PART TWO

TOWARDS A CONSTITUTIONAL COURT IN SOUTH AFRICA

The new South African constitution contains a number of clauses governing the composition, selection and jurisdiction of the South African constitutional court. Some of the issues were thoroughly discussed, and the agreements arrived at and embodied in the constitution will have meticulously to be honoured.

One of these related to the procedure for selecting the judges. Whether or not European experience turns out to be useful for the phase of drafting the final constitution, there is little likelihood that anyone would wish to tamper in any way with the painfully achieved agreement entrenched in the present constitution.

The other immutable element must be the specific role of the court in ensuring that the new constitution ~~to be~~ drawn up by the Constitutional Assembly ~~embodies and does not violate~~ complies with the agreed Constitutional Principles. Perhaps uniquely in the world, the constitution-making process has been expressly made justiciable - the c.c. will be in the unusual position of having the power to declare ~~the~~ constitution unconstitutional. The present constitution is in effect a constitution for achieving three things simultaneously: elaborating and adopting a final constitution, providing for continuity of government in the meantime and ensuring the protection of human rights during the process. The court will have a key role to play in seeing to it that all three aspects are 'controlled' by the application of the provisions of the present constitution.

At the same time, legislation will be needed to govern the establishment of the court, and the court will in turn have to adopt rules regulating its functioning. What follows is an attempt to link some of the reflections on German and Hungarian experience with current discussions on the about-to-be-created South African c.c.

Practical proposals

A number of practical and functional proposals can be made.

attaching to the SCt judges

1. The autonomy of the c.c. can be emphasised by ensuring that it has its own budget and is administratively independent of any government ministry.

2. Consideration should be given to providing professional support for the judges in the form of organised assistance from well-qualified legal and other professionals. While the American system of young law clerks has its merits, something more advanced should be investigated. The German and Hungarian practice of seconding a relatively large number of judges and law professors to the court might be too costly for South Africa. Yet it should be possible to involve at least legal academics in the work of the court, even if only on a part-time basis. A limited number of political scientists might also be considered. This could be combined with the attachment for specified periods of law clerks as well. I refer here to systematic and organised intellectual backing for the court, something that involves far more than library legwork - new ideas, options, experience in other countries, even possible outlines for elements of judgements, what might be called internal heads of argument. In addition to contributing towards the direct enrichment of the work of the court, having a body of assistants will ensure a revolving door of ideas between the court and wider intellectual communities, and also helps to prepare new generations for future work on the bench.

3. Materials will have to be made available on an organised and continuing basis. International jurisprudence on human rights and constitutional questions will be vital for helping to determine such questions as defining the meaning of rights, establishing how competing rights are balanced against each other, and indicating what limitations might be acceptable. It is not only the c.c. which has to have a full set of documents and reports. Documentary collections should be freely available to the courts, practitioners and interested parties in every province. It will be important to make the collection as truly international as possible, so that together with reports from Europe and North America materials from countries such as Namibia and India are made available.

4. Special attention will have to be given to procedural matters so as to enable the court to function speedily and fairly and with appropriate focus on the most important matters. This would include:

a. Procedures for sifting and grouping petitions and deciding on admissibility;

b. Procedures for the internal circulation of dockets and opinions and generally the distribution of judicial tasks;

c. Rules governing the reception of briefs from interested persons and public interest groups which can inform and assist the court;

d. Procedures to enable the court to commission sociological and economic impact studies which will help it arrive at correct decisions;

e. Rules concerning the relationship between oral presentation and advocacy by means of documentary presentation - in Hungary there is no oral argument at all, in the U.S.A. counsel are allowed no more than an hour between them: should there be similar restrictions in South Africa? A strong case could be made for following U.S. Supreme Court practice in this regard - but perhaps we need to hear full argument before deciding.

A new look at the question of jurisdiction

All the above matters can be dealt with by means of legislation and rules of court. The last proposal has a wider sweep, and might be achievable only by means of an amendment to the constitution. We may assume that an amendment would only be feasible if its objective was better to secure the agreed objectives of the constitution rather than to introduce new elements, if it were supported by overwhelming cross-party consensus, and if it could be attached to an omnibus provision dotting constitutional i's and crossing constitutional t's.

