DECISION 23 OF 1990: 31 OCTOBER 1990

ON CAPITAL PUNISHMENT

The petitioner sought a ruling to declare unconstitutional the various provisions of the Criminal Code and related regulations which permitted the imposition of the death penalty as a punishment for breach of criminal law.

The petitioner submitted that the said provisions were unconstitutional on the grounds, *inter alia*, that (a) they violated Art. 54 which guarantees that no-one should be arbitrarily deprived of the right to life; and that such punishment (b) could not be justified ethically; (c) was generally incompatible with fundamental rights as specified in Art. 8; and (d) amounted to an irreparable and irreversible means of punishment unsuitable in preventing or deterring the commission of serious crimes.

Held, granting the petition:

(1) Capital punishment was unconstitutional when assessed against a reading together of Arts. 8(2) and 54(1). The relevant provisions of the Criminal Code and other related legal rules which permitted capital punishment as a criminal sanction conflicted with the prohibition against any limitation on the essential contents of the right to life and human dignity. From an examination of the Constitution and the relevant international treaties, human life and human dignity formed an inseparable unity, having a greater value than other rights; and thus being an indivisible, absolute fundamental right limited the criminal jurisdiction of the State. It was the inherent, inviolable and inalienable fundamental right of every person in Hungary irrespective of citizenship, for which the State had a primary responsibility to respect and protect (page 00, line 00 - page 00, line 00).

(2) Article 8(2) did not permit any limitation upon the essential contents of fundamental rights even by way of legislative enactment. Since the right to life and human dignity was itself the essential content, the State could not dispose of it. Consequently any deprivation of it was conceptually "arbitrary." The State would come into conflict with the whole concept of fundamental constitutional rights if it were to authorise deprivation of the right by permitting and regulating capital punishment. Therefore Art. 54(1) could not be construed as allowing capital punishment even if imposed on the basis of legal proceedings, *i.e.* non-arbitrarily, since the possibility of any kind of limitation on any basis of the right to life and human dignity was theoretically excluded. Since capital punishment resulted not merely in a limitation upon that right but in fact the complete and irreversible elimination of life and dignity together with the guarantee thereof, all relevant provisions providing for capital punishment were therefore declared null and void (page 00, line 00 - page 00, line 00).

(3) As it was evident that Arts. 8 and 54 conflicted with one another, the question for their harmonisation should accordingly be referred to Parliament for resolution (page 00, lines 00-00).

(4) Further it followed from the fact that as the sanctions provided for in the Criminal Code constituted a coherent system, the abolition of capital punishment - which previously formed a component thereof - would necessarily result in a complete revision of the entire system. Such a revision, however, was beyond the jurisdiction of the Court (page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

Concerning the petition of Dr. Tibor Horváth on behalf of the League against Capital Punishment that penal regulations calling for capital punishment should be declared unconstitutional and be abolished, the Constitutional Court, with the dissenting opinion of Schmidt, J. and with the concurring opinions of Sólyom, P. and Lábady, Tersztánszky, Szabó and Zlinszky, JJ., made the following

DECISION.

The Constitutional Court declares capital punishment to be unconstitutional. Article 38(1)(i), arts. 39 and 84 in Act IV of 1978 on the Criminal Code, art. 399 in Act I of 1973 on the Code of Criminal Procedure (Crim. Proc.), paras. 17 and 18 in Law Decree I of 1979 on the Enforcement of Punishments and Provisions, and paras. 151, 152 and 153 in the Ministry of Justice Decree 8/1979 (VI.30) IM on the Rules of Enforcement of Punishment, are unconstitutional and are therefore declared null and void by the Constitutional Court.

The indication of "capital punishment" as an applicable kind of punishment, in the provisions of the Criminal Code - art. 155(1); art. 158(2); arts. 160 and 163; art. 166(2); art. 261(2); art. 262(2); art. 343(4); art. 346(1); art. 347; art. 348(3); art. 352(3) and (4); art. 354(3); art. 355(5); art. 363(2); and arts. 364 and 365 - which prescribe the imposable kinds of punishment, is also unconstitutional. The Constitutional Court therefore declares that the provisions in the abovementioned paragraphs of the Criminal Code, referring to "capital punishment" as an imposable kind of punishment, are also null and void.

The Constitutional Court will publish this Decision in the *Hungarian Official Gazette*. The annulment of the provisions will become effective on the day of the publication of this Decision in the *Hungarian Official Gazette*. In accordance with s. 43(3) of Act XXXII of 1989, the Constitutional Court orders the revision of legal procedures which imposed capital punishment under the annulled provisions on capital punishment and where the sentence has not yet been executed.

REASONING

I

When petitioning the Constitutional Court to establish the unconstitutional character of legal rules imposing capital punishment, the petitioner pointed out that these rules violate the provisions of Art. 54 of the Constitution, according to which: "In the Republic of Hungary, every human being has the inherent [***cf.* translation in Solyom's speech**???] right to life and human dignity of which no one shall be arbitrarily deprived" [para. (1)]; and "no one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment" [para. (2)].

In his petition, the petitioner expressed his opinion that capital punishment may not be justified ethically, that it is incompatible with human rights, and that it is an irreparable and irreversible means of punishment which is unsuitable and inexpedient for the prevention of severe crimes, or as a deterrent against the commission of such crimes.

II

1. In response to the request of the Constitutional Court, in his opinion dated 19 March 1990 the Minister of Justice considered the provisions on capital punishment to be unconstitutional. He found capital punishment to be an unnecessary and inhuman punishment which may not be justified on moral grounds, it does not serve the purpose of punishment, and is unsuitable for the protection of society, or as a deterrent against the commission of crimes by members of society.

He pointed out that Act XVI of 1989 was a meaningful step towards the elimination of capital punishment from the Criminal Code since it omitted capital punishment from the sentences imposable for subversive crimes.

He also suggested that the abolition of capital punishment was in harmony with European legal development. In Western European countries, the possibility of capital punishment either has been entirely eliminated or may only be applied to military crimes or in wartime.

2. The Constitutional Court requested Dr. József Földvári, Dr. László Korinek and Dr. András Sajó to submit expert opinions.

On the basis of the purpose of punishment, József Földvári finds capital punishment unjustified. However, he considers the abolition of capital punishment to be part of an all-encompassing revision in criminal law. According to András Sajó, capital punishment is unconstitutional because it is arbitrary and cruel, offends human dignity, and is contrary to the idea of a constitutional state. László Korinek examined the statistical and criminological aspects of capital punishment, and found it neither a suitable nor a necessary means of fighting against crime.

3. The Chairman of the Supreme Court, Dr. Pál Solt, and the Chief Public Prosecutor, Dr. Kálmán Györgyi, spoke at the Plenary Session in accordance with s. 30(4) of Act XXXII on the Constitutional Court.

Pál Solt expressed a legal and ethical view that capital punishment in general no longer had a place, nor now here in Hungary. In his view, capital punishment is unjustifiable from the aspect of criminal law, and it is unconstitutional, considering the relation between criminal law and the Constitution.

