result in heavier sentences. Instead, a set of amendments changed the rules applicable to sentencing, parole and probation, reducing sentences, accumulation and life imprisonment.[98] Since the 1998 amendment life imprisonment means a minimum of 20 years in a maximum security prison.[99]

The first day of possible release shall be determined by the trial court. Furthermore, in its judgment the trial court may preclude the release of the convict sentenced to life imprisonment.[100] In effect, this rule of sentencing introduced real life imprisonment in Hungary in 1998. However, note that life imprisonment never stands as a mandatory sentence under the Hungarian Criminal Code.

Note that the German Constitutional Court found real life imprisonment unconstitutional in 1977.[101] Relying on its dignity jurisprudence in the case, the German Constitutional Court attributed special significance to physical and psychological factors ['hope'] in preserving the inmate's dignity. In addition, it is important to note that the German Constitutional Court found it imperative that life imprisonment be backed up with a coordinated parole policy as opposed to an individualized, merit based parole system. While Hungarian constitutional

[96] Art. 87(2) of the Criminal Code defined the lowest possible term of imprisonment in reduced sentences.

[97] See official commentary to Act No. 73 of 1997 introducing the first wave of amendments to the rules on sentencing.

[98] Official commentary of Act No. 87 of 1998 amending the rules on sentencing. The amendments were enacted by Act No. 73 of 1997 and Act No. 87 of 1998.

[99] Art. 47/A(2) of the Criminal Code as amended in 1998. For crimes to which the statue of limitation does not apply, life imprisonment is a minimum of 30 years. Following incarceration, the convict is released on parole.

Before 1998 life imprisonment meant incarceration with the possibility of parole not earlier than 15-25 years as determined by the trial court.

[100] Art. 47/A(1) of the Criminal Code.

[101] (45 BVerfGE 187).

justices tend to listen to the wisdom of German constitutional jurisprudence, it remains to be seen whether such arguments would have similar weight before the Hungarian Constitutional Court once the constitutionality of the current rules on life imprisonment comes under review. The relevance of the 'hope' factor, however, was acknowledged.[102]

Although, the reasons for the government's attempts to raise criminal sanctions are manifold, it would be a little far fetched to say that the government was acting under an obligation derived from the Constitutional Court's statement in the capital punishment case. Indeed, the reform of sentencing rules might be better understood in the light of the revision of the criminal justice system as a whole. With transition to constitutional democracy and market economy there was clear need to reconsider guarantees in criminal procedure, to amend the rules applicable to young offenders and to introduce alternative sanctions economic crime. The opening up of the political system, however, brought unwelcome phenomena such as drug-related offences, the use of guns and explosives, money-laundering and the shocking brutality of a number of crimes against human life. The new trend of curbing judicial discretion and attempts to raise criminal sentences are attributable to a large extent to policy considerations aiming to fight organized crime.[103] Indeed, in its general introduction the official commentary of the legislative amendment distinguished the real life imprisonment from capital punishment. This comment might be read as a reassurance that the government has no intention to restore the death penalty.

Conclusion

This paper aimed to show how the decision of the Hungarian Constitutional Court abolishing capital punishment was formative of a context that prevents the restoration of the death penalty in Hungary. Amidst a web of influences supporting the abolition of capital punishment, such as the efforts of the Leagues Against Capital Punishment or the reinterpretation of the 1956 revolt, the Constitutional Court handed down its decision abolishing the death penalty in very abstract terms. The Constitutional Court was deciding the case not within the narrow constraints of the moment. For instance, although the public discourse at the time of abolition was heavy with sentiments about the 1956

[102] *Büntetőjog, Általános Rész* [Criminal Law, General Part] (ed.: Békés, I.). Budapest, 2002. 272.

[103] See the official commentary of Act No. 87 of 1998. Note that the act is called the 'Mafia package' in popular parlance.

revolution, in its decision the Court did not mention the events of 1956 or the unjust and shameful executions in express terms. The concurring opinion of Chief Justice Sólyom contains a subtle and elucidating reference in this regard. The abolition of capital punishment is more than the symbolic rejection of a system that sacrificed human lives for political purposes. The Hungarian Constitutional Court abolished capital punishment because it is incompatible with the principles of constitutional government as perceived by the Court.[104]

The decision of the Constitutional Court paved the way for Hungary's membership in the Council of Europe and made the ratification of Protocol No. 6 exceptionally smooth, undertakings followed by the ratification of Optional Protocol No. 2 of the ICCPR. These international commitments altered the terms of the domestic discourse about capital punishment as they introduced new points of reference and new safeguards. The Constitutional Court's decision was already a major step towards eliminating death talk from domestic public discourse. International obligations provide a further safeguard against the views of those who question the legitimacy or appropriateness of the Court's decision. It only demonstrates the integrity of this context that one of the newer appointees to the Constitutional Court, Justice János Strausz is a retentionist. Also, due to Hungary's international obligations there is no room for referenda on capital punishment anymore. In recent years there were two referendum initiatives sought the restoration of capital punishment. The National Elections Commission rejected the initiatives as pursuant to Art. 28/C(5) of the Constitution there should be no referendum concerning the fulfillment of international obligations. The Constitutional Court affirmed.[105] The recent ratification of Protocol No.13 to the European Convention on the unconditional abolition of capital punishment was the last move to make in perfecting the abolitionist web.

