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VISIT TO THE HUNGARIAN CONSTITUTIONAL COURT

In the last week of March 1994 the following South African constitutional lawyers visited Budapest to study the functioning of the Hunharian Constitutional Court:

Laurie Ackermann, John Didcott, Gerhard Erasmus, Pius Langa, Christina Murray and myself [Albie Sachs].

Dullah Omar found himself obliged by last minute commitments to withdraw from the group.

The trip was arranged by IDASA, and this report is sent to them as a summary of my main impressions. To IDASA, then, and to our excellent hosts in Hungary, my thanks, and the following pages.

WHY HUMGARY?

Those of us who had been on a similar visit earlier this year to the German Constitutional Court, had been told by our hosts in Karlsruhe that of all the many Constitutional Courts that had been set up in Eastern Europe to supervise the transition from authoritarian rule to multi-party democracy, the most successful by far had been that in Hungary.

The Court was established just before the first free elections were held; its function was to solve constitutional questions that might arise in the process of transition, to ensure that all new laws conformed to the limits of constitutionality and to see to it that the process of reviewing the legal acts of the previous regime was conducted in a constitutional manner.

In this sense, the fresh experience of a newly-established court with special concern for the problems of transition was felt to be of particular relevance to South African jurists.

Indeed, the visit proved to be of great interest. The influence of the German CC was to be expected and was found: four out of the nine judges had spent time in Germany on extended fellowships intended to prepare them for future work in the constitutional sphere. The mode of posing problems and the manner of motivating decisions were largely in the style of the German CC. Furthermore, the active role

played by the highly professional and experienced assistants attached to the judges was reminiscent of the German system.

At the same time, it soon became clear that this was not a branch of the German Constitutional Court functioning in Hungary, nor even an attempt to create a Hungarian replica of it. The Constitutional Court in Budapest soon established its own personality, together with its particular style of work and specific mode of discourse.

Some of the problems it dealt with were similar to those heard by the German Court and were dealt with in a similar way, e,g. abortion. In other cases, the issues were of like kind, but the approach adopted was very different, e.g. how to deal with property regimes created by Communist governments or with the punishment of conduct by communist officials. Many other matters, however, turned on specific features of constitutional-political development in Hungary, such as whether the President of the country could, as constitutional commander in chief of the armed forces, control nominations of senior officers.

THE NEW CONSTITUTION

The three principles governing the making of the new democratic constitution were: legal continuity, a negotiated transition and thorough-going socio-political transformation.

In order to maintain continuity, the new constitution took the form of an amendment to the old communist constitution of 1949. The changes related to between eighty and ninety per cent of the old constitution, but the notional form of an amendment rather than a new constitution was maintained. We were told that the only clause that was taken over without alteration was the declaration that Budapest was the capital of Hungary.

Though the new constitution was said to be a transitional one, no provision was made for a Constituent Assembly or other body to draft a new and final constitution. In practice, changes are made on a piecemeal basis through the amending procedure. [If I recall correctly, a two thirds majority in Parliament is required]. Having a permanently transitional constitution did not seem to cause any major problems. After all, as our hosts pointed out, for decades after the First World War, Hungary was a monarchy without a

king [or queen], and its head of state was an admiral [Horthy] without a navy.

The transitional nature of the constitution was, however, used by the President of the Court to justify the existence of what he called an invisible constitution that lay behind the apparent text. This invisible constitution, he argued, compelled an interpretation of the text which would treat it not as a complete document but as as a stepping stone to a full and developed democracy. More conservative members of the court, which in Hungarian conditions meant those with a more left-wing ~~rather~~ background, resisted the idea of an invisible constitution. Today the President of the Court finds it more convenient not to refer to the invisible constitution, but rather to international precedent.

The basic way in which the new constitution differed from the old was that it provided for legal rather than political mechanisms for its enforcement. Thus the old one contained many references to fundamental rights and civil liberties, but made no provision for how these were to be guaranteed. In order to mark the change, it was necessary to establish a constitutional court. The role, functioning and initial composition of the court was agreed to before the new constitution was adopted, not after, and was incorporated into a special statute. The person who drafted the law, namely the Deputy Minister of Justice, ended up as one of the first members of the court.

COMPOSITION OF THE COURT

Five judges were appointed initially. Two were ~~regarded as~~ acceptable candidates proposed by the reconstituted or new communist party: one was a respected law professor not too compromised in the past, the other the deputy-minister of Justice. A further two were proposed by the then political opposition to the communist government, while the fifth, a judge of the Supreme Court, was said to be neutral and not politically aligned.

After the elections, which completely altered the political balance in the country, a further five judges were appointed. One member of the court was made Chief Justice of the Supreme Court and replaced. Another was appointed as a member of the World Court, and not replaced. The result is that ~~there are~~ now nine persons on the court.

The law provided for the nomination of a further five judges after the second general elections, which are due to be held later this year. We were informed, however, that the present

nine judges, although claiming to be overworked, did not see any necessity to augment their number, and that a preliminary agreement had been reached by the political parties not to choose the additional five.

All the judges are men, in spite of the fact that nearly half the hundred or so members of the Supreme Court are women, as are more than half the judges in the inferior courts.

The President of the Court has a high profile and offers strong leadership to the court. He had been a member of the national leadership of the Democratic Forum, which was to emerge as the largest party in Parliament and which heads the present coalition government.

In order to be a judge, a person must be at least forty five years old, have been twenty years in legal practice or be the holder of the higher law degree required for someone to be a full law professor. The nominee must also not have been a party card-holder for one year [this provision did not apply to the first five judges]. We were told that future judges will have close ties with the different political parties, but not be card-carrying members.

Judges are elected for a nine year period which can be renewed. To counter the argument that the prospect of being up for consideration again might encourage judges to give opinions in a certain way, we were told that in Italy the judicial term was not renewable, but retiring judges could look forward to high positions in public life if they met the favour of those in power, so that the potential for favour-seeking judgements was the same.

COMPETENCE OF THE COURT

The court has seven areas of jurisdiction:

1. Preventive [prior] review of draft legislation. Fifty M.P.s [out of nearly four hundred], the Speaker or the President can petition the court for review of the constitutionality of bills before Parliament. This procedure has been used 7 times in the first 4 years. It has been strongly criticised as involving the court directly in the legislative-political process. The court has ducked out of exercising this jurisdiction by saying that it will only determine the constitutionality of a proposed law after the last debate has been concluded and when the text has been finalised by the last vote. In other words, it will in effect deny a part of its competence, and only review a Bill

after it has been adopted but before promulgation. On the other hand, there seemed to be no objection to the power of the President referring Bills to the court at his discretion after they have been finally adopted but before he has promulgated them. Apparently he had on four occasions referred what the judges considered to be important matters to the court.

2. Abstract judicial review of acts of Parliament and all of what are called sub-legislative enactments, such as those made by governmental agencies and local authorities.

Anyone can challenge the constitutionality of any legal instrument emanating from the state. The process is called abstract judicial review because the petitioner need not have a concrete interest in the matter, that is, it does not arise from what the Americans call case and controversy. The idea was taken over from the Bavarian constitutional Court, and it was intended to emphasise the openness of the court in the new democratic era. Nearly all our informants, however, criticised it as being a sort of busybodies' charter. Inveterate authors of letters to the editor, we were told, now address their epistles to the constitutional court, producing a great and unnecessary overload of work. About 2000 petitions a year are received by the Secretary General of the court. The number rose at first and now has dropped slightly. Two thirds of these are rejected by letter from the Secretary General as falling outside the competence of the court - if the petitioner insists, he or she can be formally notified by the court itself that the claim is not admissible. Approximately 600 decisions a year are given by the court and roughly 10 per cent of these involve a declaration that a statutory norm is invalid.

3. Concrete norm control. This happens when a question of the constitutionality of a norm is raised during an actual trial. The presiding judge can refer the issue to the CC and suspend the proceeedings until a determination is made. Apparently about twenty such matters were referred in three years.

4. Abstract advisory opinions in respect of petitions by the Prime Minister or other high officials seeking interpretation of the constitution. This has been a convenient mechanism for dealing with disputes inside the governing coalition or between the President, who comes from a minority party, and the Prime Minister who is from the party that leads the coalition government.

Thus, as a quid quo pro for getting agreement to certain constitutional amendments, a member of the opposition Liberal Party was chosen as President of the country. The Constitution declared that the President was Commander in Chief of the Armed Forces, and, seeking to exercise command, the President tried to restructure the high command. On a petition from the Prime Minister, the court ruled that the phrase 'commander in chief' referred to a symbolical rather than an operational relationship with the army, and that operational control lay with the government of the day, and not with the President.

Another important case dealt with under this jurisdiction related to the status of rural property nationalised by the communist government. The coalition partners could not agree on whether to restore nationalised land to the original owners, and the Prime Minister found it convenient to refer the matter to the court rather than force the issue politically. The court held that while the original nationalisation was to be regarded as unlawful, the subsequent handing over of the land to cooperatives had resulted in the creation of vested property interests in favour of the cooperatives which could not be usurped without payment to them of full compensation.