Kálmán Györgyi while emphasizing his personal belief in the abolition of capital punishment, called to the attention of the Constitutional Court that capital punishment may not be declared arbitrary on the basis of Art. 54(1) of the Constitution, and that such a decision required the complex consideration of the relationship between Art. 8(2) and Art. 54(1) and (2).

He believes that the most appropriate forum to make this decision would be Parliament: however he admits that, in the present constitutional situation, the Constitutional Court by virtue of law may not avoid answering the question on its merits.

III

The Chapter on "Penalties and Measures" at art. 38(1) of the Criminal Code, mentions capital punishment as the first item on the list of primary penalties. In art. 39, legislation provides the subjective criteria for the imposability of capital punishment, the applicable secondary punishments and the various legal consequences.

The Chapter on "Imposition of Punishments" at art. 84 states that "capital punishment may only be imposed in exceptional cases and when the crime and the perpetrator are extremely dangerous to society, and when there is an especially high degree of culpability."

Article 399 of the Code on Criminal Procedure, which also concerns capital punishment, establishes the most important procedural rules concerning reprieve, pregnant and mentally ill convicts as well as those who are sentenced to death in their absence.

Paragraphs 17 and 18 of Law Decree 11 of 1979 specify the circumstances for executions.

The provisions of the Rules of Punishment Enforcement that have been declared unconstitutional contain the rules for enforcing the punishment in relation to those condemned to death, and prescribe the measures to be taken after the execution.

Until the publication of the present Constitutional Court Decision, the Criminal Code allowed the enforcement of capital punishment on those who committed the following crimes:

- from among the crimes against mankind: genocide [art. 155(1)], aggravated cases of violence against a civilian population [art. 158(2)], aggravated cases of criminal warfare (art. 160) and violence against an envoy of war [art. 163(2)];

- from among the crimes against individuals: aggravated cases of homicide [art. 166(2)];

- from among the crimes against public order: aggravated cases of terrorist activity [art. 261(2)] and aggravated cases of seizing control of an aircraft [art. 262(2)];

- from among military crimes: specially aggravated cases of desertion [art. 343(4)], aggravated cases of escape from service [art. 346(1)], objection to service [art. 347], specially aggravated cases of breach of duty in service [art. 348(3)], specially aggravated cases of mutiny [art. 352(3) and (4)], aggravated cases of disobedience to orders [art. 354(3)], specially aggravated cases of violence against a commander or an officer in service [art. 355(5)], aggravated cases of jeopardizing combat alertness [art. 363(2)], a commander's breach of duty [art. 364] and escape from performing a military duty [art. 365].

IV

In justifying its decision to declare capital punishment unconstitutional, and to abolish the decrees allowing capital punishment, the Constitutional Court's reasoning is as follows:

Chapter I of the Constitution, entitled "General Provisions," states that "The Republic of Hungary recognizes the inviolable and inalienable fundamental human rights. Ensuring the respect and protection of these shall be a primary obligation of the State" [Art. 8(1)]. It mentions

in the first place in Chapter XII, "Fundamental Rights and Duties," that "In the Republic of Hungary, every human being has the inherent right to life and the human dignity, of which no one shall be arbitrarily deprived." [Art. 54(1)]. Article 8(4) states that the right to life and human dignity are considered fundamental rights, whose exercise may not be suspended or curtailed even in times of a state of exigency, emergency or peril.

It can be concluded from the comparison of the quoted provisions of the Constitution that, irrespective of citizenship, the right to life and human dignity is an inherent, inviolable and inalienable fundamental right of every human being in Hungary. It is a primary responsibility of the Hungarian State to respect and protect these rights. Article 54(1) of the Constitution stipulates that "no one may be arbitrarily deprived of" life and human dignity. The wording of this prohibition, however, does not exclude the possibility that someone may be deprived of life and human dignity in a non-arbitrary way.

Nevertheless, when judging the constitutionality of the legal permissibility of capital punishment, the controlling provision is Art. 8(2) of the Constitution which replaced the former Art. 8(2) and was enacted on 23 October 1989 by Parliament, in accordance with s. 3(1) of Act XL of 1990 passed on 19 June and entering into force on 25 June. Under the current provisions of Art. 8(2) of the Constitution, "in the Republic of Hungary the law contains rules on fundamental rights and obligations shall be determined by law which, however, shall not impose any limitations on the essential contents of fundamental rights."

The Constitutional Court found that the provisions in the Criminal Code concerning capital punishment and the quoted related regulations came into conflict with the prohibition against the limitation of the essential contents of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only

impose a limitation upon the essential meaning of the fundamental right to life and human dignity, but also allows for the entire and irreparable elimination of life and human dignity or of the right ensuring these. Therefore, the Constitutional Court established the unconstitutionality of these provisions and declared them null and void.

V

After outlining the reasons for the Constitutional Court's decision that declares the unconstitutionality and the annulment of the quoted provisions of the Criminal Code and other regulations, the Constitutional Court considers it necessary to mention the following:

1. Article 8(2) of the Constitution as amended on 19 June 1990 conflicts with the quoted text of Art. 54(1). It is the responsibility of Parliament to harmonize them.

2. Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the condition for several additional fundamental rights. The constitutional state shall regulate fundamental rights stemming from the unity of human life and dignity with a view to the relevant international treaties and fundamental legal principles in the service of public and private interests defined by the Constitution. The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State.

3. The Constitutional Court thinks that consideration should be given to the criminological and statistical findings, based on the experience of several countries, that the application and abolition of capital punishment have not been confirmed to influence the total

number of crimes and the incidence of the commission of crimes that were formerly penalized by capital punishment.

4. Article 6(1) of the International Covenant on Civil and Political Rights - which was signed by Hungary and promulgated by Act VIII of 1976 - declares that "each human being has an inherent right to life. This right has to be protected by law. No one may be arbitrarily deprived of his/her life." Paragraph (6) of the same article states that "none of the provisions of this article shall be invoked to delay or to prevent the abolition of capital punishment by a State which has signed the Covenant."

The Covenant, therefore, recognizes a developmental process towards the abolition of capital punishment. While art. 2(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, had recognized the legitimacy of capital punishment, art. 1 of the Supplementary Protocol adopted on 28 April 1983 provides that "capital punishment shall be abolished. No one may be sentenced to death and capital punishment may not be enforced." Also, art. 22 of the Declaration "On Fundamental Rights and Fundamental Freedoms" endorsed by the European Parliament on 12 April 1989 declares capital punishment to be unconstitutional. Hungarian constitutional progress moves in the same direction since in Art. 54(1) capital punishment is still not clearly excluded, however, it is followed by the new text of Art. 8(2), which proscribes legal limitations upon the essential contents of fundamental rights.

5. Since the punishments included in the Criminal Code form a coherent system, the abolition of capital punishment which is a part of this system requires the revision of the entire penal system; this does not, however, fall within the competence of the Constitutional Court.

SCHMIDT, J., dissenting: Articles 8 and 54 of the current Constitution in force contain conflicting provisions. While Art. 54(1) prohibits the arbitrary deprivation of one's life but fails to repeal the possibility of capital punishment, a later provision in Art. 8(2) does not allow any limitation on the essential contents of fundamental rights even by way of law. The prohibition against capital punishment may be traced from this.

