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Searching for the Rule of Law in the Wake of Communism

George P. Fletcher*

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I. INTRODUCTION

Of all the dreams that drive men and women into the streets, the “rule of law” is the most curious. We have a pretty good idea of what we mean by “free markets” and “democratic elections.” But legality and the “rule of law” are ideals that are opaque even to legal philosophers. Thus, we have reason to puzzle whether political changes in Eastern Europe represent a renewed commitment to the rule of law. What constitutes living under the rule of law after Communism? What would count as achieving “a-state-based-on-law”—to use an expression popular in the last days of Soviet Communism?

Rather than approach these questions theoretically, I want to attempt to answer them with some case studies taken directly from the recent pages of post-Communist Hungarian political life. Considering these examples will give us a foundation to conclude by reflecting on the virtues and vices associated with the rule of law. The three case studies that will engage us will be the taxi strike in the fall of 1990, a complex decision whether to prosecute someone who violated the law in the name of democratic values, and the invalidation of capital punishment by the Hungarian Constitutional Court.1 What

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these specific occurrences have to do with the rule of law will become clear as the discussion proceeds.

II. The Taxi Strike of 1990

It is worth beginning with the taxi strike since it represents one of the most unusual phenomena of post-Communist politics. On Thursday night, October 25, 1990, the Hungarian government made a sudden announcement to increase the price of gas. The new prices would be slightly higher than in Austria, Hungary's closest Western neighbor. The price increase came as an obvious consequence of tensions in the Gulf, price hikes in the world market for oil, and the Soviets' move to shut off the spigot of subsidized gas that flowed freely when Hungary was a dutiful colony. Although the price hike did not have as drastic an impact as Yeltsin's economic shock therapy in Moscow, it was Hungary's first direct experience with the capitalist idea that consumers must pay the real (unsubsidized) price of the goods they buy.

The taxi drivers were upset not only by the price increase, but by the government's apparent duplicity in planning the move. Prior to the price hike, the government had repeatedly promised not to raise the price of gas. The sudden increase was designed to catch people off guard while they were still exuberant after having celebrated their national epic, the abortive 1956 revolution, on October 23. With several days off from work, most people were in a good mood. This was the first time since the transition to democracy that the Hungarians had openly and joyfully celebrated the passionate agony of 1956.

In 1990, however, it was not tanks, but taxi cabs that clogged the streets and bridges of Budapest. Within a few hours after the government announced the price increase, the taxi drivers had managed to shut down the major traffic arteries in the city. They had parked their taxies on all the major bridges, and had thrown up blockades around the city. Spontaneous cooperation among the taxi drivers and private truck drivers all over the country generated similar blockades in provincial cities.

In the fall of 1990, I was in Budapest as a visiting professor at the local law school. I woke up that fateful Friday without advance warning of the strike. From my balcony overlooking the Danube, I noticed a large crowd milling around
the Szabadsághid —the “Freedom Bridge” leading from the old market in Pest across the murky blue river to the palatial Gellért Hotel in Buda. I went out among the crowd. “Strike” was the word on the lips of the angry drivers hanging out by their cars blocking the bridge.

Events on Friday began to hint that this was more than a strike. The drivers had cordoned off the airport in Budapest. Unless foreign businessmen were willing to walk the last few miles to the airport, they were better off sitting on their suitcases in the lobbies of luxury hotels. This rag-tag collection of apolitical, tough-talking guys also managed to close the border to Austria. As in 1956, the only way to cross the border was to go through the fields and bypass the official checkpoints.

Business came to a standstill and shops closed early. The subway, however, was still running under the river. Commuters could get home even if they lived and worked on opposite sides of the river and even if streetcars and private cars could not cross the Danube. The crowded subway stations became rumor mills. Reports began to circulate that food supplies were running low, that the hospitals could not receive deliveries of medicine. No one knew what was going to happen. The government was a fragile expression of a democratic order—would it fail this first test?