A further case where coalition partners were in fierce dispute, and which [I think] was decided under this jurisdiction, related to the punishment of communist officials guilty of ordering executions and other violations of fundamental rights in the 1950's. This turned out to be a landmark case, and like others of that genre, the landmark is likely to be followed by further landmarks. The issue before the court was whether or not a statute of limitations, in terms of which responsibility for crimes prescribed after twenty years, withstood the impact of constitutional transformation. In a celebrated decision, the court held that the first article of the constitution declared that Hungary was to be a rechtstaat [which our informants referred to as a country under the rule of law]. As such, the principle of non-retroactivity of penal provisions had to be upheld; accordingly, any attempt to extend the period of prescription after it had already elapsed would be unconstitutional. We were led to understand that in the light of decisions by the German and other courts, the court would probably in future qualify its decision by declaring that it should not be seen as applying to crimes against humanity and gross violations of human rights, in respect of which prescription should never be seen to run.

5. Conformity of legislation with International Treaties. In a direct sense, this referred to bringing internal legislation into line with international treaty obligations. Indirectly it formed part and parcel of the complete overhaul of what we would regard as the common law. The two relevant factors are as follows: Hungary has adhered to the European Convention on Human Rights, and Hungary has a codified system of law, in terms of which property law, criminal law and procedure and so on, are contained in Codes. Since many aspects of these Codes and the ways in which they have been applied violate the European Convention, they must now be reviewed and revised. It seems that all are agreed that this process must be gradual and systematic rather than sudden and revolutionary - it is said that anarchy would be more violatory of constitutionality than living for a little longer with inconsistency of norms. At the same time a major difference of opinion appears to be developing between the Constitutional and the Supreme Courts respectively as to which court should be responsible for the necessary revision, each claiming that it alone has the responsibility.

6. Resolving conflict between different state organs. Surprisingly to us, only one case in four years had been brought under this heading, and it had dealt with a minor dispute between local authorities.

7. A constitutional complaint of violation by administrative act of a fundamental right. This competence is similar to that exercised by the German Constitutional Court in respect of concrete norm violation, i.e. where the petitioner claims a violation of his or her fundamental rights by the State. The difference, however, is that in the case of Hungary, such petition may only be grounded on a violation of fundamental rights resulting from the application of an unconstitutional statutory norm. It cannot be based upon unconstitutional conduct by state officials if performed in terms of a statury provision that is in itself constitutional.

Only 56 cases were brought under this heading in 3 years. In practice it is easier simply to rely on the jurisdiction mentioned under paragraph 2 above, that is, abstract norm control.

The following were two successful constitutional complaints:

A person refused a permit to build a house complained that under the existing law he had no right to challenge the

refusal in a court of law, but could only appeal to a higher administrative structure. The CC upheld the complaint and ordered the Legislature expeditiously to adopt legislation establishing an Administrative Court to provide for judicial review of administrative acts.

It should be mentioned that the doctrine of constitutional omission seems to be heavily relied upon in Hungary, and the CC frequently puts Parliament to terms to enact new legislation to fill the gap. We were informed that Parliament grumbles but obeys. The only time Parliament ignored a ruling of the court was when it became clear that compliance was manifestly impossible for practical reasons [the court had held that Hungarians living abroad were entitled to vote and that the necessary legislation should be passed- it emerged that problems of identification and registration were insuperable, and the matter was quietly forgotten.]

The second matter related to adoption cases made complicated by social upheaval and sudden disappearances of biological parents across the borders into exile. The legally interesting part of this case was the utilisation by the court of doctrine developed in the Italian CC in terms of which the way in which a law was applied could be declared unconstitutional even if there was nothing unconstitutional in the text as such, i.e. the court would look to the law as lived and not simply the law as written. This decision provoked the disapproval of the Supreme Court, which claimed that it alone had the right to decide on how the law should be interpreted.

~~8.~~

DIVISION OF LABOUR IN THE COURT

The Secretary General's staff receives petitions and filters them, preparing an outline commentary on each. In two thirds of the cases, the Secretary General writes to the petitioner explaining that the matter has been wrongly referred to the CC. If the petitioner insists, he or she can receive a formal decision from the court.

The General Secretary then refers the admissible cases to the President of the Court. Cases that deal with the same subject matter are grouped together. The President then assigns cases to the different judges depending on their professional experience. He may also keep cases himself.

Each judge has two professional assistants, whom he himself chooses, as well as a clerk. We were told, incidentally, that a factor which favoured the choice of several practising lawyers for the bench was that, unlike the judges and law professors, they knew how to keep and manage large numbers of files. These professional assistants are highly qualified legal experts, frequently law professors, who do much of the research and who help with draft opinions, under the direction of the judge who has chosen them.

In all cases the assistants prepare outlines of the case and propose decisions. In the simpler cases they will write draft judgements for perusal and correction by the judge. The docket is then returned to the SG who consults with the President about a day when the case will be finally decided. The remaining judges must then receive copies of the case file and proposed decision at least eight days in advance.

Decisions on Parliamentary legislation have to be taken by the court sitting in plenary session. Plenaries are presided over by the President. The assigned judge makes his presentation and all the other judges then give their opinions. In complicated cases the issues can be fragmented and separate votes taken on each question. At times cases require up to eight plenaries before a final decision is reached.

The court tries to achieve consensus wherever possible. In three-quarters of the cases, unanimous judgements are handed down through a single opinion. Individual judges may, however, file dissenting or assenting judgements. Since the CC is the only court in Hungary in which dissenting opinions may be delivered, this exceptional practice was said to give rise to public disquiet. Obviously, in countries used to majority and minority opinions the disquiet would arise if all judgements were given as though unanimous.

What was striking to us was that the court sits behind closed doors without adversarial proceedings. To some extent this was attributable to the fact that Continental court procedure in general is judge-directed rather than a contest driven by advocates, an enquiry rather than a duel. We were told further that since all questions related to norm control rather than the determination of the interests of any party, it was not necessary to have representation of petitioners and respondents. The diverse character of the judges, we were further informed, resulted in a natural internal adversary procedure being established which was said to be more fruitful than external advocacy.

The key element was the abstract nature of the proceedings. Since the issues were those of determining constitutional limits, what was needed was intensive debate by disinterested professionals rather than grandstanding by advocates. The President of the Court said that in only two cases had public hearings been held. The one related to the death penalty, the other to social welfare provisions. "In both cases well-known political views were expressed."

Thus the doors of the court were wide open to complaints but completely closed to complainants. No greater testimony to the relative weakness of the Hungarian legal profession could have been offered than that when at last they came to enter the kingdom of the rechtstaat, they did not have the right to appear in its highest court.

Challenges to the validity of norms below the level of Acts of Parliament are dealt with by three-member groups of judges. The groups are constituted around ~~experts~~ and are applied for a year at a time. Plenaries meet on Mondays and Tuesdays, while the three-member groups sit on Wednesdays.

And for the rest of the week? we asked.

Wednesdays, Thursdays, Fridays, Saturdays and Sundays, including Sunday nights, we prepare drafts - one of the judges told us emphatically.

Judges are not permitted to accept other forms of employment, save that they are permitted to carry on work as law professors at universities, which a number of them do.

THE ROLE OF PRECEDENT

~~One~~ theoretical reason for having the CC, we were told, was that the Hungarian legal system did not follow the doctrine of stare decisis, that is, did not work on the principle of the binding nature of previous court decisions. Thus, each court could at least in theory give its own interpretation of the Constitution and the Codes. For the sake of stability, it was therefore felt necessary to have a definitive voice that would be binding on all courts and the government - hence the CC.

Someone suggested that the President of the court was in fact so eager to establish the doctrine of precedent that he would find a way to give judgements in a number of small cases without major apparent constitutional significance, and

then cite them as precedent to justify the decision he thought was right in a big case which soon followed. We did not put this observation to him, so have no means of knowing whether it is accurate.

In any event, the judgements in fact contain very few references to decided cases, whether Hungarian, or ~~in~~ foreign courts or international tribunals. It seems that standard practice in preparing decisions is for the judges to look at decisions of the German, Italian, Spanish, Portuguese and United States courts, and to give special attention to judgements of the European Court in Strasbourg.

Comparative jurisprudence was clearly seen as the major means of ensuring that appropriate constitutional values were being maintained. There was ~~a manifest eagerness of the judges~~ to conform to what some of them referred to as Western concepts, hence the special emphasis on the decisions of the European court.

The influence of standards established in other courts is therefore frequently decisive but never explicit. A perusal of judgements shows that they are cast in quite a different way to those to which we in South Africa are accustomed.

The judges acknowledged that their own values played an important part in influencing the way they interpreted the constitution. At times they have been accused of writing rather than interpreting the constitution. Their answer was that there could be no gaps in the constitution [in other words, the constitution abhors a vacuum]. Where the constitution was silent on a topic, they would say: "there are no constitutional obstacles" to a certain proposal.

The court preferred not to refer to the proceedings at the Round Table talks where the text of the constitution was agreed upon, but rather to look to comparative jurisprudence. There was no bar, however, against looking at legislative debates.

Where the court felt that the state was itself failing to carry out its constitutional responsibilities, the court would not hesitate to require the state to adopt an appropriate legal instrument to meet the deficiency. In other words, the judges would not simply strike down unconstitutional laws, they would require the legislature to act where laws that should have been in existence were not on the statute books.

Furthermore, the doctrine was developed that where fundamental rights were being violated by social agencies other than the state, then the state could be obliged to intervene to supply a remedy. This was referred to as the duty on the state to provide institutional guarantees of constitutional rights.

The court regards itself as being guided by a hierarchy of values. At the top are the rights to life and dignity. These are rights that cannot be restricted - you cannot take away someone's life for five minutes.

Next come the fundamental communication rights - the rights of free speech, religion and science. All laws restricting these areas must be narrowly construed.