While the interpretation of the Constitution falls within the competence of the Constitutional Court, it is the right and obligation of Parliament, the body empowered to frame or to change the Constitution, to resolve the conflict between the provisions of the Constitution. Such powers may not be assumed by the Constitutional Court.

Therefore, in my opinion, the Constitutional Court must make clear that it lacks such a power, and must call Parliament's attention to the necessity of eliminating the conflict. This would not exclude the possibility for the Constitutional Court to list all the current arguments against capital punishment.

LÁBADY and TERSZTYÁNSZKY, JJ., concurring:

1. By recognizing international conventions on human rights, Hungary has assumed an obligation to recognize general human rights as fundamental values. Under Art. 7(1) of the Constitution, the legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law, and harmonizes the internal laws and statutes of the country with the obligations assumed under international law.

2. The starting point of documents on human rights in current international law is human dignity. The International Covenant on Civil and Political Rights refers to "the inherent dignity of each and every member of the human community," and regards human dignity as a paramount

source of rights when that points to the recognition that "human rights originate from the innate dignity of human beings."

3. Human dignity, as the unity of personality along with human life, means the essence of man. Dignity is an elevated and absolutely respected quality of our human life and values: it is a standard of our human essence. It is an *a priori* value in the same way as life, and expresses the human dimension of life. Being a human and human dignity are inseparable from one another. Both are inalienable, imminent, essential properties of man. To be worthy of life means dignity as a human being, and that is why human life and human dignity may not really be handled separately.

4. The life and dignity of man, as the unity of man, is not really a right, because human essence is in fact transcendent - *i.e.*, beyond the reach of law. Human life and dignity are, therefore, included in the list of human rights and in modern constitutions as the sources of rights or values beyond the reach of law which are inviolable rather than as fundamental rights. Law should ensure that such inviolable values are respected and protected.

This - and only this - protection is already a dimension of law. The law involved at this point creates prohibitions and guarantees to differing extents for everyone including the State.

5. Thus, when Art. 54(1) of the Constitution mentions the inherent rights to life and dignity - with regard to the adjectives "inviolable and inalienable," in Art. 8(1) - it provides for categories that are superior to legal values, and must be given the fullest possible legal protection. The standards for the protection of these values (as real legal prohibitions) are unlimited and consequently binding upon the State. The State, therefore, may not use its criminal jurisdiction to deprive a human being of his/her life and human dignity because, by using capital punishment, it would arbitrarily restructure the above values protected by the Constitution. Arbitrarily, because

human life and dignity are superior to any other values, these are the source, origin and basis of human rights - *i.e.*, that are values inviolable and inalienable by law. Capital punishment is, therefore, arbitrary and consequently unconstitutional.

6. Since Art. 54(1) of the Constitution prohibits the arbitrary deprivation of one's life and human dignity, there must be room, according to the Constitution, for non-arbitrary deprivation. Consequently, it may not be stated that any deprivation of one's life is illegitimate or arbitrary.

Deprivation of one's life is only impossible in law; however, similar values - *i.e.*, another person's life and dignity - may compete with one another. In this case, law creates situations rather than restructuring the values: in the case of justifiable defence or other non-arbitrary deprivations, it recognizes the protection of the quality of non-arbitrariness as a defence against arbitrariness rather than recognizing the right to capital punishment.

SÓLYOM, P., concurring:

1. *Freedom of the Constitutional Court in formulating its decision*

According to the Constitution, no one may be arbitrarily deprived of life and human dignity. Accordingly, the formal key to the constitutionality of capital punishment seems to be the interpretation of arbitrariness. As no one obviously may be "arbitrarily" deprived of any right, our task is to identify the special conditions of the deprivation of one's right to life and human dignity - *i.e.*, to interpret arbitrariness with a view to the attributes of such rights. The decision concerning the constitutionality of capital punishment should, therefore, be based on the explanation of the contents of the right to life and human dignity. The Constitution declares that the law governing fundamental rights must not impose limitations on the essential contents of fundamental rights. First of all the contents of these rights must be made clear before deciding

whether the provisions of the acts concerning the law on capital punishment impose a limitation upon the essential contents and meaning of the rights to life and human dignity and are, therefore, unconstitutional.

The right to life and the right to human dignity are the most fundamental rights. As understood by the Constitutional Court, the right to human dignity is a "maternal right" - *i.e.*, the source of still unnamed fundamental freedoms. The interpretation of this right, therefore, may have an impact on decisions about the limitations placed upon individual autonomy in the cases of other human rights in the same way as the interpretation of the right to life may influence decisions about other controversial issues on the disposal of life (*e.g.*, abortion or euthanasia).

Before such a highly important decision is made, first the freedom of and constraints upon the Constitutional Court in forming the contents of its decision must be made clear.

As far as its grounds and finality are concerned, the decision of the Constitutional Court on the constitutionality of capital punishment considerably differs from the abolition of capital punishment by a legislative act. When deciding, Parliament is free to use any arguments, scientific, practical, or current political considerations or reasons. (See the abolition of capital punishment in 1989 for political crimes.) The publicity surrounding the legislative process provides an opportunity to introduce and compare as many arguments as possible and at the same time prepares the public for the decision. Another reason why it is easier to make a parliamentary decision is that the law providing only for the abolition of capital punishment does not have any pressing consequences with regard to additional aspects of the right to life. On the other hand, Parliament is under public pressure. Parliament may maintain, abolish or restore capital punishment at its discretion until the Constitutional Court renders a final decision on the constitutionality of this punishment.

By contrast, the Constitutional Court may only make constitutional arguments to justify its decision. In particular, it may not be satisfied with the usual criminological argument that capital punishment may not be proved to have an effect on the prevention of crimes. The Constitutional Court is not bound by the intent of the legislature since it may review the constitutionality of the Criminal Code and it may interpret the Constitution. A Constitutional Court decision is final. The Constitutional Court is not bound either by the will of the majority or by public sentiments. It is not bound either by any ethical or scientific trend.

The Constitutional Court has to create its own interpretation on the right to life.

In this context, the starting point is the whole Constitution. The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality - an "invisible Constitution" - beyond the Constitution, which is often amended nowadays by current political interests; and because of this "invisible Constitution" probably will not conflict with the new Constitution to be established or with future Constitutions. The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality.