Walking the streets of Budapest and confronting barricades at key intersections, I had an eerie sense of being in Paris in 1968. Could this lead to a general strike? Would the opposition parties exploit the government’s vulnerability? Newspapers started appearing in special editions. The leaders of the leading half-dozen political parties started speaking out, but in muted tones. The government itself tried to rally support by staging a counter-demonstration. But the leading opposition parties, the Free Democrats and the Young Democrats, did nothing to exploit the situation. Their attitude was to keep their distance, watch what was going on, and urge a peaceful resolution. The will of Paris ’68 was missing; no new alliances were forming, no revolutionary thrust.

On Saturday, October 27th, the mood began to stabilize. Standstill became the norm. Though the streets were still blockaded, the crisp fall day invited strolling. Budapest came out into the streets. Baby carriages and bicycles took over the lanes normally clogged with polluting vehicles. My sense on “Freedom Bridge” was that most people were beginning to
enjoy "sticking it" to the government. As one working man told me, "That's what those thieves deserve." Then came the news that the police chief of Budapest had announced that if the government ordered intervention, he would resign.

"What is going on?" I thought to myself as I sat in the hot baths at the Gellért pool and tried to engage other Hungarians in conversation about the events swirling outside. One group of workers seized control over the major resources of the city and everyone seemed to applaud. At one level it seemed like an act of violence that met with general approval. Other citizens were deprived of the right to use the bridges, yet they did not complain. They did not insist that labor be kept in its place. Nevertheless, there was no doubt in my mind that if, in the United States, the Teamsters tried to shut down the bridges to Manhattan, the police would immediately don their battle gear.

But this was Budapest, not New York. The enemy is not organized labor, but organized government. The closest analogy to the taxi strike, as I see it, is a 1960s style college sit-in. The taxi drivers protested the gas hike in much the same way that American students protested the Vietnam war by closing down universities. The government was understood in the minds of Hungarians as university administrations were understood in the minds of students—as the symbol of all authority. The drivers "parked in" on the bridge; they ceased doing "business as usual." Their fellow denizens thought it was just fine to make life difficult for the parental surrogates called the Government.

Some intellectuals began to speak of the "park-in" as an act of civil disobedience. But acts of civil disobedience raise fundamental issues of right and wrong. There was no moral issue at stake in the taxi strike. This was a bread and butter question. When I buttonholed people and asked, "Why shouldn't taxis simply raise their rates to offset the gas price increase?" the typical response was, "But then no one could afford to use taxis." This is the logic of those who still do not accept the vicissitudes of capitalism. As of 1990, Hungarians still looked to their government as their providers, as guarantors of their welfare.

On Sunday, the strike leaders entered into negotiations with the government. Remarkably, the negotiations were

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2. "Park-in" is my term, not theirs.
broadcast, non-stop, on Hungarian television. Citizens sat glued to their sets with the rapt attention Americans reserve for sexual harassment hearings. It appeared as though the conflicting sides were reaching an agreement in front of the television cameras. The meeting was then suspended for about an hour; the parties came back and announced a compromise that would temporarily lower the price of gas as taxi strikers went back to work and life returned to normal.

What do these events tell us about the rule of law? Our first reaction to this situation might be that these taxi strikers obviously violated the rights of ordinary citizens. The minimal context of the rule of law is that the state enforces and protects the quotidian rights of ordinary people. In the West, no one would tolerate a labor organization imposing that kind of tertiary effect upon citizens not involved in the labor dispute. At the time, I was inclined to think that the indulgence displayed toward the strikes reflected an insufficient appreciation by the Hungarian authorities of the legal framework required for peaceful labor disputes. In effect, the government allowed the entire society to be held hostage to the demands of a small group of workers. The rule of law requires, at a minimum, that the law be enforced. The Hungarian government chose not to do so.

My impression was that very few people in Budapest cared about the symbolic importance of maintaining the proper legal framework in a dispute between a small group of driver-citizens and the government as oil supplier. The Hungarians were more concerned with taboos other than breaching the rule of law. No one wanted another violent confrontation on the streets of Budapest. Having just observed the anniversary of the 1956 uprising, everyone was horrified by the thought of blood flowing once again on the banks of the Danube. Using force to open the bridges was simply out of the question.