Finally, these are the issues relating to the structures and functions of state organs. Here the court is less likely to take up emphatic positions. It intervenes strongly in defence of fundamenmtal human rights, but is reluctant to be drawn into what are essentially political controversies.

Decisions of the court are reported in a regular court bulletin, and ~~all~~ those that have the effect of declaring legislation invalid are published in the government gazette.

SOME IMPORTANT CASES

The death penalty - the court held that the death penalty by ~~its very nature~~ involved an arbitrary taking of human life and as such was unconstitutional.

Proposed retroactive extension of the prescription period in the statute of limitations so as to permit prosecution of communist leaders for offences committed in the 1950's - the court decided that since Hungary was a rechtstaat, the rule of law did not permit retroactive extension of the prescription period in order to allow punishment of persons whose liability for prosecution had already lapsed.

Return of property confiscated by the communist government in 1949 - the initial act of nationalisation was held to be invalid, but the court decided that the peasant cooperatives which had subsequently been established on the land had acquired a new kind of ownership which the court would recognise, and as such could not be deprived of their interest without compensation.

Relations between church and state and the equality clause - a law authorising the return of school buildings to the

church was held not to violate the principle of separation between church and state, nor to represent an unconstitutional discrimination in favour of the church as against other owners whose property had been seized.

The banning of a vitulently anti-Semitic journal - the law prohibiting incitement [to racial hatred?] was upheld, but the part imposing criminal penalties for group libel was invalidated on the grounds that civil rather than criminal penalties would have been sufficient.

Broadcasting monopoly by the government - the statute authorising this was declared to be unconstitutional, but in the absence of a new broadcasting law the present situation had to continue, since, the president of the court said, anarchy was an even greater threat to the constitutional order than carrying on for the time being with invalid arrangements [our informants said that this decision had led to abuse of broadcasting by the government, and that, unfortunately, the President of the court had not shown any eagerness for the matter to be further reviewed by the court in the light of the failure of the government to adopt appropriate legislation opeing up the airwaves].

Personal data in government files - the court ordered legislation providing for maximum disclosure.

Social welfare legislation - the court split almost evenly, letting the government off the hook in relation to an unpopular new law.

Abortion - the twenty year old law granting relatively free access to medical services to terminate pregnancy was held to be unconstitutional since it took the form of a decree by the Minister of Health and the court decided that only Parliament could legislate on a matter of such fundamental concern touching on the right to life; Parliament in its wisdom could adopt any law it chose within the limits of constitutionality, the latter being determined by balancing out the fact that human life commences at conception but Hungarian law only recognises legal personality at birth. The court indicated that a law permitting abortion within the first trimester would not infringe constitutionality provided that proper counselling was made available and the woman concerned was encouraged to have the child by the knowledge that there would be real support for the child in the event of its birth. [Parliament in fact adopted such a law without extensive opposition. A constitutional challenge has been posted, but the court appears not to be anxious to put it high up on the roll.]

EVALUATION OF THE COURT

One of our informants described Hungary as q quarrelling democracy. If this is so, then the CC clearly helps to keep the quarrels within limits, and to facilitate the movement from one quarrel to another. The judges of the CC were ~~clearly~~ proud of their role. Their self-assurance seemed to be both a prerequisite of their profession and a consequence of their activity.
They had confidence in their function and, despite manifest differences of background, world view and professional experience, seemed to show a high degree of collegiate harmony. ~~We were also told that Hungarians like to complain [Hungarians like to talk about what Hungarians are like]. Thousands direct their complaints every year to the court. It is also true that they like to complain about the court.~~

Hungarioans - we are told by Hungarians - like to complain. They complain to the court and they complain about the court. ~~The strong impression I got, however, is that that~~ the CC is an institution they specially love to complain about. They welcome the existence of the court both for the work it does and for the chasnce that it gives them to criticise. This is not as paradoxical as it sounds. It is a sign that the court displeases some of the people some of the time, but never displeases all the people all the time.

A senior parliamebntary official, who came from one of the opposition parties, said that by and large, the majority party did not like the CC because it challenged thei majority wisdom when adopting laws. At the same time, he added, he as a member of the opposition felt the court intervened too much by its silence. In his view, the court made law in favour of the majority party even when it failed to act, for example, when it refused to follow through in relation to forcing the government to surrender its monopoly on broadcasting. Another example of activist dereliction which he cited was that of failing to

Having exercised his constitutional right to complain, he fulfilled his patriotic duty by defending the institution. The words he used were similar to those employed by just about all our informants: the Hungarian CC had undoubtedly played a significant and positive role in protecting the country's fledgling democracy, aiding the process of extensive socio-economic transition and bringing the norms of public life into line with international standards.

His final comment was interesting, indicating that if the court saw itself as protector of fledgling parliamentary institutions, parliament felt a responsibility in turn to support the fledgling constitutional court. "You don't play football," he told us "on newly sown grass."

Our information about the court came ~~exclusively~~ from reading judgements in translation, reading journal articles and listening to members of the court or persons whose work brought them close to the court. We did not have the benefit of the opinions of the man or woman on the Danube hovercraft

I came away with the firm impression that the court was now a permanent and valued feature of Hungarian society, and that such criticism as there was, related to the details of its functioning and the correctness of individual decisions rather than to its role in general.

The detailed improvements sought by our informants were:

- A new look at the power of any person to petition the court alleging that a law was unconstitutional ["you don't have to be a citizen, even you South Africans on your short trip could petition the court"]. One proposal was that only persons with a direct interest in the matter, or even better, only recognised interest groups affected by a measure, should have the right to approach the court. In such a case, legal aid should be provided so that complaints would no longer be received on the back of a piece of cigarette paper.

- Controlling the discretion of the President of the court in relation to the distribution of cases and the speed with which certain cases could be handled, while others were delayed.

- There was clear disagreement as to whether the CC should have the last word in determining whether the Codes were being interpreted in a constitutional manner. Given the comprehensive scope of the Codes, this would in effect give the CC a supervisory role over the whole of what we would regard as the common law. In Germany, this function is expressly given to the CC. The CC does not determine whether the Supreme Court was right or wrong, but whether its decision does or does not overstep the bounds of constitutionality. Nevertheless, it is an important power, and means that the CC has the last word not only in relation to Parliament but also in respect of the whole judiciary ["above the CC is only the blue sky:]

In Hungary this competence was not expressly granted. The President of the CC thinks, however, that a coherent constitutional system requires a coherent judicial approach,which only a single authoritative source, namely, the CC, can bring. The Chief Justice of the Supreme Court differs sharply. In his view, each court has its own clear functions, and neither should seek to interfere in the realm of the other.

In Hungary this competence was not expressly granted. The President of the CC thinks, however, that a coherent constitutional system requires a coherent judicial approach,which only a single authoritative source, namely, the CC, can bring. The Chief Justice of the Supreme Court differs sharply. In his view, each court has its own clear functions, and neither should seek to interfere in the realm of the other.

SOME GENERAL OBSERVATIONS OF A SPECULATIVE CHARACTER BASED ON VISITS TO THE CONSTITUTIONAL COURTS OF GERMANY AND HUNGARY

A paradox. The court functions most effectively where it is least needed. Thus, in Russia , where the President and Parliament were locked in deadly battle, the CC was not able to play a meaningful role in resolving the crisis, but rather became drawn into the crisis itself. Conversely, where there is relative institutional stability, the CC can be activist and influential.

A disappointment. The courts are not able to function in such a way that anyone who feels that his or her constitutional rights have been violated can be guaranteed his or her day in court. On the contrary, what the Americans call traffic management is vital to the effective functioning of the courts. In Germany, 98 per cent of cases submitted are not even heard, while in Hungary the figure is about two thirds.

A curiosity. Judgements are not built around precedent in the way to which we are used. Nor do the facts take up any or much space. Instead of a judgement following the format 50\40\10, i.e., fifty per cent of the space going to the factual setting, forty per cent to an analysis of judgements in similar cases and only ten per cent to hard, principled argument leading to a conclusion, virtually the whole of the judgement is based upon the exposition of a logical idea. I am informed that in Hong Kong counsel arrive to argue constitutional issues with massively researched references to cases from all over the world. Critics say that the fundamental constitutional issues get lost because a positivistic legal style based on fine analysis of precedent is employed; that the constitution is interpreted as though it were just another statute with words to be construed using the normal aids to interpretation; that discovering

and developing the inner constitutional logic plays little or no role.

A point of interest: there are a number of areas where the courts apply constitutional principles neither vertically nor horizontally, but diagonally. Thus, where there are manifest cases of no or insufficient legislative remedies to enable people to enjoy the rights declared to be theirs by the constitution, the courts may require state action to permit people to exercise such rights. Thus it is not only state action which can be unconstitutional, but state inaction.

A caution: the visits reinforced some advice given by M. Robert Badinter, President of the French Constitutional Council, during his recent visit to South Africa. Asked about the most important quality of a CC judge, he replied : modesty. It is not the duty of a CC to correct error, he explained, but simply to determine the limits of constitutional action. Nor is it its function to improve on legislation, but merely to decide whether the law passes the test of constitutionality. He added that it often required great restraint not to correct manifestly wrong decisions of a lower court, nor to point out the stupidity or impracticality of a statute, but the CC judge had to limit him or herself to questions of constitutionality.

A new perspective: in striking down a law, the court does not merely say why it is unconstitutional, but goes on to indicate the factors which Parliament should balance one against the other when passing new legislation as well as to lay down the broad limits within which legislative choice can legitimately be made.