The drafters of the Constitution worked with the values of pluralism, characteristic of a society and State after a change of regime; the modification of the Constitution promulgated on 23 October 1989 (by Act XXXI of 1989) broke with the "official" ideology which had formerly served as the basis of the State and with the requirement that the rights need to be interpreted in accordance with this ideology. The various intellectual trends suggested during the drafting of the Constitution illustrates this diversity of values, as does the retention of "the values of bourgeois democracy and democratic socialism" in the modification of October 1989. Since then this has

been removed from the Constitution by Act XL of 1990. The quite abstract wording of constitutional rights provides no indication that the legislature has committed itself to a given interpretation of these rights. Even if that had been the case, such a legislative commitment would not be a starting point for the Constitutional Court: the Constitutional Court is independent from the legislature's intent, and it would also be disquieting to rely on the fact of the social changes of the past year which have discredited the Constitution drafters' original concept. This could mean that the Constitutional Court is compelled to alter the meaning of the Constitution. However, that does not fall within the competence of the Constitutional Court. The interpretation of the Constitution shall begin with the concept of the rights interpreted as a neutral category, the limits of which may be established with a high degree of consensus, while its content may be filled with many different value concepts. If we proceed accordingly, the wide definitions of the Constitution include also a plethora of moral questions to be answered. The essence of a pluralist society is that these questions may be answered in many different ways - *i.e.,* the rights may encompass a variety of values while the whole constitutional system of rights remains coherent and operative. The Constitutional Court has to intervene in borderline cases to draw the line beyond which a given concept about the contents ("answer") may not be brought into harmony with the whole system (basic principles) of the Constitution. The equality of citizens, for example, may be interpreted in a variety of ways; the Constitutional Court had to declare that this equality might not be limited to mechanical equality with regard to the distribution of material wealth and had to clarify the conditions under which positive discrimination is permissible. In other cases, the Constitutional Court may establish that a given concept about the content of a constitutional right fits into the conceptual framework of the Constitution even though the legislature wished to exclude it. In exceptional cases, a constitutional right can bear only a single interpretaton. Of

course, it is a value judgement. This is the very thing which the Constitutional Court has the authorization to form - *i.e.*, to enforce its own concept on the contents to maintain the Constitution. The Constitutional Court has to make choices in borderline cases or when incompatible concepts come into conflict. The concept of the right to life may not encompass two concepts, one of which allows, while the other excludes, capital punishment. The Constitutional Court shall impose the interpretation that it considers in harmony with the whole Constitution.

Such a simultaneous freedom of decision and obligation burden the Constitutional Court with an immense responsibility. Though starting from the whole Constitution, it is the Court itself, with its continuous interpretation, that defines the standard of interpretation. As the decision is final, the judge must accept responsibility before his own conscience and before the public, primarily before the professional public. We must, therefore, face the fact that one of the possible meanings of a constitutional right will become binding (which might be corrected in a later decision by the Constitutional Court or might fall into disuse). The correct professional reasoning gains ground within a prior choice of value.

In terms of the above framework , the decision of the Constitutional Court is deliberately subjective and tied to history: even if the Constitutional Court proclaims absolute values, it reveals their meaning in the given period; and its decision, for example, in the questions of capital punishment or abortion, should not lay claim to eternity. The Constitutional Court's image of man, choice of philosophy and conception of a judge's duty are all subjective features. That is why it is desirable for the Constitutional Court to consider the contemporary international approach to capital punishment as an objective criterion; the evaluation of this subject already belongs to the Constitutional Court's realm of permissible political engagement.

In 1972 the US Supreme Court proclaimed that all laws on capital punishment were unconstitutional and set an example of liberating effect to other countries. Since 1976, however, we have witnessed the restoration of capital punishment. On the other hand, the Council of Europe - based on the development in most of the Member States - considered the abolition of capital punishment as a general trend and in 1983 it attached a protocol on the abolition of capital punishment to the European Convention on Human Rights 1950. (Of the 22 Member States, 15 have signed and 12 have ratified this Sixth Protocol - but for example in the non-ratifying Federal Republic of Germany, there is no capital punishment.) Article 22 of the Declaration on Fundamental Rights and Fundamental Freedoms, adopted by the Council of Europe on 12 April 1989, declares the abolition of capital punishment. This made most of the European nations eliminate the compromise included in the International Covenant on Civil and Political Rights allowing capital punishment: nevertheless, this compromise was followed by the Hungarian Constitution as late as October 1989 when only the prohibition against arbitrary deprivation was included.

The Constitutional Court has good reasons to rely on our own historical situation when it increases the respect of the right to life through the abolition of capital punishment and drives back the criminal jurisdiction of the State from this area. It is more than a symbolic opposition to a political system that sacrificed human life, without restraint, for its political purposes; the abolition of capital punishment for political crimes could have been on the agenda in 1960, in the same way as the prohibition against capital punishment was a current issue in 1949 in the *Grundgesetz* of the Federal Republic of Germany. The current historical task now is to establish and bind the legislature because as a constitutional order that is interpreted and protected by the Constitutional Court, the State cannot afford to deprive someone of their life.

2. *The right to life in the Constitution*

In this, I will examine where the right to life is placed in the Constitution, and how it is qualified by and related to similar provisions pertinent to it without outlining the concept of the content of the right to life.

According to Art. 54(1) of the Constitution: "In the Republic of Hungary every human being has the innate [***cf.* previous translation**] right to life and to the dignity of man, and no one may be arbitrarily deprived of these rights."

Provisions to be interpreted:

(a) the honoured role of and the relation between the rights to life and human dignity.

(b) the "innateness" and, under Art. 8 of the Constitution, "inviolability and inalienability."

(c) the provision "no one may be arbitrarily deprived," under Arts. 8 and 54 of the Constitution.

(a) In the 18th century, it was usual in natural law to trace back natural rights to some of the ancient rights or fundamental rights. Such a starting point was the right to life. Nowadays, human dignity plays a similar role of the basic norm both in constitutions and international conventions. In this capacity, it is a descendant of "natural freedom" in natural law. The right to human dignity is a definite "maternal right" in German, American and Hungarian Constitutional Court practice; to protect the freedoms of action and self-determination, the Court derives ever newer fundamental freedoms therefrom. The right to life has not lost its honoured role either.

There are opinions that continue to regard it as the basis of other rights. Generally the right to life follows from the right to dignity at the head of the catalogue of fundamental rights but there are cases, such as in the Hungarian Constitution, where they appear in the same. It is a usual practice today that the right to life is related to physical soundness and health, on the one hand, and to the prohibition, influenced by international law, of torture and cruel or inhuman [degrading] punishment, on the other hand. The two rights seem to live separate lives while retaining their importance. A more in-depth analysis, however, can demonstrate their interrelation in substance, that only in their unity they may explain the legal status of man and may serve as a real basis of fundamental rights.

It is the unity of the rights to life and dignity that distinguishes man from other persons on the one hand, and from other living creatures on the other. The separate historical role of these two aspects of the status of man is not inconsistent with the concept that the present historical moment, especially with regard to the acute question of disposal of life by a third party, requires a uniform approach to the rights to life and dignity. To prove all this, the characteristics of these two rights have to be examined in detail as I will do in Point 3 below.

(b) According to Art. 54 of the Constitution, human beings have the "innate" right to life and to the dignity of man. Based on the title of Chapter XII, these rights are fundamental rights. Under Art. 8, the Republic of Hungary recognizes "the inviolable and inalienable (fundamental) rights" of persons.