There is much to be learned from this episode. First, it seems that the rule of law hardly makes sense in a situation in which the citizenry still sees itself as negotiating with their government as employees negotiate with management. Alas, this is the legacy of communism and central planning. The Party did indeed function as the management of Hungary, Inc. Moreover, the round-table discussions leading to democratic elections perpetuated the problem by carrying forward the mentality of employees negotiating benefits from their masters.
But in a centrally planned economy and controlled society, it is hard to think otherwise.

The rule of law, it seems, requires a vision of government closer to the liberal theory of the state as a disinterested arbiter. The states' officials must be above the conflicts that lend themselves to regulation under law. So long as the government—as sole supplier of gas—is a party to disputes, one cannot expect the matter to be resolved under a neutral standard called law.

Also, the rule of law requires governmental distance in another sense. The state cannot enforce the law consistently and even-handedly if it thinks of itself as a surrogate parent bearing ultimate responsibility for its citizens' welfare. That kind of indulgence shown by college administrations in the late 1960s, and by the Hungarian government in 1990, reflects an identity with the interests of the citizenry rather than the kind of distance required for the neutral arbitration of disputes. The Hungarian government and the masses on the streets shared a common interest in avoiding a repetition of past traumas, and this common interest weighed more heavily on the government than its commitment to secure the rights of citizens to free access to the streets and bridges.

III. THE DECISION TO PROSECUTE:
THE CASE OF JOZSEF VÉVGÁRİ

The connection between the rule of law and full enforcement of the law (at least the criminal law) is revealed in the classic dispute surrounding prosecutorial discretion. We in the United States have come to accept prosecutorial discretion as normal and, as some might say, inevitable in a legal system administered by people, not machines. Yet the dispute about full enforcement is still very much alive on the European Continent. The opposing positions are captured in the German phrases Legalitätsprinzip (full enforcement) and Opportunitätsprinzip (discretionary or "opportunistic" enforcement). Note the linguistic connection between the notion of full enforcement and the concept of legality (Legalität). German legal theory maintains a commitment to the Legalitätsprinzip, the Legality Principle.

One of the implications of a commitment to the Legalitätsprinzip is that prosecutors may not make special deals with particular suspects. Legal systems committed to
legality, the rule of law, should be chary of "crown witnesses"—granting immunity in order to induce the testimony of some suspects against others. Deliberately not prosecuting offends the principle of equality before the law and in that sense breaches the principle of legality. According to the "Opportunity Principle," however, the interests of law enforcement, and even individualized justice, sometimes mandate discriminating uses of power. In other words, the criteria of expediency and compassion may sometimes outweigh the demands of legality.

The conflict between the principles of full and discretionary enforcement came to a head in Hungary's transition to democratic rule. The occasion was the prosecution of Jozsef Végvári, a onetime loyal officer of the Hungarian Secret Service, who changed sides during the 1989 Revolution. On Christmas day 1989, Végvári invited a television crew from Fekete Doboz—an alternative TV group—into the inner sancta of the Secret Service building in Budapest. The group filmed files and other secret corners of the operation and showed the film on television. The resulting scandal came to be known as "Dunagate." Dissident groups celebrated the scandal, for Végvári's deception gave them access to the Communist Party's files on the democratic opposition.

Hungary's first free elections took place in February 1990, three months after Végvári breached his official duties as an intelligence officer. There is little doubt that his acts constituted criminal violations under the criminal code then in force. And indeed, if we may abstract from the political conflict of the moment, his acts should in principle constitute a criminal offense under any system of criminal law. Every legal system, whether democratic or communist, maintains a secret service. Breaching the rigors of official secrecy for the sake of a good political motive is hardly a defense. It seems that Végvári should have been prosecuted and convicted.

The Communist chief prosecutor decided, however, not to prosecute. This was a decision based not so much on expediency, but on a recognition of Végvári's good faith, and perhaps on the perception that the changing political climate rendered him more of a hero than a villain. Yet in June 1990, the newly constituted democratic government appointed a new chief prosecutor, Kálman Györgyi, who was a distinguished professor of criminal procedure well schooled in German
literature on the imperative of the "Legality Principle." Paradoxically, the new democratically-minded chief prosecutor decided that he must prosecute Végvári. The principle of legality required that he bring to trial a man who had served the cause of the democratic transition.