A false choice: there is nothing to prevent a CC from being both activist and deferential at the same time. The activism relates to defending the fundamental rights to life, dignity, freedom of conscience, speech and creation. In disputes that involve how money should be spent, or in the case where one government institution is arguing with another, the function of the court is to encourage democratic dialogue with maximum input from all those concerned rather than to interpose its own decisions.

PART ONE

VISITS TO THE GERMAN AND HUNGARIAN CONSTITUTIONAL COURTS

NOTES BY A SOUTH AFRICAN LAWYER

I recently had the privilege of being a member of small teams of South African lawyers who visited the constitutional courts of Germany and Hungary respectively. What follows are rough notes written up after my return. I add some observations on possible implications for the process of setting up a constitutional court in this country.

These do not purport to be definitive accounts of the working of the two courts. Every statement still needs checking. Hopefully, our hosts and my colleagues on the visits, who will receive copies, will help me make corrections in due course. I circulate these impressions rather prematurely, in the belief that urgency pre-empts detailed accuracy and finesse. The objective is to raise themes for debate rather than propose definitive solutions.

We will be living in a constitutional state without a constitutional court. We will have a charter of guaranteed fundamental rights, without an institutional guarantor. Yet the court will soon be upon us [and some of us will soon be on the court].

Hopefully, through open, honest, non-partisan, inclusive and serious discussion we can reach a consensus on how best to ensure that the court fulfills its important constitutional functions both wisely and well.

1. VISIT TO THE GERMAN CONSTITUTIONAL COURT IN KARLSRUHE

The following persons, invited by the Community Law Centre of the University of the Western Cape at the request of the Friedrich Ebert Stiftung, spent the last week of January 1994 in the Federal Republic of Germany studying that country's constitutional court:

Pius Langa, Lewis Skweyiya, Adv. Moerane, from Natal; Prof Yvonne Mokgoro from Pretoria and Judge Laurie Ackermann, Adv. Nona Goso and myself from Cape Town.

The centrepiece of the trip was a day and a half spent at the seat of the court in Karlsruhe. We spoke to judges, the Registrar and professional assistants to the judges. We also visited a state constitutional court and met with a number of political leaders and legal experts who spoke to us generally about the role of the court in Germany today. It was clear from our discussions that although many of the decisions of the court were highly controversial, the court as an institution enjoyed great prestige. Indeed, opinion polls indicated that it stood higher in the esteem of the German public than any other public institution [M.P.'s, journalists and lawyers coming near the bottom].

Structure of the court - two senates

The constitutional court was established shortly after the Basic Law of the Federal Republic of Germany was adopted in 1949. It was and still is made up of two distinct chambers called senates, each consisting of eight judges. The initial idea was that the first senate would focus on cases of disputes between the lander [regional states] and the federal government, while the second would attend to complaints of violations of individual rights. As it turned out, there was little work for the first senate to do, since 'inter-governmental disputes' were in practice resolved through hard bargaining in the Bundesrat [upper house of Parliament], rather than by means of litigation. The result was that both senates now take cases of complaints of violation of fundamental rights. The great majority of cases come from the ordinary courts in respect of litigation in which questions of constitutional rights arise. There is a rough division of labour between the courts based on subject matter, and within each senate there are specialist groups that do the basic spadework in relation to defined areas, such as tax law, family matters, criminal law and so on.

Choice of judges

Judges are chosen for a twelve-year period, non-renewable. They retire at the age of 68. They must be qualified as lawyers and be at least forty years old. They are expected to be outstanding personalities with considerable experience of politics or law. While on the constitutional court they cannot hold legislative or political office. They may, however, continue to occupy a university chair.

In order to give democratic legitimacy to the judges, they are chosen by Parliament. In other words, Parliament makes

itself party to the limitations on its powers. The Bundestag [lower house] and the Bundesrat [upper house] each establish a selection committee of 12 persons. Half the judges are chosen by the one, half by the other. In each case, a two thirds majority is required.

In practice, roughly a third of the judges have a political background, a third are drawn from the judiciary and a third are law professors. Thus, the President of the court, Mr. Herzog, was appointed to that position directly from being a party and government leader in one of the lander. He has recently been proposed by his former party [Christian Democratic Union - CDU] for the post of President of the country. While his candidature is being discussed, he carries on as president of the court, but once the process is formalised he will be expected to step down from the court. When he is replaced on the court, his successor will be nominated by the CDU but require a two thirds majority from the selection committee. In other words, the successor has to be acceptable to the opposition Social Democratic Party [SPD].

Conversely, the SPD has the right to propose the president of the second senate, presently vacant. It is highly likely that a woman will be chosen. We met one senior figure in the SPD whose name had been put forward. Her vigour and affirmation made her - in the words of the CDU - too controversial, and she withdrew her candidature.

People openly spoke about CDU judges and SPD judges, as a result of the 'one-for-you, one-for-me' mode of selection. This did not mean that the respective judges were in any way accountable to the parties that had nominated them. On the contrary, we were informed several times, individual judges frequently disappointed the expectations of those who had proposed them.

Yet a certain degree of balance and predictability was built in to the court, corresponding roughly to the political/cultural balance within the country at large. Also, each individual judge had to have sufficient standing and ability to satisfy the test of at least medium common denomination of all-round acceptability. Regional factors, as well as specialist expertise, played some role in the selection, while the small Free Democratic Party also had a limited but not insignificant influence. At the moment there are only two women on the court, and it is expected that for the coming period women candidates would have a particularly strong chance of being chosen.

The open acknowledgement of political links or political association came as a surprise to us. Our informants insisted that once on the bench, the judges owed allegiance only to the constitution. The court's jurisprudence in any event followed a logic and style, which, though influenced by political developments, was different from that of the political process. Furthermore, in order for the court to give effective judgements fine-tuned to the political and administrative reality of the country, it was seen as a distinct plus to have members who had participated actively in government and public life.

Above the court - only the blue sky

A saying we heard a number of times in Germany was that above the constitutional court there was only the blue sky. This meant that neither the government, nor Parliament nor all the king's or all the queen's men or women, could alter a judgement of the court.

Members of the women's movement used the phrase with some bitterness when referring to a recent decision of the court on legislation relating to abortion.

In 1974 the court upheld legislation which permitted abortion on a limited number of grounds. In later years, the issue came before Parliament again, which eventually passed legislation hammered out as a result of prolonged negotiation between pro-choice and pro-life groupings. The new detailed legislation was once more submitted to the court, which gave a long and controversial majority decision striking down important sections of the law and prescribing the details of a new compromise. In essence, the court held that in order to achieve a proportionate and constitutionally correct balance between the rights of the unborn child and those of the pregnant woman, there had to be vigorous counselling to encourage the woman to bring the pregnancy to term, but that in the first trimester she could not be deprived of her right to opt for and obtain an abortion. Are we children - our informants asked - that we need special counselling before deciding what is best for us?

We pointed out that philosophically there was no way in which the pro-life and pro-choice positions could be reconciled, and that the court had adopted a solution based on practical and pluralistic considerations which acknowledged the rights of conscience of both sides [no one could be compelled to perform an abortion, nor could anyone be compelled to give birth]. That, we were told, was exactly

what Parliament had done after extensive debate, but now the court had shifted the goalposts in a way that was morally more condemnatory of women without substantially changing the choices that could be made. Parliament would have to debate the matter all over again, making sure that the detailed prescriptions of the majority of the court were followed. The only alternative was to pass a constitutional amendment or wait some years until the composition of the court had changed and the minority view became the majority one. In the meanwhile, the court and the blue sky ruled.

The constitutional courts of the lander

We learnt with interest that these courts are not very active. They consist of part-time judges, most of whom serve ex officio, that is, they automatically become members of the court by virtue of being presidents of the administrative court, civil court, labour court and criminal courts respectively in their land. It seems that their main work consists of dealing with territorial and jurisdictional disputes between local authorities and the land government.

The president of the state constitutional court we visited said he wished to impress two points upon us. Firstly, we should not look to the constitutional court to solve major political conflicts in the country. These had to be resolved on the basis of a consensus amongst all major political actors to settle hard political questions by a process of negotiations and give and take. The court then ensures that any agreement arrived at conforms to basic constitutional principles. Secondly, he warned us, political parties frequently used the courts not to resolve real constitutional questions, but to carry on arguments they had lost in the legislature. This wasted a lot of time, was done purely for the sake of publicity and had to be guarded against.

The federal constitutional court

Karlsruhe was deliberately chosen as the seat of the court so that geographical distance could emphasise functional and moral independence from Bonn. We were informed that most of the judges had a home in the vicinity of the town. The court has a modern, open-plan and accessible character, in which seating arrangements are such that spectators are not made to feel dwarfed by or remote from the judges. Unlike other courts which fall under the Ministry of Justice, the constitutional court has its own budget and is completely autonomous in its functioning.

The registrar, or secretary general, of the court occupies an important position. The present incumbent has been there for many years, seeing judges come and go. He speaks for the court as an institution, receives visitors [and received us most warmly], and represents it in international organisations. In addition, he liaises with the judges' professional staff who do the primary sorting of cases referred to the court. As will be seen, it is on their recommendation that well over ninety per cent of complaints submitted to the court are declared to be inadmissible.