The interpretation of these adjectives does not provide sufficient basis for the decision on the constitutionality of capital punishment. With regard to inalienability for example, there is a classical theory that the right to life may not be assigned to the State in the social contract, consequently the State may not take it away. A similar explanation could be found for

inviolability or innateness too, or one can do without these adjectives to argue that the State may not impose limitations upon the right to life (see Point 3). Innateness can be interpreted as an expression of the *a priori* values of life (and dignity) from which the rights that protect them originate. However, legal history and present-day constitutions and international conventions show a range of examples, that the declaration of inalienability of the right to life has not excluded capital punishment. Article 54(1) of the Hungarian Constitution has also aimed at allowing the deprivation of one's inalienable and inviolable innate right to life and dignity unless it is an arbitrary deprivation. Therefore, without the interpretation of arbitrariness, no opinion may be formed about the inalienability of the right to life and dignity.

(c) Accordingly, the limits upon the right to life are dependent on how "arbitrariness" is interpreted.

The imposition of a punishment may be considered arbitrary when it allows the judge to be excessively subjective in making his decision. Though capital punishment was declared unconstitutional in the USA because of its unusualness and cruelty, the real objection to the death penalty statutes had been the imprecisely defined conditions precedent to the application of capital punishment. Andr s Saj˘ brings up a similar argument in Point 1 of his professional opinion. The provisions of the Criminal Code concerning the imposition of capital punishment, however, do not differ substantially from the provisions concerning the imposition of other kinds of punishment, consequently their "arbitrariness" may have a bearing on the imposition of other punishments. In my opinion, however, the arbitrariness referred to in Art. 54 of the Constitution calls for a special interpretation that has no bearing other than on the rights to life and dignity.

Another approach suggests that arbitrariness means a procedure which fails to comply with the law. It is supported by the European Convention on Human Rights 1950, art. 2, which

says that the only permissible deprivation of one's life is the carrying out of a death sentence imposed according to law. (In 1983, however, the Sixth Protocol abolished capital punishment.) In a constitutional state, no punishment may be imposed except for reasons defined in law, and on the basis of legal proceedings. There is precise wording in the Constitution with regard to the deprivation of one's freedom (Art. 55). Comparison of Art. 54(1) with Art. 55(1) suggests that the arbitrariness of the deprivation of life and dignity is not precluded if carried out for reasons defined in law and on the basis of lawful proceedings. This is a necessary but insufficient condition. The difference is explained by the qualitatively different nature of the deprivation of life and freedom (see Point 3).

But if the formal legitimacy of capital punishment does not necessarily preclude arbitrariness, the only question left to be answered about its contents is whether or not capital punishment itself as a kind of punishment is arbitrary.

According to a widespread view, capital punishment is arbitrary because no evidence may be found that it is suitable for achieving the aims of punishment which are in accordance with the Constitution. (This is also mentioned in the reasons of this decision.) Human life and dignity enjoy preference over this uncertainty. It is true that a punishment not serving its purpose is unconstitutional. It is also true that because the deprivation of fundamental rights is in question here, evidence must be found that the punishment is suitable for the purpose. However, I do not think that the mere argument over effectiveness is sufficient to establish the unconstitutionality of capital punishment. It might be suggested that we also do not have reliable evidence of the preventive effect of other punishments including imprisonment. Again, the difference between loss of life and loss of freedom would have to be explained (*i.e.*, the special nature of the right to life) to prove that we can be satisfied with the (high) probability of the appropriateness or

effectiveness of the punishment in the case of imprisonment or fines but not in the case of capital punishment. My second objection is that, according to the argument mentioned above, it follows that capital punishment would be constitutional if the punishment was sure to achieve its purpose. The usual reassuring answer is that the purpose of punishment will never be achievable with full certainty in the case of capital punishment for the very reason that human error cannot be eliminated. So, the argument remains pragmatic. It is difficult to break out of this cycle because we are questioning the practical effectiveness of punishment rather than proving that capital punishment is theoretically unsuitable. This question leads us further to the peculiar nature of capital punishment and makes us switch over to a theoretically different line of argument: the special nature of capital punishment is based on the peculiarity of the right to life. Therefore it would be better to start from the peculiarity of the right to life and prove that life may not be taken away even if that appears to achieve its purpose.

(d) According to Art. 8(2) of the Constitution, the laws regulating fundamental rights may not impose any limitations upon the essential contents and meaning of the fundamental rights to life and dignity. The question is: in what relation do we determine the limitation on a fundamental right? This question is of particular importance in our case. Capital punishment comes into conflict with not only the right to life per se but also the right to life as a right of which "no one may be arbitrarily deprived." So, whether or not the Criminal Code imposes limitations at all upon the constitutional right to life depends on the interpretation of "arbitrary deprivation" included in Art. 54(1) of the Constitution. If the deprivation of life is formally and in any case considered arbitrary, or the right to life is considered absolute, then capital punishment is a limitation upon this right. But if the right to life in the Constitution itself is thought to be limited by supposing that certain non-arbitrary cases of the deprivation of life, provided they are based on

legal proceedings, are consistent with the nature of the right to life, then the Criminal Code does not limit the right to life; and whether the Constitution itself may impose a limitation upon the essential contents of a fundamental right does not belong to the investigation of the unconstitutionality of the Criminal Code.

3. *The peculiarity of the rights to human dignity and life.*

The right to human dignity is not merely a declaration of moral value. The concept that human dignity is a value *a priori* and beyond law, and is inaccessible by law in its entirety does not preclude this value from being regarded as the source of rights - as many international conventions and constitutions do by following natural law - or the law from requiring the respect of dignity or the transformation of some of its aspects into a true right.

The right to human dignity has two functions. On the one hand, it means that there is an absolute limit which may not be transgressed either by the State or by the coercive power of other people - *i.e.* it is a seed of autonomy and individual self-determination withdrawn from the control of anybody else by virtue of which, according to the classical wording, man may remain an individual and will not be changed into a tool or object. The same is expressed by the approach, shared by the Constitutional Court, that the right to human dignity is a "maternal right," the source of ever newer freedoms, with which we continuously safeguard the sphere of self-determination against (state) control. This approach to the right to human dignity is what distinguishes man from legal entities that may be entirely controlled and do not have any "intangible" essence. (And that is the theoretical difference between man and a legal entity, rather than the suggestion that certain rights "because of their nature, may only be attached to man." Based on the latter model analogues rights for legal entities may always be created.)

We shall see that the right to human dignity will fulfill its function only if it is interpreted in unity with the individual person's right to life; if we leave it out of consideration, abstract dignity will allow treatment of a concrete individual as an object.

The other function of the right to dignity is to ensure equality. The historical achievement of "everyone's equal dignity" meant equal legal capacity - *i.e.*, a formally equal chance. The characteristic of equality that upon this right other rights may be built (*e.g.*, equal dignity, when applied to legal capacity, serves as a basis for acquiring additional rights); but from which effect must not be taken away needs to be stressed for the understanding of the present decision. This also means that dignity is indivisible and irreducible - *i.e.*, the minimum condition of human status of which no one may be deprived.

The right to equal dignity must ensure, in union with the right to life, that differently "valued" bare lives are not to be treated differently in a legal sense. No one is more or less worthy of life. Because of equal dignity, the life and human dignity of a cripple and someone morally criminal are equally untouchable. Human dignity is shared by every human being, no matter to what extent the possibility of human achievement he or she has accomplished and the reason therefor. As a result of the unity of the rights to life and dignity, not only is everybody equal in death; but the equality of lives is also guaranteed by dignity.