The case finally came to trial in the fall of 1990, and the process revealed a curious mixture of Soviet and Western legal ideas. On the one hand, the decision to prosecute reflected a yearning to identify with the principles of legality that prevailed in the West, or at least in those few countries officially committed to the "Legality Principle." Yet many of the legal arguments internal to the case reflected the ongoing influence of Soviet legal theory. Végvári's defense was that his conduct was justified because, as Soviet lawyers were wont to say, it was not "socially dangerous." The underlying principle of this defense is that the ultimate criterion of legality (lawful and unlawful behavior) is not the nominal violation of the law, but generating a threat to the legitimate interests of society. According to this theory, Végvári was aiding the democratic movement and indeed the movement had won. In what sense could one say that his conduct constituted a danger to the legitimate interests of the emerging democratic order?

The answer to the question depends, of course, on how we define Végvári's conduct. If we look just at what he did, namely reveal official secrets, his conduct was surely criminal regardless of his motives. If we focus on this conduct in context, however, it takes on the appearance of justifiable civil disobedience. The military court that heard the case cannot be criticized for failing to resolve this conundrum. The prosecution ended in November 1990, with a compromise verdict. The court issued an official reprimand of Végvári's conduct, an informal sanction short of an official conviction.

The very institution of an official reprimand reflects the survival of communist-inspired paternalistic thinking in the Hungarian legal system. The reprimand reflects the authorities' disapproval of conduct that is not demonstrably unlawful. Oddly, despite the differences between the Végvári affair and the taxi strike, both instantiate, in different ways, the paternalistic dimension of the legal system. The

3. As an intelligence officer, Végvári was under military jurisdiction.
4. Because this is a trial court case, a citation is unavailable.
government, as parent, censures its citizens without a legal conviction; and the citizens, in turn, regard the government as the symbol of all coercive power. It will take years of reform to eliminate this way of thinking from a society that despised but became used to "big brother" in government.

IV. THE JUDICIAL INVALIDATION OF CAPITAL PUNISHMENT

A third event, which occurred in the fall of 1990, raises still other questions concerning the rule of law and its promise in Eastern Europe. In October, just before the taxi strike, the newly created Hungarian Constitutional Court heard the complaint of Dr. Tibor Horváth, a law professor from Miskolc, challenging the constitutionality of the death penalty in Hungary. The Hungarian Court is modeled after the German Constitutional Court and consists of ten members, virtually all of whom are professorial types appointed from research or teaching positions. Each of the Court's members serves a term of nine years. Significantly, these members have had to confront and resolve more controversial cases than the United States Supreme Court assayed in its first hundred years. This is partly because the Court's jurisdiction includes the "abstract review" of statutes on their face without the requirement of a specific case controversy. The decision on capital punishment was one of the most dramatic uses of this "abstract review.”

A. The Court's Decision

Sitting in the courtroom on October 24, 1990, I was taken aback by two features of the oral argument. First, I was surprised that there was no discussion and certainly no serious debate about the issue that would be most important to us, namely the problem of the Court's deference to the democratically-elected political branch. Second, the hearing seemed to rely, more than in Anglo-American practice, on the opinions of expert witnesses. Court-appointed experts were asked to expound on the merits of capital punishment. The original plan was to appoint at least one expert against and one expert for capital punishment. It turned out that all three appointed experts spoke against capital punishment.

One of the experts, András Sajó, reported on American studies concerning the deterrent effect of the death penalty. However, it would be difficult to say that these experts were addressing an issue that lent itself to resolution as a matter of neutral scientific inquiry. The fact that the experts were invited and that all three lined up against the death penalty, gave one a sense for which way the ideological tide was turning. The Court broke for lunch, returned, and, within an hour, declared the death penalty invalid on its face. The vote was nine to one, and the single dissenting vote focused on a procedural issue.