An examination of the Hungarian capital punishment case in its broader context provides an excellent opportunity to observe the making of a discourse space and the development of a constitutional culture from its inception. When deciding about the constitutionality of capital punishment, the justices of the Constitutional Court intended to hand down an enduring decision. The judgment withstood trials at least in two distinct senses. On the one hand the decision became the foundation for building a system of safeguards against attempts seeking to restore capital punishment. These safeguards proved to be effective in

[104] 23/1990 (X. 31.) AB decision, ABH 1990. 99–100.

[105] See 11/1999 (V. 7.) AB decision on the referendum initiative to restore capital punishment. See also 2/1999 (III. 3.) AB decision on a referendum initiative for the temporary restoration of capital punishment. The National Elections Commission rejected the initiative and the petition for review by the Constitutional Court was late.

controlling the needs and aspirations of daily power games. The Constitutional Court's decision became a reference point and a source of limitations for the purposes of the public discourse. On the other hand, an analysis of the jurisprudence of the Constitutional Court reveals that the decision—itself a piece of creative judicial interpretation—was developed further by the Court and became a starting point for a number of jurisprudential concepts and means of right protection. In the light of these developments the exciting question of the day in the field of criminal is not whether there is room for restoring capital punishment in Hungary, but whether "real" life imprisonment is constitutional.[106]

The success of abolition in Hungary is not to suggest that abolition of capital punishment via judicial review should be more successful *per se* than abolition via constitution-making, referendum or legislation.[107] One may go as far as finding that unless a constitution clearly precludes capital punishment (such as Art. 102 of the German Basic Law), no judicial review forum can establish reasons, which are capable to prevent the restoration of capital punishment. Judicial review fora have the final say in the case before the bench, but they do not have a final say on the matter in its larger context. Following the decision of any constitutional tribunal, political branches may resort to amending the constitution or enacting new legislation, thus contributing to an ongoing discussion of public affairs. Therefore, the authoritative interpretation of the constitution by a constitutional review forum cannot prevent *per se* the political branches from reopening the discourse about capital punishment.[108] Also, when newly established constitutional courts decide on the constitutionality of capital punishment among the first cases, the review forum may use this opportunity to lay the foundations of its jurisprudence, as was in Hungary or in South Africa. In comparison, old courts—the US Supreme Court being one of them—are

[106] See an interview with the well-know defense attorney Orosz, B. in *Fundamentum,* 1998. Vol. 2/4, 38.

[107] Analysing the legitimacy of judicial review as a means to abolish the death penalty would exceed the limits and aspirations of the present paper.

[108] For the concept of the political process as discourse see Habermas, J.: *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy* [Faktizitaet und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates]. REHG, W. (trans.) Cambridge, Mass., The MIT Press, 1998, especially chapter 6 on the judiciary and the legislature and Stone, A. S.: *Governing with Judges, Constitutional Politics in Europe.* Oxford, Oxford University Press, 2000.

Cf. the words of Chief Justice Sólyom in his concurring opinion to the judgment abolishing capital punishment: "The legislative may sustain or abolish capital punishment at its liking—until the Constitutional Court delivers the final word on the constitutionality of the death penalty." 23/1990 (X. 31.) AB decision, ABH 1990. 93.

constrained by the mass of previous case law.[109] Thus, whether the decision on the abolition of capital punishment is taken by a constitutional tribunal or is the expression of political will, in order to fully understand its motivation, significance and implications, the decision shall be considered in its broader context. The timing of the Hungarian Constitutional Court's decision abolishing capital punishment shall also be taken into account. At the time of the decision the Constitutional Court was a newly established institution untainted by the previous regime, a factor that rendered the Court immense popular (institutional) legitimacy. This phenomenon is not unique to Hungary. Another post-authoritarian constitutional tribunal, the South African Constitutional Court, also benefited from similar legitimacy.[110]

If viewed so, the context built with the active participation of the Constitutional Court is stabile while capable of accommodation and transformation. Indeed, the recipe offered by the Hungarian Constitutional Court turned out to be a highly successful one. Still, as the analysis suggests its success is due as much to careful planning as to the interplay of unforeseen but at least partly favorable factors. However, as these factors were in constant interaction with each other, the ratio of logic and luck might be impossible to determine. When describing phenomena in democratic transition in Central and Eastern Europe 'rebuilding the ship on the open sea' (Jon Elster) and 'working at the drawing-board' (Stephen Holmes) are established metaphors. These metaphors suggest conscious planning, forward-looking intellectual exercises, the actors' control over the project to a certain extent. Although the decision of the Court is regarded as an indispensable step in the evolution of the abolitionist context, careful analysis shows that while some components of the abolitionist context stem from strategic action or at least a forward-looking approach, unexpected and unforeseeable events also played a significant role. Since the Hungarian Constitutional Court's decision, the emphasis has shifted from certain aspects of this context and put other issues in the limelight of attention. A term in the word-game of democratic transition, or rather, of transitology, which captures such interplay of intended and unexpected consequences is probably Timothy Garton Ash's 'refolution'. An examination of the Hungarian case demonstrates the significance constitutional and legal safeguards in keeping the often rhapsodic sentiments about capital punishment at bay during and beyond 'refolutionary' times.

[109] See Harcourt, B. E.: Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases. *Harvard Human Rights Journal,* 1996. Vol. 9, 255.

[110] Webb: *op. cit.*, 208.