The right to (bare) life was absolute only in certain natural law theories (*e.g.*, in Hobbes) in as much as the authority to dispose of it might not be transferred to the State. Until capital punishment (or war) became questionable or, on the other hand, until other living creatures' right to life emerged, it had not become pressing to figure out what causes the right to life to be a special human right. The dignity of man and its relation to life are what distinguish the right of man to life from any other rights. The right to life without dignity is not the right to human life.

In the natural law approach already mentioned, the right to life is a residue of nature, the placing of survival over everything, this right - as has already been written by Spinoza - "is granted to animals as well." Today the right of man to life is made specific by its relation to the right to dignity, as compared to "the rights of animals and trees." The obligation of the state to protect life (each life) and to protect dignity must be distinguished from man's subjective right to life and dignity. The "rights of animals and trees" are not mere metaphors; the State has indeed an obligation to maintain the natural bases of each life, and to safeguard each life from moss through the embryo to man, but this protection is relative except with regard to individual human life, and only man has a subjective right to it.

What today defines the relationship between the rights to life and dignity? Before a constitutional court makes a decision about life and death it must first elucidate its image of man. Today a dual approach is predominant: the different secularized versions of the statuses of body and soul. Regarding their individuality, "bodily" rights are inferior to the abstract "soul" - dignity - that is easily separable from the concrete individual. It is also common to use man as a biological and social life as a point of departure. Such a linkage, however, does not have any consequences in law, since the right to life is conceived as "the right to biological-physical existence"; that is why the right to bodily soundness and health is traditionally linked to it. In most constitutions, these (individual) "bodily" rights do not enjoy absolute protection, as opposed to the right to dignity by which man has a share in the dignity of the human race and which is, therefore, untouchable. (This "racial" right survives man in the eyes of those who - like many - view the right to be paid duty as the dead person's right.)

Such a hierarchy in the rights to dignity and life carries grave consequences because this dualistic approach may be a justification for sacrificing the individual man for public purposes.

Under such circumstances, a criminal may be executed for the purposes of general prevention because his dignity will not suffer damage anyway. (Hegel evaluates criminals through punishment. In my opinion this argument may only be accepted for punishments other than capital punishment.) With these dual values it would become easy to justify disposal of life even in cases when a loss of dignity is established - *e.g.*, in the case a disease resulting in the permanent loss of clear consciousness. In other words, if because of this dualism the protection of man is restricted to the untouchability of abstract dignity, the life of the concrete person will be subject to the mercy of others.

The Constitutional Court is free to decide whether to start from a uniform and indivisible image of man, rejecting the dualism of body and soul - *i.e.*, to view man in the unity of his/her life and dignity. Accordingly, only the unity of the subjective right to life and to dignity will provide the status that is specifically related to the concrete individual: it is the untouchability and equality contained in the right to human dignity that results in man's right to life being a specific right to human life (over and above animals' and artificial subjects' right to being); on the other hand, dignity as a fundamental right does not have meaning for the individual if he or she is dead. (The possible moral value of their death is the concern of survivors - including the relevant obligations of the State - disregarding of course the fact that this value might motivate his or her action, even his or her self-sacrifice.) Human dignity is a quality of human life which naturally accompanies it. The subjective right to human dignity does not allow the individual to be deprived of his/her dignity. Man, however, may only be deprived of human dignity by the taking of his/her life, causing both to come to an end once and for all.

According to the above approach, the right to human dignity and life essentially differs from any other rights.

This right concerns the undivided and complete man - while all other rights regulate abstract "roles" or partial aspects. (Even personal rights concern only those with average, "normal" sensibility.) The right to life and dignity, as the basis of man's legal status, is the most personal and most general at the same time.

The other rights may be limited, then restored; their withdrawal may only be partial also because their limitation does not preclude the prevalence of other rights. Several rights may be taken away entirely, then granted again. The ultimate limit of their withdrawal is exactly the right of man to life and dignity (which does not mean that reaching this ultimate limit would be constitutional in all cases). On the contrary, the right to life and dignity can be taken away only irreversibly, causing any other rights to cease. Due to its indivisibility, the right to life and human dignity is theoretically unlimitable, and constitutes a theoretical boundary for the limitation of any other rights. (If the unity of these two rights are recognized as the basis of the individual's legal status, it will be possible to make different decisions about the extent to which other rights based on them may be limited.) The limitation of personal freedom for the purposes of punishment, for example, may take a variety of forms. Within the given legal system, a limit must be defined there which even punishment by imprisonment may not exceed. This may range from an open prison to custody with "knee-deep irons," from country to country, and from constitution to constitution. In the meantime, the various derivative rights deducible from the rights to life and dignity may also be limited - *e.g.*, in respect of the outward appearances of dignity. The condemned, however, continues to be entitled to several additional rights, and when his sentence has been served his right to personal liberty is restored. The limitations, however, may not concern the fundamental rights to life and dignity; not only because it is forbidden but also because law is not able to impose such limitations. It is easy to admit, for example, that as long as the prisoner is conscious,

he may not be deprived of the possibility of autonomous reaction or free will, whether it is internal resistance, repentance or some other decision. And while he is alive, there is no doubt about his human status. The uniform approach to life and dignity is an even more complete safeguard for man: his dignity does not depend on his state of consciousness and morality, it is given by his life. His human status is therefore indisputable as he is untouchable because of the dignity of his life.

Article 8 of the Constitution confines the limitability of fundamental rights. It withdraws from the outset their "essential contents" from the control of the legislature - *i.e.*, the State - and it forbids the suspension or curtailment of the exercise of the most important fundamental rights even in times of emergency, national crises or extreme danger. But the rights to life and dignity are conceptually unlimitable, and man may be deprived of those completely and once and for all - *i.e.*, no distinction may be drawn between the part that may be limited and the "essential contents." The right to life and human dignity is the essential content itself, and that is why the State may not dispose of it. These rights also form a part of the essential contents of all other fundamental rights, since they are the source and the condition of, and serve as the absolute boundaries upon the limitability of, all of the other fundamental rights.

It follows from this, that the deprivation of the right to life and dignity is conceptually "arbitrary." The State will come into conflict with the whole concept of the Constitution concerning fundamental rights, if it authorizes the deprivation of the right to human life and dignity by allowing and regulating capital punishment. Consequently, Art. 54(1) of the Constitution may not be construed as allowing capital punishment as a "non-arbitrary" deprivation of life. On the contrary: capital punishment is unconstitutional.

Thus, capital punishment is arbitrary not because it limits the essential content of the right to life but because the rights to life and dignity - due to their characteristics - are naturally unlimitable. That is why the modification of Art. 8(2) and (3) of the Constitution by Act XL of 1990 was not necessary to render capital punishment unconstitutional. When Art. 8(3) of the Constitution still allowed limitation upon the exercise of a fundamental right "if it was required for the security of the state, internal order, public security, public health, public morality or for the protection of other people's fundamental rights and freedom," the term "arbitrariness" in Art. 54(1) of the Constitution could not be construed to allow capital punishment if imposed on the basis of legal proceedings - *i.e.*, non-arbitrarily. Capital punishment was unconstitutional even at that time because, in terms of the rights to life and dignity, the possibility of any kind of limitation on any basis, has theoretically been precluded.