On the merits, the conflict should have been more controversial. This was a unique event in constitutional history. No other Court, anywhere in the world, had categorically and irreversibly outlawed society's oldest form of punishment. Moreover, there were no obvious abuses of capital punishment in Hungary. Unlike the former Soviet Union, which retained the supreme penalty for a wide range of offenses, including embezzlement of state property and a politicized version of treason, Hungary was relatively progressive. The death penalty was reserved only for various forms of aggravated homicide, burglary resulting in death, genocide, other life-threatening, highly dangerous acts, such as terrorist acts and hijacking, and certain military offenses committed in wartime. All of these offenses, or almost all of them, would pass muster under American constitutional standards as the kind of offenses that render the death penalty permissible. As might be expected, the vast majority of the Hungarian population strongly supports the death penalty. Unless the Hungarian people are totally out of touch with standards of civilized conduct (and many reformers think they, as well as the American public and judicial system, are indeed out of touch), the legal debate and
the vote of the judges in Budapest should have more closely reflected the views of the electorate.

If there were a clear provision on point in the reformed Hungarian Constitution, as amended on October 23, 1989, one might see the judges as acting under a simple constitutional imperative. But there was no relevant clause that could generate a knockout syllogism against the death penalty. The Hungarian Constitution contains nothing more compelling than the vague language of the American Eighth Amendment prohibiting "cruel and unusual punishment."15 Article 54(1) of the amended Hungarian Constitution provides:

In the Hungarian Republic everyone has the inherent right to life and human dignity of which no one shall be arbitrarily deprived. And no one shall be subject to torture or to cruel and inhumane or degrading treatment or punishment. And no one shall be subject without his free consent to medical or scientific experiment.16

The key phrase in this provision proved to be "arbitrarily deprived." A plurality of Justices on the United States Supreme Court have thought that capital punishment decisions in our courts are excessively discretionary and arbitrary in that sense.17 The Hungarian judges, however, had a different sense of the word in mind. They were concerned not with the arbitrariness inherent in the process, but rather with the substantive arbitrariness that issues from not having a good reason to engage in a particular practice.18 Their claim was that the death penalty has no sound, supporting reason. If the death penalty has no sound, supporting reason, the argument follows, it must be viewed as arbitrary. If the death penalty is arbitrary, an individual executed under a death sentence is arbitrarily deprived of his or her life.

15. U.S. Const. amend. VII ("Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted.").
B. Possible Reasons for the Court's Decision

Now how would one conclude that the death penalty has no sound, supporting reason? The majority of the Judges limited their focus to the concept of deterrence and its inadequacies.\(^\text{19}\) It is fairly easy to cast doubt on the statistics supporting deterrence as a rationale for the death penalty. If deterrence is the only rational basis for the death penalty, then it would not be far-fetched to conclude that executing murders for this factually unsubstantiated purpose was arbitrary.

Of course, the death penalty was not originally established because people thought—apparently, incorrectly for all these years—that executing some would deter others. If there was ever a point to the death penalty, it is that retributive justice requires that the norm against killing be vindicated by turning the crime back on the criminal, making him suffer as he made his victim suffer. The biblical provision mandating a "life for life, ... Eye for eye, tooth for tooth"\(^\text{20}\) was in fact interpreted, at least in the Jewish tradition, to require monetary equivalence rather than a re-creation of the crime on the body of the offender.\(^\text{21}\) Yet in Western philosophical thought, notably in Kant and in Hegel, the principle of equivalence came to be a stable component in our thinking about just punishment. Nine of the ten Judges on the Hungarian Constitutional Court ignored the retributive justification for capital punishment. Limiting their focus to deterrence and its inadequacies, they concluded, without much ado, that the death penalty was arbitrary and therefore unconstitutional.\(^\text{22}\)

The one Judge who recognized and endorsed the retributive rationale for punishment, András Szabó, concluded that even under this standard the death penalty was arbitrary.\(^\text{23}\) Several points in his opinion are instructive. He argues first that there is no reason to privilege any particular theory of punishment in the Constitution.\(^\text{24}\) There is no reason to sup-