This highlights a second special feature of the court, namely, the role played by professional assistants to the judges. Each judge was supported in his or her work by three assistants. These assistants were generally more experienced than the law clerks working with the American Supreme Court judges. Instead of being recent graduates, they were experienced judges or law professors in their late thirties or early forties seconded from their places of work to be attached to the judges who selected them. If I recall correctly, they served in the constitutional court for three year periods at a salary no less than they had been receiving, and without losing career benefits. Their position in the court was highly regarded, and many of them went on later to become judges of the court themselves.

Their function went well beyond simply devilling [doing research] for the judges and acting as their sounding boards. They fed in new ideas from the universities and the courts [and took new concepts back with them when they returned to their posts]. They helped to sort out cases and design judgements, ensured that the judges were well informed of the various dimensions of the problems and thus allowed the judges to see above the details and concentrate on the broader philosophical and moral questions.

Cases referred to the court

There were four ways in which a case could come to the court:

1. **Citizen's complaints of unconstitutionality.** Last year the number was about 4,800. Of this total, only about two and a half per cent were admitted and only about two per cent were successful. As has been mentioned, it was the judges' assistants who did the sorting out. One of the preconditions for a citizen to raise a complaint in the constitutional court is that he or she has exhausted all other available remedies. In practice, this means that the citizen must have worked his or her way up the normal court

structure. By the time the matter is referred to the constitutional court it has usually been heard by as many as five levels of judges. The constitutional court will only intervene if there is a new constitutional point that needs determining. Usually there is no basis whatsoever for the appeal other than that the petitioner is unhappy with the result and wishes to try his or her last possible shot.

2. **Disputes between the highest organs of state.**

3. Challenges to the constitutionality of Parliamentary laws or lander legislation. Referral is by the opposition. This is known as **abstract norm control**, that is, no litigation between parties is involved.

4. Referral by judges during a trial where the constitutionality of a law which would affect the outcome, is brought into question. This is known as **concrete norm control**, that is, the challenge to the law arises out of a concrete piece of litigation. About 150 of these referrals are made each year.

SOME OBSERVATIONS ABOUT THE ROLE OF THE COURT

It was impressive and encouraging to encounter a court that clearly functions well and enjoys high prestige. We learnt that far from being a brake on democracy, a good constitutional court encourages democracy.

In the case of Germany, two contextual factors were said to have contributed to the success of the court. One was the need for the total repudiation of the shocking violations of human rights which had characterised the Nazi period. The other was the fact that political life in post-war Germany had been based on alternating governments led by two evenly balanced major parties. This had resulted in the achievement of core consensus positions on the basic themes of public life. The court was accordingly called upon to reinforce, function within and refine basic values, rather than to discover or invent them.

I suspected, but never asked about, two other possible factors: The first was a unifying cold war need to present a clear alternative model to the state-centred authoritarian positivism of the German Democratic Republic. The second resulted from the way that Christian moral philosophy and German legal dogmatics combined to produce a species of contemporary natural law. This allied itself to a specie of constitutionalism which corresponded at the juridical level to the CDU concept of Germany being a social state with

Christian moral underpinnings at the political level. Incidentally, to be dogmatic in Germany is not to be obtusely rigid. Dogmatic legal reasoning is seen to be scientific, rational and objective, as opposed to what they consider to be the casuistic, sociological and journalistic legal mode of Anglo-American jurisprudence.

The visit had some interesting intellectual outcomes for me. For the first time I began to understand some of the ideas that Dennis Davis had vainly been trying to din into me. While many of us were fighting for social and economic rights to be given strong constitutional recognition, he was arguing for a different route to be followed to achieve the same objective. Whether or not I understand him correctly, the idea is attractive of leaving it to Parliament and other elected bodies to deal with resources while the constitutional court focuses on rights. The connection between the two is that resources must be fairly used in a rights context, while resources must be made available to ensure that rights are exercised. Resources need rights, and rights need resources. Rights are conceived of not as ideological programmes of the left, or, these days, of the right, or, for that matter of the various groups that claim to be the centre; though programmes have their role in political discourse, they are not the stuff of judicial decision-making.

Rights, on the other hand, are the broad basic freedoms that citizens need to be in charge of their destinies and to be able to make informed and meaningful choices affecting their lives. The emphasis is neither on controlling government nor on allowing government to do whatever it likes. Instead it is on guaranteeing that government is open and sensitive, that pluralism, dialogue and multiple inputs are secured, that there is a free circulation of information and ideas, and that community organisations and interest groups of every variety can have their say. The courts are then implacable in defence of fundamental freedoms and firmly insistent on fair and correct procedures being followed, but reluctant to become directly embroiled in substantive questions of how resources should best be used.

Some of these ideas were articulated to us by the professional assistants to the judges. Whether they correspond to actual court practice I would not be able to say. For those interested in theory, it seems that Rawls and Dworkin are not enough - we have to get acquainted with Habermass.

Another shift in my thinking related to the question of whether the Bill of Rights should have only vertical application, that is, between the citizen and the state, or also apply horizontally, that is, create rights of citizen as against citizen. I had understood the German approach to be that the constitution itself only created negative rights, that is, rights that could be enforced to limit rather than require state action. Positive duties on the state could only be invoked if imposed by implementing legislation. We learnt that the German court was in fact developing an in-between doctrine in terms of which it saw its role as being not merely to defend rights against violation but to ensure that the rights were actually enjoyed. This approach resulted in decisions which promoted substantive as opposed to formal equality between men and women, and covered the sphere of private as well as public employment. The women's movement welcomed these decisions, but were less enthusiastic about the application of the doctrine when it was applied to the rights of the unborn child [which, incidentally, were to be protected - in a balanced way - not against the state but against the potential mother].

A final new insight that came through to me related to the inter-connection between the constitutional court and the ordinary courts. I had been under the impression that the constitutional court was there as some kind of over-arching or umbrella court to ensure that all state institutions functioned in such a way as not to violate the rights of any citizen. This supposition turned out to be true only in the broadest of senses. In reality, the c.c. has the function of determining the constitutional limits of state conduct rather than that of deciding whether in each and every case the state has acted in a constitutional way. Thus, it is the function of the ordinary courts to handle the umpteen claims by citizens that a police officer or a city bureaucrat has violated their rights. The constitutional court comes into the picture if there is a dispute in relation to the constitutionality of the legal rule or principle in terms of which the police officer or administrator purported to act. It is for this reason that the overwhelming majority of individual complaints by citizens are rejected by the c.c. The task of applying the legal rules to concrete controversies and to fact situations is left to the ordinary courts. In Germany this means, too, that the ordinary interpretation of the Codes is left to the ordinary courts. The only function of the c.c. in this connection is to see to it that the ordinary courts make their decisions within constitutional limits.

One informant made the point that the c.c. judges were not cleverer than the ordinary judges. The advantage they had was that they had a little more time for reflection and had to concentrate on one question only, namely, that of constitutionality. Their function was not to decide whether laws were good or bad, but whether they conformed to the constitution or not. Similarly, it was not their role to determine whether the ordinary courts were functioning well or poorly, both in individual cases and generally, but to say whether their decisions fell within constitutional limits.

From this I deduced that the c.c. does not get involved in analysing factual situations and commenting on inferences drawn by the judges. They are accordingly not called upon to wade through huge court records to decide whether or not a claim has been correctly upheld or denied, or whether or not a person has been correctly convicted or acquitted. What matters is the constitutionality of the legal principle or rule in terms of which the lower court's decision was made.

Unfortunately, the importance of this distinction, and its significance for an appropriate division of labour between the South African c.c. and the Appellate Division, only became clear to me well after my return to South Africa. As a result, I did not verify the correctness of my assumption that effectively the German c.c. focuses on the constitutionality of laws, rules, practices and standards of behaviour, rather than enters into on evaluation of conduct in concrete cases,

II. VISIT TO THE HUNGARIAN CONSTITUTIONAL COURT

In the last week of March 1994 the following South African constitutional lawyers visited Budapest to study the functioning of the Hungarian Constitutional Court:

Laurie Ackermann, John Didcott, Gerhard Erasmus, Pius Langa, Christina Murray and myself.

Dullah Omar found himself obliged by last minute commitments to withdraw from the group.

The trip was arranged by IDASA, and this report was sent to them as a summary of my main impressions.

WHY HUNGARY?

During our visit to the German Constitutional Court, we were informed that of all the many Constitutional Courts that had been set up in Eastern Europe to supervise the transition from authoritarian rule to multi-party democracy, the most successful by far had been that in Hungary.

The Court was established just before the first free elections were held; its function was to solve constitutional questions that might arise in the process of transition, to ensure that all new laws conformed to the limits of constitutionality and to see to it that the process of reviewing the legal acts of the previous regime was conducted in a constitutional manner.

In this sense, the fresh experience of a newly-established court with special concern for the problems of transition was felt to be of particular relevance to South African jurists.

Indeed, the visit proved to be of great interest. The influence of the German CC was to be expected and was found: four out of the nine judges had spent time in Germany on extended fellowships intended to prepare them for future work in the constitutional sphere. The mode of posing problems and the manner of motivating decisions were largely in the style of the German CC. Furthermore, the active role played by the highly professional and experienced assistants attached to the judges was reminiscent of the German system.

At the same time, it soon became clear that this was not a branch of the German Constitutional Court functioning in Hungary, nor even an attempt to create a Hungarian replica of it. The Constitutional Court in Budapest soon established its own personality, together with its particular style of work and specific mode of discourse.