4. *The dilemma of justifiable defence*

The Constitutional Court considered it necessary to note that the entire penal system needs to be revised after the abolition of capital punishment. The serious problems concerning the system of punishments are considerably decreased by the fact that capital punishment has always been an alternative penalty in the Criminal Code. The uniform approach to right to life and dignity has indeed made a new explanation for justifiable defence unavoidable, at least in cases where the person attacking life is killed. (What follows will concern exclusively this case of justifiable defence.) If the deprivation of one's right to life is conceptually arbitrary, no one may have a right to deprive another person of life under any circumstances. The problem of justifiable defence prevails in all other cases when the law "allows" the deprivation of life: for example, in extreme necessity or under the orders of a principal.

Although the Constitutional Court is not required to draw these conclusions, I will briefly summarize what follows from Point 3 above with regards to justifiable defence. The deprivation of life cannot be supported by the usual explanation for justifiable defence according to which "the criminal organs of the State are not present at the scene of the unjustified attack, and thus the victim (or the person acting in support of the victim) accomplishes the defence of society against the assailant." The State may not assign a power for the implementation of justice that it itself lacks: the assailant may not be sentenced to death by a court either.

Due to the absolute approach to the right to life, the range of justifiable defence will narrow. Life may only be proportional to life. If an attack against material goods or public interest is repelled by killing the assailant, then punishability may not be precluded under the rule of justifiable defence. There still remains a question: why cannot the person be punished who repels an attack against life by killing the assailant?

When the victim kills his assailant, the law does not recognize the legality of the deprivation of life by the non-punishability, insured by "justifiable defence" but that the situation in which the attack and its repelling occurred is beyond the reach of law. The situation of justifiable defence is present only if there is a choice between lives, "the redistribution of death," because the victim's life may be saved only if the assailant's life is lost. However, the law may not divide and distribute death. In this borderline case, law does not oblige and does not entitle the victim to anything. It may not grant a right to kill the assailant, just as it may not require the victim to bear this: since this would mean the power of disposing of his life. Therefore, the natural condition controls those moments in which the situation requires a choice between lives. That is the case from the point of view psychologically as well: the manifestation of the instinct for life which can break through any barriers of civilization - *i.e.*, the characteristically non-

human "right" to survival (a right "granted to animals as well"). Upon the end of situation of choice law that only examines the limits of its competence - *i.e.*, whether the conditions of the "justifiable defence situation" were present, without assessing what happened there steps in again.

SZABÓ, J., concurring:

1. The professional opinions outlined above have examined the inefficiency and unsuitability of capital punishment for achieving the purposes of punishment, as well as its arbitrariness in light of the wavering of the decision. In my opinion, these arguments are incapable of deciding the question as they concern not only capital punishment but in fact all other kinds of punishment. The conclusion drawn from them, however, is that neither the lack of efficiency nor the unsuitability for serving its purpose nor the variations and differences in judgment question the *raison d' tre* of punishment in general. It is well known that criminal reprisal is unable to influence the incidence of crime as it is basically dependent on the current social situation. This does not mean, however, that punishment in general should be given up because of its inefficiency and unsuitability for serving its purposes or because of the differences and variations in the practice of judgment. The imposition of punishment is based on the principle that no crime may remain unpunished or that crime deserves punishment, rather than on the efficiency, the appropriateness to fulfill its purpose and the uniformity of punishment. And if these arguments do not question criminal punishment in general, they do not question the raison d' tre of capital punishment either. In this system of arguments, the unsuitability for serving the purposes of punishment would question the constitutionality of punishments including capital punishment only if the purposes of punishment were defined in the Constitution. However, there are no constitutionally legitimate purposes for punishment. Therefore, the constitutionality or

unconstitutionality of capital punishment - as a kind of punishment - depends solely and exclusively on how the right to life is regulated in the Constitution. It is defined in Art. 8 as a fundamental right to be protected by the State, the essential contents and meaning of which may not be limited even by law.

When the Constitutional Court eliminated capital punishment from our legal system, it relied solely and exclusively on the Constitution, rather than on criminal or criminological considerations. It maintained the principle that crime deserves punishment, but - worthy of a constitutional state - it did not deduce the State's right to punishment from state authority. The right to punishment is not unbounded. We must, therefore, give up capital punishment as a licence for punishment stemming from absolute power.

2. The Constitutional Court established in the reasoning of its decision that the punishments included in the Criminal Code constitute a coherent system, and the abolition of capital punishment as one of its elements requires the revision of the entire penal system which, however, does not fall within the duties of the Constitutional Court.

I consider this revision necessary because of the following reasons:

- in the present system of criminal law, capital punishment is justified on the basis of the purposes of punishment - *i.e.*, general and special prevention - irrespective of the opinion of experts and the explanations of criminal law theories;

- the removal of capital punishment from the penal system has, therefore, necessarily an influence on the Criminal Code interpretation of the social purpose of the penal system;

- and since it is found that within the penal system capital punishment may be justified on the basis of the purposes of punishment, and the pursuit of those purposes, these must also necessarily be considered unconstitutional.

- punishments in the penal system need not be bound to the pursuit of purposes, or the suitability for the purpose, since the fact that it is not effective or that it does not fulfill certain purposes does not mean that its use is not necessary, fair and justified. The principle that crime deserves punishment may come true without the pursuit of purposes, effectiveness or efficacy;

- the social purpose of criminal law is to become a sanctional cornerstone of the legal system as a whole. It does not have an independent sphere of action as have the other branches of law. That is why a criminal sanction differs from the sanctions of other branches of law which are aimed at repairing, restoring, or setting of obligations. A criminal sanction is, therefore, a punishment, it causes disadvantages, and its role and intention is to maintain the soundness of legal and moral norms when the sanctions of other branches of law fail;

- a punishment intended to maintain the soundness of law has a symbolic function: the orders of criminal law may not be contravened without impunity neither when there are good reasons to transgress those, nor when the punishment fails to achieve any purpose or the punishment is unsuitable for achieving a definite aim. The aim of punishment is within itself: in the public declaration of the soundness law, in the reprisal that does not consider the purpose:

- a symbolic retaliatory punishment, which leaves the purpose out of consideration, and intends to maintain the soundness of law, is the same as the principle of proportional punishment. The principle of proportional punishment precludes punishment, because punishment requires and allows proportioning to the purpose instead of proportioning to the weight of the deed. If, for example, education or treatment was viewed as a purpose, a serious crime would be assessed in the light of bad upbringing or curability rather than the seriousness of the crime. However, the perpetrator's personal condition may not be the basis of punishment in a constitutional state. A punishment intended to maintain the soundness of law - a retaliatory

proportional punishment - is much more humane than a seemingly humane, educational punishment because it does not concern my personality, personal autonomy and freedom of conscience. The logic of imposing a punishment in criminal law may not be substituted with the logic of education and treatment if it wants to remain within the framework of justice;

- another reason why the principle of proportional punishment is the only possible constitutional punishment in a constitutional state is that nothing else is compatible with the idea of equality before the law. Any other approach would be a declaration of inequality before the law as it would necessarily proportion punishment to the individual's personal condition or status instead of the deed.