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23. Id., U.T. at 35 (Szabó, J., concurring).
pose that either deterrence, retribution, or rehabilitation is mandated in the national charter. The proper interpretation of the criminal law, including the death penalty, is, after all, a philosophical problem. It cannot be resolved by an act of legislative will. Secondly, Szabó reasons that privileging deterrence as a constitutional rationale for punishment would call into question not only the death penalty, but the entire system of criminal law.\textsuperscript{25} There is no reason to think that imprisonment is more effective than the death penalty as a deterrent. Article 54 prohibits the arbitrary deprivation not only of life, but of human dignity.\textsuperscript{26} Therefore, if the death penalty arbitrarily deprives an offender of life, imprisonment arbitrarily deprives him of his dignity. This is a very ingenious maneuver against the dominant reasoning of the Court.

Judge Szabó's application of the retributive principle to the case of capital punishment is less compelling. His argument begins with this premise: The principle of equivalent punishment is designed to restore the moral order disturbed by the crime.\textsuperscript{27} He infers that the only way to understand this process of restoration in the modern world is to view it not metaphysically, but as a symbolic process.\textsuperscript{28} Therefore, the maximum punishment justified as retribution would be the degree of punishment understood by the public as a sufficient response to the crime. Szabó then makes a logical leap. He reasons that because long terms of imprisonment would be sufficient, symbolically, to restore the moral order, the death penalty is unnecessary.\textsuperscript{29} Hence, according to Szabó, the death penalty is excessive and arbitrary.

It is difficult to know why the Hungarian Judges did not engage in more vigorous debate about the retributive rationale for punishment. It may be that the Soviet influence on the Hungarian legal culture was greater than the Hungarian lawyers would like to admit. According to Soviet legal philosophy, with its instrumental and utilitarian focus, retribution is not an acceptable purpose of criminal law.

\textsuperscript{25} Id., U.T. at 36-37.
\textsuperscript{26} A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54, § 1 (Hung.).
\textsuperscript{27} The Death Penalty Case, 107 1990 MK., U.T. at 37 (Szabó, J., concurring).
\textsuperscript{28} Id., U.T. at 37-38.
\textsuperscript{29} Id., U.T. at 39.
More significant than the covert Soviet influence, however, may have been the attention paid to certain international covenants and the respect they detail for human rights, including the right to life. Article 54 of the Hungarian Constitution is almost a verbatim adaptation of Articles 6(1) and 7 of the 1966 International Covenant on Civil and Political Rights. An analogous provision is found in the European Convention on Human Rights. Significantly, the Hungarian documents add the protection of human dignity to the protection of human life found in the international documents.

However valuable the right to life may be, there is nothing in these antecedent international documents that outlaws capital punishment. On the contrary, they are all drafted to recognize an exception for the world’s oldest form of punishment. For example, the remainder of article 6 in the International Covenant on Civil and Political Rights details the way in which the death penalty may be appropriately applied. And the European Convention on Human Rights explicitly recognizes that one may be sentenced to death and executed according to the judgments of a court. So far as I know, no international document flatly prohibits the death penalty. It is true that voluntary protocols to both the International Covenant and the European Convention require subscribing states to forswear death as a sanction, but protocols, it is worth repeating, are not binding on member states. Great Britain, Belgium and other respectable states have so far refused to sign.

The political maneuvering connected to Hungary’s entry into the Council of Europe may also have had something to do with the death penalty decision, or at least with the inescap-
able sense that professional opposition to the decision was weaker than it should have been. In 1990, the Hungarian government was engaged in serious negotiations about its entry into the Council of Europe. This was a significant aspiration for political leaders in Budapest, as it is for every Central European government. Rumor has it that the negotiators from the Council of Europe demanded four changes in Hungarian law as a condition for entry into the Council of Europe. The first change was the establishment of an independent judiciary. The second change was the establishment of freedom of the press. The third was the reduction of pre-trial detention time—the period between arrest and bringing the suspect before a magistrate—from five days to three. The fourth change was the abolition of capital punishment.