Some of the problems it dealt with were similar to those heard by the German Court and were dealt with in a similar way, e.g. abortion. In other cases, the issues were of like kind, but the approach adopted was very different, e.g. how to deal with property regimes created by Communist governments or with the punishment of conduct by communist officials. Many other matters, however, turned on specific features of constitutional-political development in Hungary, such as whether the President of the country could, as constitutional commander in chief of the armed forces, control nominations of senior officers.

THE NEW CONSTITUTION

The three principles governing the making of the new democratic constitution were: legal continuity, a negotiated transition and thorough-going socio-political transformation.

In order to maintain continuity, the new constitution took the form of an amendment to the old communist constitution of 1949. The changes covered more than eighty per cent of the old constitution, but the notional form of an amendment rather than a new constitution was maintained. We were told that the only clause that was taken over without alteration was the declaration that Budapest was the capital of Hungary.

Though the new constitution was said to be a transitional one, no provision was made for a Constituent Assembly or other body to draft a new and final constitution. In practice, changes are made on a piecemeal basis through the amending procedure. [If I recall correctly, a two thirds majority in Parliament is required]. Having a transitional constitution that was permanent did not seem to cause any major problems. After all, as our hosts pointed out, for decades after the First World War, Hungary was a monarchy without a king [or queen], and its head of state was an admiral [Horthy] without a navy.

The transitional nature of the constitution was, however, used by the President of the Court to justify the existence of what he called an invisible constitution that lay behind the apparent text. This invisible constitution, he argued, compelled an interpretation of the text which would treat it not as a complete document but as a stepping stone to a full and developed democracy. More conservative members of the court, which in Hungarian conditions meant those with a more left-wing background, resisted the idea of an invisible constitution. Today the President of the Court finds it more convenient not to refer to the invisible constitution, but rather to internationally accepted values that form part of the constitution.

The basic way in which the new constitution differed from the old was that it provided for legal rather than political mechanisms for its enforcement. Thus the old one contained many references to fundamental rights and civil liberties, but made no provision for how these were to be guaranteed.

In order to mark the change from an authoritarian state with paper guarantees to a state governed by the rule of law, it was necessary to establish a constitutional court. The role, functioning and initial composition of the court was agreed to before the new constitution was adopted, not after, and was incorporated into a special statute. The person who drafted the law, namely the Deputy Minister of Justice, ended up as one of the first members of the court.

COMPOSITION OF THE COURT

Five judges were appointed initially. Two were proposed by the reconstituted or new communist party and regarded as acceptable by the then opposition: one was a respected law professor not too compromised in the past, the other the deputy-minister of Justice. A further two were proposed by the then political opposition to the communist government, while the fifth, a judge of the Supreme Court, was said to be neutral and not politically aligned.

After the elections, which completely altered the political balance in the country, a further five judges were appointed. One member of the court was transferred to become Chief Justice of the Supreme Court, and replaced. Another was appointed to the World Court, and not replaced. The result is that there are now nine persons on the court.

The law provided that after the second general elections, which are due to be held later this year, a further five judges would be appointed. We were informed, however, that the present nine judges, although claiming to be overworked, did not see any necessity to augment their number, and that a preliminary agreement had been reached by the political parties not to choose the additional five.

All the judges are men, in spite of the fact that nearly half the hundred or so members of the Supreme Court are women, as are more than half the judges in the inferior courts.

The President of the Court has a high profile and offers strong leadership to the court. He had been a member of the national leadership of the Democratic Forum, which was to emerge as the largest party in Parliament and which presently heads the coalition government.

In order to be a judge, a person must be at least forty five years old, have been twenty years in legal practice or be the holder of the higher law degree required for someone to be a full law professor. The nominee must also not have been

a party card-holder for one year [this provision did not apply to the first five judges]. We were told that future judges will have close ties with the different political parties, but not be card-carrying members.

Judges are elected for a nine year period which can be renewed. To counter the argument that the prospect of being up for consideration again might encourage judges to give opinions in a certain way, we were told that in Italy, where the judicial term was not renewable, retiring judges could be just as influenced by the hope of high positions in public life after leaving the bench.

COMPETENCE OF THE COURT

The court has seven areas of jurisdiction:

1. **Preventive [prior] review of draft legislation.** Fifty M.P.s [out of nearly four hundred], the Speaker or the President can petition the court for review of the constitutionality of bills before Parliament. This procedure has been used 7 times in the first 4 years. It has been strongly criticised as involving the court directly in the legislative-political process. The court has ducked out of exercising this jurisdiction by saying that it will only determine the constitutionality of a proposed law after the last debate has been concluded and when the text has been finalised by the last vote. In other words, it will hold back from exercising its full competence and only review a Bill after it has been finally adopted. On the other hand, there seemed to be no objection to the President exercising the power to refer Bills to the court after they have been adopted but before promulgation. Apparently on four occasions the President had referred what the judges called 'important matters' to the court.

2. **Abstract judicial review of acts of Parliament and of what** are called **sub-legislative enactments**, such as decrees of governmental agencies and regulations by local authorities.

Anyone can challenge the constitutionality of any legal instrument emanating from the state. The process is called abstract judicial review because the petitioner need not have a concrete interest in the matter, that is, it does not arise from what the Americans call 'case and controversy'. The idea was taken over from the Bavarian constitutional Court, and it was intended to emphasise the accessibility of the court in the new democratic era. Nearly all our informants, however, criticised it as being a busybodies'

charter. Inveterate authors of letters to the editor, we were told, now address their epistles to the constitutional court, turning it into an organ of popular complaint rather than a serious court of law.

About 2000 petitions a year are received by the Secretary General of the court. The number rose at first and now has dropped slightly. Two thirds of these are rejected by letter from the Secretary General as falling outside the competence of the court - if the petitioner insists, he or she can be formally notified by the court itself that the claim is not admissible. Approximately 600 decisions a year are given by the court and roughly 10 per cent of these result in a declaration that a statutory norm is invalid.

3. **Concrete norm control.** This happens when a question of the constitutionality of a law is raised during an actual trial. The presiding judge can refer the issue to the CC and suspend the proceedings until a determination is made. Apparently about twenty such matters were referred in three years.

4. **Abstract advisory opinions in respect of petitions by the Prime Minister or other high officials seeking interpretation of the constitution.** This has been a convenient mechanism for dealing with disputes inside the governing coalition or between the President, who comes from a minority party, and the Prime Minister, who is from the party that leads the coalition government.

Thus, as a quid quo pro for getting agreement to certain constitutional amendments, a member of the opposition Liberal Party was chosen as President of the country. The Constitution declared that the President was Commander in Chief of the Armed Forces, and, seeking to exercise command, the President tried to restructure the high command. On a petition from the Prime Minister, the court ruled that the phrase 'commander in chief' referred to a symbolical rather than an operational relationship with the army, and that operational control lay with the government of the day, and not with the President.

Another important case dealt with under this jurisdiction, related to the status of rural property nationalised by the communist government. The coalition partners could not agree on whether to restore nationalised land to the original owners, and the Prime Minister found it convenient to refer the matter to the court rather than force the issue politically. The court held that while the original nationalisation was to be regarded as unlawful, the

subsequent handing over of the land to cooperatives had resulted in the creation of vested property interests in favour of the cooperatives, which could not be usurped without payment to them of full compensation.

A further case where coalition partners were in fierce dispute, and which [I think] was decided under this jurisdiction, related to the punishment of communist officials guilty of ordering executions and other violations of fundamental rights in the 1950's. This turned out to be a landmark case, and like others of that genre, the landmark is likely to be followed by further landmarks. The issue before the court was whether or not a statute of limitations, in terms of which responsibility for crimes prescribed after twenty years, withstood the impact of constitutional transformation. In a celebrated decision, the court held that the first article of the constitution declared that Hungary was to be a rechstaat [which our informants referred to as 'a country under the rule of law']. As such, the principle of non-retroactivity of penal provisions had to be upheld; accordingly, any attempt to extend the period of prescription after it had already elapsed would be unconstitutional. We were led to understand that in the light of decisions by the German and other courts, the court would probably in future qualify its decision by declaring that it should not be seen as applying to crimes against humanity and gross violations of human rights, in respect of which prescription should never be seen to run.

5. **Conformity of legislation with International Treaties.** In a direct sense, this referred to bringing internal legislation into line with international treaty obligations. Indirectly it formed part and parcel of the complete overhaul of what we would regard as the common law. The two relevant factors are as follows: Hungary has adhered to the European Convention on Human Rights, and Hungary has a codified system of law, in terms of which property law, criminal law and procedure and so on, are contained in Codes. Since many aspects of these Codes and the ways in which they have been applied, violate the European Convention, they must now be reviewed and revised. It seems that all are agreed that this process must be gradual and systematic rather than sudden and revolutionary - it is said that anarchy would be more violatory of constitutionality than living for a little longer with inconsistency of norms. At the same time a major difference of opinion appears to be developing between the Constitutional and the Supreme Courts as to which court should be responsible for the necessary

revision, each claiming that it alone has the responsibility.

6. **Resolving conflicts between different state organs.** Surprisingly to us, only one case in four years had been brought under this heading, and it had dealt with a minor dispute between local authorities.

7. **A constitutional complaint of violation by administrative act of a fundamental right.** This competence is similar to that exercised by the German Constitutional Court in respect of concrete norm violation, i.e. where the petitioner claims a violation of his or her fundamental rights by the State. The difference, however, is that in the case of Hungary, such petition may only be grounded on a violation of fundamental rights resulting from the application of an unconstitutional statutory norm. It cannot be based upon unconstitutional conduct by state officials if performed in terms of a statutory provision that is in itself constitutional.