The removal of capital punishment from our legal system has the paradoxical consequence that the idea of punishment intended to maintain the soundness of law - *i.e.*, retaliatory punishment - is confirmed, not the idea of revenge that corresponds to the principle of talion - *i.e.*, "an eye for an eye, and a tooth for a tooth." Historically, reprisal is the rationalization and moderation of revenge. It maintains moral indignation as motive while, in its standard, it induces moderation, self- control and the causation of just and well-deserved *malum*. In the future, the most serious punishment replacing capital punishment will be the standard of comparison. A retaliatory punishment respects personality because it does not assume the role of psychotherapy, curing, social or mental care and, therefore, does not make these obligatory as punishment. These functions must and can be offered in the course of the punishment being enforced.

The criminal jurisdiction of the state has no right to take away life. There are no hangings in a constitutional state! However, a constitutional state is entitled to employ retaliatory, proportional punishment that maintains the soundness of the law. A proportional punishment may

be imposed even without capital punishment. As mankind has given up mutilative or bodily punishments, it can give up capital punishment as well. The principle of proportional punishment will not suffer damage if next to the whipping bench, the gallows and guillotine are exhibited in criminal museums.

ZLINSZKY, J., concurring:

1. *Capital punishment and the text of the Constitution*.

From the point of view of the unconstitutionality of capital punishment, Art. 8(1) and Art. 54(1) of the Constitution must be examined in relation to the entire text and basic trend of the Constitution.

According to Art. 54(1), that no one may be arbitrarily deprived of life, is obviously adopted from the Universal Declaration of Human Rights, and both texts were formulated for the situation where law still recognizes capital punishment. "Naturally arbitrary" may not be deduced from the Constitution: with regard to capital punishment, originally, the Constitution did not consider capital punishment arbitrary provided it was imposed for reasons defined by law, and on the basis of legal proceedings. (The text of the Constitution is imprecise in its meaning as well: instead of "may not be," one obviously must not be arbitrarily deprived of one's life.)

The later amended Art. 8(1) prohibits the limitation of a fundamental human right even by law: if the right to life is recognized as a fundamental right - and it is undoubtedly recognized as a fundamental right in our Constitution - then this right may not be limited by the Criminal Code. The question is whether the deprivation of life means its limitation. Since more includes fewer, and complete deprivation is more than limitation, the answer to the above question seems affirmative.

2. *The right to life*

Law, however, is not able to provide man with eternal life. It merely aims to create and maintain a social order where the individual is free to fulfil his life and human dignity without doing harm to others. The fulfilment of human dignity includes the free decision to accept and fulfill moral values. Any legal barrier directly or indirectly forcing moral decisions on people in fact, hurts their dignity, because it reduces, consequently - if the worst happens - deprives them of the freedom of taking their own moral decisions. In pursuit of the possible respect for the freedom of man, the law establishes such norms for coexistence which are intended to resolve the frictions between individuals; at the same time, it seeks to guarantee the individual's safety so that they can freely form their lives in accordance with their goals in life.

The limit of this human freedom is where this freedom comes into conflict with the freedom of others. If the free decision of a person is directed against another person's freedom, dignity or freedom of action, it will be the responsibility of the society and, within this, of the State to help the victim. In the legal system, the State promises this assistance, and at the same time prohibits individual defence against attack or threat (at least it allows a very narrow range of justification when the attack is direct and may not be repelled in another way).

3. *The criminal jurisdiction of the State*

The criminal jurisdiction of the State serves to protect the individual's safety. Partly by punishing the attack or injury and inducing the offender to change his position, and partly by threatening with punishment in order to hold others back from causing similar injuries, and

finally by eliminating or minimizing the situations in which somebody's life and dignity can be threatened.

The criminal jurisdiction of the State undoubtedly restricts people in their freedom of decision, therefore, it imposes to a certain extent limits on human dignity. At the same time it provides the possibility for making a new positive moral decision, since the legally-formed norm may be freely accepted and met; and such a decision has moral value. It is still a fact, however, that while living in a society is at the same time a limitation on and a prerequisite for human freedom, a norm protected by the State is a limitation upon the moral value, and therefore, it only has a place there and to the extent that is necessary for the protection of the individual's life and freedom (life is to be understood here as encompassing all of the prerequisites of social existence). Therefore, according to my opinion and contrary to the concurring opinion of Szabó, J., punishment is acceptable only if directed to an objective and it immediately loses its justification as soon as it becomes unsuitable for achieving its objectives. Society after all is not entitled to form an opinion about the individual's morality, acceptance or rejection of values.

4. *Final conclusion*

As even the members of the Constitutional Court have different opinions about the interpretation of the criminal jurisdiction of the State, no conclusion may be drawn about the permissibility or impermissibility of capital punishment from the criminal jurisdiction itself or from its bounds. I think it has been an implicitly accepted principle - constitutional principle - in criminal law for centuries that punishment has preventive purposes: it serves to deter attacks against protected social values. It may prevail only where it fulfills its objective, it loses its legal

basis when it can no longer serve its purpose or can serve that only at the expense of causing a more serious injury than that which it prevents.

The general preventive effect of capital punishment may not be proved by the present scientific knowledge. It would probably have a preventive effect in some of the cases if the criminal was sure to count on being punished; it would not have an effect in another type of case, as some of the crimes threatened with capital punishment are committed under provocation or by deviant persons. Because of the low effectiveness of criminal investigation, the preventive effect of capital punishment does not prevail even where there is a possibility for it; and it may not be proved whether in these cases other serious but non-lethal threats bound to ensue would not have the same degree of preventive effect. Thus, in this regard, the necessity of capital punishment is not confirmed today; therefore, the use of capital punishment is based either on the prerogative decision-making power of the legislature or on the maintenance of the status quo: arbitrary.

There is no doubt that capital punishment precludes the risk of repeated crime. It is quite frequent and that is why capital punishment seems to create a certain social security. The risk of repeated crime, however, may be controlled by other means as well; in the meanwhile, the preconditions of crime are reproduced by society; and capital punishment diverts attention from the fact that society does not pay the required attention to the elimination of the preconditions, and to the creation of the prerequisites of safe coexistence. From this point of view, the maintenance of capital punishment is definitely harmful because it disguises the delay in absolutely necessary steps to be taken by the State. Capital punishment, however, eliminates the still occasional - even though highly probable - risk of repeated crime by an action that certainly results in the termination of life; however, the right to life - because of its nature - may not be limited or terminated in order to prevent or lessen presumed but uncertain risks.

Today in Hungary, social disposition towards criminals often calls for retaining capital punishment. It is quite common, however, that such disposition is directed towards crimes which are not threatened with capital punishment, as for example in the case of fatal car accidents when they demand death for the person who caused death. The Constitutional Court, however, does not hunt for popularity among the members of society; its only competence is to ensure the harmony and constitutionality of the legal system: deprivation of life by the State is forbidden even according to the strict text of our Constitution and may not be justified by the constitutional principles of criminal law either.