The first three demands were plausible; all were required by international documents. The first two are relatively unproblematic. First, at one level, “independence” of the judiciary requires merely that politicians cease interfering in the administration of justice. Second, freedom of the press always existed in Hungary in the sense that censorship under the Communists was self-censorship, not control by an official body charged with keeping the press “politically correct.” The third demand of reducing pre-trial detention required a minor revision in the Code of Criminal Procedure.

But where does the Council of Europe get the authority to tell Hungarians that they should abolish capital punishment? Though the international documents do not require abolition, one might argue that the policy consensus of European governments favors an end to the death penalty. In addition, as to the formerly totalitarian governments, abolition represents a principled break with the past. The firing squad has become a symbol of totalitarian government. Some democratic societies might use the death penalty responsibly, but arguably every totalitarian society invokes the death penalty, sometimes responsibly, sometimes as an instrument of terror. Therefore, a transition to democracy might sensibly require the abandonment of symbols of repression, such as the state’s efforts to make decisions of life and death.

Whether the Council of Europe actually made this demand on Hungary remains disputed. I know some people who vigorously claim first hand knowledge of the negotiators’ demands. Whether or not the demand was actually articulated, and if
articulated, whether or not the Judges on the Constitutional Court knew about it, there is little doubt that the symbolic significance of abolition moved the Judges to think that by stretching their analysis of "arbitrariness," they were acting in the name of the new democratic Constitution.

This self-profiling of the Court is nowhere more evident than in the concurring opinion by the President of the Court, László Sólyom. Judge Sólyom takes the extreme position that the right to life is absolute, and that no purpose, no countervailing value, could justify the death penalty. Sólyom's analysis of the right to life bears the earmarks of the German 1975 abortion case, which holds abortion on demand invalid on the ground that the fetus has a right to life. Yet the leap from a right to life to an absolute right—one that never admits of justified exceptions—is great indeed. The major counterexample to the right to life is justifiable self-defense, recognized in virtually every legal system of the world. In the interest of "absolutizing" the right to life, Sólyom disputes whether self-defense, under the conditions required for the defense, really "justifies" the taking of life. He submits that self-defense is never really more than an excuse and thus does not undermine the proposition that intentional killing is always wrong.

Needless to say, this interpretation of self-defense would fail to account for a number of assumed principles, such as the right of strangers to come to the aid of the victim. If self-defense were merely an excuse, there would be no basis for permitting intervention on the side of one party or the other. It would help Sólyom's case to invoke the German doctrine of rechtsfreiem Raum, a theory which holds that in some conflicts there is no right and no wrong; when life is pitted against life, the influence of the law comes to a halt, anything goes. If that were the case, strangers could intervene on behalf of aggressors as well as victims. That implication should give us pause.

Sólyom's philosophical slips are the tribute his views pay for the "correct" democratic position that the value of life must

37. *Id.*, U.T. at 30-32.
be taken very seriously. It is true that we should revere life, but we should also revere principles of justice that justify killing in self-defense and even, as Kant and Hegel would argue, executing criminals in the name of justice. Kant's philosophy is foundational in generating our modern notions of respect for life and human dignity. Yet in Kant's view, the death penalty is perfectly compatible with the notion that each human being has an absolute value. Indeed the precise function of punishment is to underscore and vindicate the value called into the question by the crime. Because homicide calls into question the value of life, the fitting response is, as the argument goes, the death penalty.

C. The Death Penalty Decision and the Rule of Law

What does this decision tell us about the rule of law in post-Communist Hungary? Some strict constructionists might argue that the Court obviously exceeded its mandate by analyzing the relevant provision so boldly. That is not my view. Preliminarily, how do we know precisely what the mandate of the Hungarian Constitutional Court is? In my opinion, that mandate is being worked out as the Court takes bold steps, encounters criticism, and then either cuts back or goes forward with its innovations. It cannot be the case that at all times, in all places, the rule of law demands only that judges apply statutes or their constitution precisely as written. As Romanian Professor Valeriu Stoica argued recently in Bucharest, the independence of judges does not require that they be reduced to the servants of the written word. The Communist conception of legality required that judges surrender their personalities to the political view embodied in the statutory law. True independence, Stoica reasons, implies that judges think imaginatively and innovatively about the law they are called upon to interpret. We ought not be overly critical of the judges of the Hungarian Constitutional Court simply because they might have thought a little too creatively about the death penalty.