Only 56 cases were brought under this heading in 3 years. In practice it is easier simply to rely on the jurisdiction mentioned under paragraph 2 above, that is, abstract norm control.

The following were two successful constitutional complaints:

A person refused a permit to build a house complained that under the existing law he had no right to challenge the refusal in a court of law, but could only appeal to a higher administrative structure. The CC upheld the complaint and ordered the Legislature expeditiously to adopt legislation establishing an Administrative Court to provide for judicial review of administrative acts.

It should be mentioned that the doctrine of constitutional omission seems to be heavily relied upon in Hungary, and the CC frequently puts Parliament to terms to enact new legislation to fill the gap. We were informed that Parliament grumbles but obeys. The only time Parliament ignored a ruling of the court was when it became clear that compliance was manifestly impossible for practical reasons [the court had held that Hungarians living abroad were entitled to vote and that the necessary legislation should be passed- it emerged that problems of identification and registration were insuperable, and the matter was quietly forgotten.]

The second matter related to adoption cases made complicated by social upheaval and sudden disappearances of biological parents across the borders into exile. The technically interesting part of this case was the utilisation by the court of a doctrine developed in the Italian CC in terms of which even if there was nothing unconstitutional in the text as such, the way in which a law was applied could be declared unconstitutional, i.e. the court would look to the law as lived and not simply the law as written. This decision provoked the disapproval of the Supreme Court, which claimed that it alone had the right to decide on how the law should be interpreted.

DIVISION OF LABOUR IN THE COURT

The Secretary General's staff receives petitions and filters them, preparing an outline commentary on each. In two thirds of the cases, the Secretary General writes to the petitioner explaining that the matter has been wrongly referred to the CC. If the petitioner insists, he or she can receive a formal decision from the court.

The General Secretary then refers the admissible cases to the President of the Court. Cases that deal with the same subject matter are grouped together. The President then assigns cases to the different judges depending on their professional experience. He may also keep cases himself.

Each judge has two professional assistants, whom he himself [the judges are all men] chooses, as well as a clerk. [We were told, incidentally, that a factor which favoured the choice of several practising lawyers for the bench was that, unlike the judges and law professors, they knew how to keep and manage large numbers of files.] These professional assistants are highly qualified legal experts, frequently law professors, who do much of the research and who help with draft opinions, under the direction of the judge who has chosen them.

In all cases the assistants prepare outlines of the case and propose decisions. In the simpler cases they will write draft judgements for perusal and correction by the judge. The docket is then returned to the SG who consults with the President about a day when the case will be finally decided. The remaining judges must then receive copies of the case file and proposed decision, at least eight days in advance.

Decisions on Parliamentary legislation have to be taken by the court sitting in plenary session. Plenaries are presided

over by the President. The assigned judge makes his presentation and all the other judges then give their opinions. In complicated cases, the issues can be fragmented and separate votes taken on each question. At times cases require up to eight plenaries before a final decision is reached.

The court tries to achieve consensus wherever possible. In three quarters of the cases, unanimous judgements are handed down through a single opinion. Individual judges may, however, file dissenting or assenting judgements. Since the CC is the only court in Hungary in which dissenting opinions may be delivered, this exceptional practice was said to give rise to public disquiet. Obviously, in countries used to majority and minority opinions the disquiet would arise if all judgements were given as though unanimous.

What was striking to us was that the court sits behind closed doors without the benefit of adversarial proceedings. To some extent this was attributable to the fact that Continental court procedure in general is judge-directed rather than a contest driven by advocates - an enquiry rather than a contest. We were told further that since all questions related to norm control rather than the determination of the interests of any party, it was not necessary to have representation of petitioners and respondents. The diverse character of the judges, we were further informed, resulted in a natural internal adversary procedure being established which was said to be more fruitful than external advocacy.

The key element was the abstract nature of the proceedings. Since the issues were those of determining constitutional limits, what was needed was intensive debate by disinterested professionals rather than grandstanding by advocates. The President of the Court said that in only two cases had public hearings been held. The one related to the death penalty, the other to social welfare provisions. "In both cases well-known political views were expressed."

Thus the doors of the court were wide open to complaints but completely closed to complainants. No greater testimony to the relative weakness of the Hungarian legal profession could have been offered than that when at last they came to enter the kingdom of the rechstaat, they did not have the right to appear in its highest court.

Challenges to the validity of norms below the level of Acts of Parliament are dealt with by three-member groups of

judges. These three-person panels are constituted on the basis of area expertise, and function for a year at a time.

Plenaries meet on Mondays and Tuesdays, while the three-member groups sit on Wednesdays.

And for the rest of the week? we asked.

Wednesdays, Thursdays, Fridays, Saturdays and Sundays, including Sunday nights, we prepare drafts - one of the judges told us emphatically.

Judges are not permitted to accept other forms of employment, save that they are allowed to carry on work as law professors at universities, which a number of them do.

THE ROLE OF PRECEDENT

One theoretical reason for having the CC, we were told, was that the Hungarian legal system did not follow the doctrine of stare decisis, that is, did not work on the principle of the binding nature of previous court decisions. Thus, each court could at least in theory give its own interpretation of the Constitution and the Codes. For the sake of stability, it was therefore felt necessary to have a definitive voice that would be binding on all courts and the government - hence the CC.

Someone suggested that the President of the court was in fact so eager to establish the doctrine of precedent that he would find a way to give judgements in a number of small cases without major apparent constitutional significance and then cite them as precedent to justify the decision he thought was right in a big case which soon followed. We did not put this observation to him, so have no means of knowing whether it is accurate.

In any event, the judgements in fact contain very few references to decided cases, whether Hungarian, or of foreign courts or international tribunals. It seems that standard practice in preparing decisions is for the judges to look at decisions of the German, Italian, Spanish, Portuguese and United States courts, and to give special attention to judgements of the European Court in Strasbourg, but not to cite them in judgements.

Comparative jurisprudence was clearly seen as the major means of ensuring that appropriate constitutional values were being maintained. There was a manifest eagerness of the

judges to conform to what some of them referred to as Western concepts, hence the special emphasis on the decisions of the European court.

The influence of standards established in other courts is therefore frequently decisive but never explicit. A perusal of judgements shows that they are cast in quite a different way to that to which we in South Africa are accustomed.

The judges acknowledged that their own values played an important part in influencing the manner they interpreted the constitution. At times they have been accused of writing rather than interpreting the constitution. Their answer was that there could be no gaps in the constitution [in other words, the constitution abhors a vacuum]. Where the constitution was silent on a topic, they would say: "there are no constitutional obstacles" to a certain proposal.

The court preferred not to refer to the proceedings at the Round Table talks where the text of the constitution was agreed upon, but rather to look to comparative jurisprudence. There was no bar, however, against looking at legislative debates.

Where the court felt that the state was itself failing to carry out its constitutional responsibilities, the court would not hesitate to require the state to adopt an appropriate legal instrument to meet the deficiency. In other words, the judges would not simply strike down unconstitutional laws, they would require the legislature to act where laws that should have been in existence were not on the statute books.

Furthermore, the judges developed the doctrine that where fundamental rights were being violated by agencies other than the state, then the state could be obliged to intervene to supply an appropriate remedy. This was referred to as the duty on the state to provide institutional guarantees of constitutional rights.

The court regards itself as being guided by a hierarchy of values. At the top are the rights to life and dignity. These are rights that cannot be restricted - you cannot take away someone's life for five minutes.

Next come the fundamental communication rights - the rights of free speech, religion and science. All laws restricting these areas must be narrowly construed.

Finally, there are the issues relating to the structures and functions of state organs. Here the court is less likely to take up emphatic positions. It intervenes strongly in defence of fundamental human rights, but is reluctant to be drawn into what are essentially political controversies.

Decisions of the court are reported in a regular court bulletin, and all those that have the effect of declaring legislation invalid are published in the government gazette as well.

SOME IMPORTANT CASES

The death penalty - the court held that the death penalty by its very nature involved an arbitrary taking of human life and as such was unconstitutional.

Proposed retroactive extension of the prescription period in the statute of limitations so as to permit prosecution of communist leaders for offences committed in the 1950's - the court decided that since Hungary was a rechstaat, the rule of law did not permit retroactive extension of the prescription period in order to allow punishment of persons whose liability for prosecution had already lapsed.

Return of property confiscated by the communist government in 1949 - the initial act of nationalisation was held to be invalid, but the court decided that the peasant cooperatives which had subsequently been established on the land had acquired a new kind of ownership which the court would recognise, and as such could not be deprived of their interest without compensation.

Relations between church and state and the equality clause - a law authorising the return of school buildings to the church was held not to violate the principle of separation between church and state, nor to represent an unconstitutional discrimination in favour of the church as against other owners whose property had been seized.

The banning of a virulently anti-Semitic journal - the law prohibiting incitement [to racial hatred?] was upheld, but the part imposing criminal penalties for group libel was invalidated on the grounds that civil rather than criminal penalties would have been sufficient.

Broadcasting monopoly by the government - the statute authorising this was declared to be unconstitutional, but in the absence of a new broadcasting law the present situation had to continue, since, the president of the court said,

anarchy was an even greater threat to the constitutional order than carrying on for the time being with invalid arrangements [our informants said that this decision had led to abuse of broadcasting by the government, and that, unfortunately, the President of the court had not shown any eagerness for the matter to be further reviewed by the court in the light of the failure of the government to adopt appropriate legislation opening up the airwaves].