The problem with the opinions in the Hungarian capital punishment decision is that they reflect a curious attitude toward the authority of the democratically-constituted Parlia-

41. Id.
ment. Adjusting the distribution of power between the legislative body and a court authorized to strike down legislation is central to any well-functioning democracy based on the rule of law. Yet this seems to be a problem that has not yet received due attention either in Hungary or in the other democracies of the region. This problem is familiar to American lawyers under the label "counter-majoritarian difficulty" and the imperative of judicial "deference" to the legislature.

The peculiarity of Hungarian legal thinking on these issues is signaled by Judge Péter Schmidt's lone dissent in the capital punishment case. The opinion stresses a supposedly logical conflict between articles 54(1) and 8(2) of the Constitution. The former, quoted above, provides that "everyone has the inherent right to life and human dignity, of which no one shall be arbitrarily deprived." The latter, relying upon the precedent of article 19 in the 1949 German Grundgesetz, provides that legislation may not encroach upon the "substantial contents of any fundamental right" secured under the Constitution. That is, legislation may encroach upon the protected right at the edges, at the penumbra, but not at its core. Judge Schmidt perceived a contradiction between the two provisions. One holds that "arbitrary" deprivation is categorically prohibited; the other seems to permit "arbitrary" deprivation in penumbral areas of the right of life. Judge Schmidt concludes that in view of this contradiction in the Constitution, the Constitutional Court should withhold decision and petition the Parliament to resolve the conflict between norms.

Judge Schmidt's deference to the legislature seems curious for Western lawyers, for they regard a perceived conflict between norms not as problem requiring abstention, but rather as an opportunity for interpretation. Apparently, the perceived conflict did not bother the other nine Judges on the Court; they were willing to interpret away the conflict and base their decision on article 54(1). Judge Schmidt's position derives perhaps from a strict constructionist view that requires judges

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43. *A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54, § 1 (Hung.).* 
44. *Id. art. 8, § 2.*
46. *A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54(1) (Hung.).*
merely to apply the letter of the norm. This is impossible when there is apparent contradiction between norms.

Because the Hungarian Constitution may be amended rather easily (a two-thirds vote of the single house of Parliament), it seems that whatever the Court does, the ultimate power rests with Parliament. Parliament can amend the Constitution as easily as the United States Congress can override a presidential veto. This feature of the Hungarian legal system creates the temptation to turn the duty of deference on its head. If it does not approve of a decision by the Court, Parliament can always veto the Court’s decision by amending the Constitution.

Parliament has shown its willingness to amend the Constitution dozens of times since October 1989. This disposition by Parliament may encourage the Court to press its influence as far as it can—at least until it runs into a parliamentary veto. Under this transposed state of affairs, the principle of deference requires an all-powerful Parliament to yield to the Court by not amending the Constitution.

In a democratic legal system, however, the duty of deference must run from the appointed judicial body to the elected legislative chamber. In a paternalist legal tradition, the danger is that a body of appointed experts—particularly academic experts—will think that they are true guardians of the nation’s values. This is the danger today in Hungary’s attempt to merge the Western idea of judicial review with the principles of democratic law-making.

V. CONCLUSION

The quest for the rule of law in Eastern Europe has moved from the streets to the areas of political discourse and step-by-step dismantling of the Communist infrastructure in legal and political thought. The paternalist residue of Communist thinking profiles the government in the taxi strike as a surrogate parent, in the Végvári dispute as a chiding teacher, and in the capital punishment dispute as a wise philosopher. To realize the rule of law, these images of government must gradually yield to a more modest conception of bureaucrats, legislators and judges. It is not that Hungarians genuinely respect their

47. Id. art. 24, § 3.
48. See id.
leaders today, but aspects of their legal tradition promotes these unrealistic images of the personalities in power. The transition to the rule of law requires both a lowering of expectations in governmental officials and a corresponding trust in the legal institutions that take the place of personal and charismatic power.