Personal data in government files - the court ordered legislation providing for maximum disclosure.

Social welfare legislation - the court split almost evenly, letting the government off the hook in relation to an unpopular new law.

Abortion - the twenty year old law granting relatively free access to medical services to terminate pregnancy was held to be unconstitutional since it took the form of a decree by the Minister of Health and the court decided that only Parliament could legislate on a matter of such fundamental concern touching on the right to life; Parliament in its wisdom could adopt any law it chose within the limits of constitutionality, the latter being determined by balancing out the fact that human life commences at conception but Hungarian law only recognises legal personality at birth. The court indicated that a law permitting abortion within the first trimester would not infringe constitutionality provided that proper counselling was made available and the woman concerned was encouraged to have the child by the knowledge that there would be real support for the child in the event of its birth. [Parliament in fact adopted such a law without extensive opposition. A constitutional challenge has been posted, but the court appears not to be anxious to put it high on the roll.]

EVALUATION OF THE COURT

One of our informants described Hungary as a quarrelling democracy. If this is so, then the CC clearly helps to keep the quarrels within limits, and to facilitate the movement from one quarrel to another.

The judges of the CC were proud of their role. Their self-assurance seemed to be both a prerequisite for their function and an outcome of their activity. They had confidence in their role, and, despite manifest differences of background, world view and professional experience, seemed to show a high degree of collegiate harmony. The

problem is how to be sensitive and flexible without being hesitant.

Hungarians - we are told by Hungarians - like to complain. They complain to the court and they complain about the court. The CC appears to be one of those institutions they specially love to complain about: it is either too active or too inactive. They welcome the existence of the court both for the work it does and for the chance that it gives them to criticise. This is not as paradoxical as it sounds. It is a sign that the court displeases some of the people all of the time, and all of the people some of the time, but never displeases all of the people all of the time.

Our information about the court came from reading judgements, studying journal articles and discussions with members of the court or persons whose work had brought them close to the court. We did not have the benefit of the opinions of the man or woman on the Danube hovercraft. Allowing for this, I came away with the firm impression that the court was now a permanent and valued feature of Hungarian society. Such criticism as there was, related to the details of its functioning and the correctness of its individual decisions rather than to its role in general.

Overview by a parliamentarian

A senior parliamentary official, who came from one of the opposition parties, said that by and large, the majority party did not like the CC because it challenged the legislative wisdom of the majority. At the same time, he added, he as a member of the opposition felt the court intervened too much by its silence. In his view, the court made law in favour of the majority party even when it failed to act, for example, when it refused to follow through in relation to forcing the government to surrender its monopoly on broadcasting. Another example of activist dereliction which he cited was that of failing to deal with the question of the devolution of state property to local government.

Having exercised his constitutional right to complain, he went on to fulfill his patriotic duty by defending the institution he had criticised. The words he used in praise of the court were similar to those employed by just about all our informants: the Hungarian CC had undoubtedly played a significant and positive role in protecting the country's fledgling democracy, in aiding the process of extensive socio-economic transition and in bringing the norms of public life into line with international standards.

His final comment was interesting, indicating that if the court saw itself as the protector of fledgling parliamentary institutions, parliament in its turn felt a responsibility to support the fledgling constitutional court. "You don't play football," he told us "on newly sown grass."

Overview by a law professor

The summary of the court's role which I found most convincing was as follows:

Hungary had undergone a self-limiting revolution with radical institutional changes in all areas of society. The court saw itself as the guardian of this process. First came the practice, then the theorisation. "You cannot create a rechstaat by violating the principles of such a state." This was the philosophy of the president of the court, who saw the court's role as being that of protector of human rights during the transition process. The self-denial of those exercising political power was assisted by the court. It was an example of less being more: the fact was that controlled continuity in public life provided for more radical change than absolute discretionary power in the hands of the new rulers. Only the extreme right had objected to this process of continuity; the total destruction of the past which they had sought would only have reproduced the old regime in a new form, and ended up as far less radical in reality.

The new Hungarian constitution had essentially been the product of negotiation between political elites. The process had not been democratic. In fact it could well have been far more democratic without risking the maintenance of continuity. This had resulted in some problems of legitimacy, especially when the court played a constitutionally interventionist role.

Even so, the judges had to a remarkable degree established parameters of constitutionalism which had become an accepted part of the life of the country. It is possible to have a constitution without constitutionalism [and vice versa, to have constitutionalism without a constitution, as in the United Kingdom]. What the court had done was to insert constitutionalism into the constitution. It did so [in the retroactivity case], and then justified its action.

Nevertheless, it had not been equally successful in all areas. In particular, it had failed to keep the political process as open as possible. This was most evident in relation to state control of the electronic media, where the court had failed to go against the government, and where the

worst fears of its critics had been realised. In our informant's view, judicial review ensures that the political process is kept as open as possible. This is to be done not only by the elected bodies themselves but by independent bodies related to civil society. In the words of Habermass, constitutional patriotism requires more than democratic decision-making principles; it presupposes the direct involvement of civil society, and prolonged, open public debate on major issues.

Suggested improvements

The detailed improvements sought by our informants were:

* A new look at the power that any person has to petition the court alleging that a law was unconstitutional ["you don't have to be a citizen, even you South Africans on your short trip could petition the court"]. One proposal was that only persons with a direct interest in a matter, or even better, only recognised interest groups affected by a measure, should have the right to approach the court. In such a case, legal aid should be provided so that complaints would no longer be received on the back of a piece of cigarette paper.

* Controlling the discretion of the President of the court in relation to the distribution of cases and the speed with which certain cases could be handled, while others were delayed.

* There was clear disagreement as to whether the CC should have the last word in determining whether the Codes were being interpreted in a constitutional manner. Given the comprehensive scope of the Codes, this would in effect give the CC a supervisory role over the whole of what we would regard as the common law. [In Germany, this function is expressly given to the CC. The CC does not determine whether the Supreme Court was right or wrong, but whether its decision does or does not overstep the bounds of constitutionality. Nevertheless, it is an important power, and means that the CC has the last word not only in relation to Parliament but also in respect of the whole judiciary - "above the CC is only the blue sky."]

In Hungary this competence was not expressly granted. The President of the CC thinks, however, that a coherent constitutional system requires a coherent judicial approach, which only a single authoritative source, namely, the CC, can bring. The Chief Justice of the Supreme Court differs sharply. In his view, each court has its own clear

functions, and neither should seek to interfere in the realm of the other.

111. SOME GENERAL OBSERVATIONS BASED ON THE VISITS

A paradox. A constitutional court functions most effectively where it is least needed. Thus, in Russia , where the President and Parliament were locked in deadly battle, the CC was not able to play a meaningful role in resolving the crisis, but rather became drawn into the crisis itself. Conversely, where there is relative institutional stability, the CC can be activist and influential.

A disappointment. Constitutional courts are not able to function in such a way that anyone who feels that his or her constitutional rights have been violated can be guaranteed his or her day in court. On the contrary, what the Americans call traffic management is vital to the effective functioning of the courts. In Germany, 98 per cent of cases submitted are not even heard, while in Hungary the figure is about two thirds.

A curiosity. Judgements are not built around precedent in the way to which we are used. Nor do the facts take up any or much space. Instead of a judgement following the format 50\40\10, i.e., fifty per cent of the space going to the factual setting, forty per cent to an analysis of judgements in similar cases and only ten per cent to hard, principled argument leading to a conclusion, virtually the whole of the judgement is based upon the exposition of a logical idea. I am informed that in Hong Kong counsel arrive to argue constitutional issues with massively researched references to cases from all over the world. Critics say that the fundamental constitutional issues get lost because a positivistic legal style based on fine analysis of precedent is employed; that the constitution is interpreted as though it were just another statute with words to be construed using the normal aids to interpretation; that discovering and developing the inner constitutional logic plays little or no role.

A point of interest: there are a number of areas where the courts apply constitutional principles neither vertically nor horizontally, but diagonally. Thus, where there are manifest cases of no or insufficient legislative remedies to enable people to enjoy the rights declared to be theirs by the constitution, the courts may require state action to permit people to exercise such rights. Thus it is not only

state action which can be unconstitutional, but state inaction.

A caution: the visits reinforced some advice given by M. Robert Badinter, President of the French Constitutional Council, during his recent journey to South Africa. Asked about the most important quality of a CC judge, he replied : modesty. It is not the duty of a CC to correct error, he explained, but simply to determine the limits of constitutional action. Nor is it its function to improve on legislation, but merely to decide whether the law passes the test of constitutionality. He added that it often required great restraint not to correct manifestly wrong decisions of a lower court, nor to point out the stupidity or impracticality of a statute, but the CC judge had to limit him or herself to questions of constitutionality.

A new perspective: in striking down a law, the court does not merely say why it is unconstitutional, but goes on to indicate the factors which Parliament should balance one against the other when passing new legislation, as well as to lay down the broad limits within which legislative choice can legitimately be made.

A false choice: there is nothing to prevent a CC from being both activist and deferential at the same time. The activism relates to defending the fundamental rights to life, dignity, freedom of conscience, speech and creative activity. In disputes that involve how money should be spent, or in cases where one government institution is arguing with another, the function of the court is to encourage democratic and informed dialogue with maximum input from all those concerned, rather than to interpose its own decisions. Similarly, the court is reluctant to be drawn into disputes over foreign policy, such as whether German troops could be sent outside the country's borders to participate in UN peace-keeping operations.