The proposal does not deal with two questions that have been raised in legal circles and that are presently being debated; namely, whether the competence of magistrates to apply the new principles of the constitution in their day-to-day handling of cases should not be expressly spelt out, and whether judges of the provincial divisions of the Supreme Court should not have the power to review the constitutionality of legislation adopted in the pre-democracy era. It refers instead to the streaming of cases between the Appellate Division and the c.c., and consequently to the specific functions of each court. In essence, it suggests drawing a distinction between the power of constitutional review, on the one hand, and the power to correct error on the other. The proposal is that in order to enable the c.c. to concentrate on its task of reviewing norms it be relieved of responsibility for

evaluating conduct. In practice, this would mean making it clear that the Appellate Division retains its function of hearing appeals in cases where the legal principles and rules involved are regarded as constitutionally valid but the behaviour of state officials is seen as unlawful ~~in terms of those rules~~.
In order to explain the proposal, ~~it~~ will ~~be useful to~~ refer to the U.S. and the Austrian models of constitutional courts and their functions.

Most of us are roughly familiar with the US Supreme Court prototype ~~in terms of which~~ that court ~~sits~~ at the apex of the judiciary, to determine questions of constitutionality which arise in the course of litigation in the courts beneath it. The concept of case and controversy is fundamental to the way in which constitutional questions are posed and resolved. In other words, concrete cases involving particular disputes between actual litigants are the foundation of the Supreme Court's jurisdiction. Major issues take years, even decades, to ripen before they are finally decided. The processing of cases on the way up to the court and the determination by the court as to what matters it should hear, has ~~as much~~ impact on the legal scene, ~~as the~~ actual ~~decisions~~.

The Austrian c.c. represents the other main model. Established after the First World War, the Austrian c.c., if I understand correctly, has jurisdiction only in relation to what is called abstract norm control, that is, determining the constitutionality of laws and regulations and, possibly, patterns of state practice. Only certain figures in the institutions of government, whether from the ruling party or the opposition, have the right to raise questions of the validity of such laws. It does not solve individual disputes.

Most post-dictatorship c.c.'s, such as those in Germany and Portugal, ~~in fact~~ combine elements of both systems. The German system permits direct referral of laws and regulations to the c.c. without going through the normal court system. Certain state officials have the right to petition directly, as have specified numbers of members of the law-making bodies. This abstract norm control is supplemented by concrete norm control, in terms of which the ordinary courts can suspend the hearing of a case in order to get a determination by the c.c. of the validity of a law which affects the outcome of the matter. In addition, the c.c. can hear constitutional complaints by individual citizens alleging violation of fundamental rights, subject to the proviso that the latter must first exhaust all

available remedies, which means that they must work their way up through the ordinary court system.

The Hungarian system is both wider and narrower. It is broader in the sense that any person can petition the c.c. directly to have a state norm declared unconstitutional. He or she need not be a high functionary or a member of Parliament or even have a direct interest in the matter. The actio popularis is alive and well on the banks of the Danube, and even non-citizens like ourselves could, if we had mastered magyar during a week's visit, have challenged the constitutionality of any law in our host country. In addition, judges presiding in cases of concrete litigation can refer questions of the constitutionality of relevant laws to the c.c. What was more restrictive in Hungary, however, was the absence of the right of citizens to launch constitutional complaints based on violatory state conduct. The effect of this division was that the ordinary courts retained their full jurisdiction to determine whether or not in concrete cases, conduct of state officials violated the constitution and the law. At the same time, only the c.c. could declare invalid a legal rule in terms of which the state may have acted. Put simply: the court would entertain constitutional complaints if they were based on the unconstitutionality of a law, but not if they were founded on unconstitutional conduct. A clear distinction is made between norm control and conduct control: the former is a question of the constitutional validity of a law, which belongs exclusively to the c.c., while the latter is a matter of interpretation and implementation of the law, which lies in the sole domain of the ordinary courts. From time to time, the c.c. claims the right to determine whether the interpretations of the Codes and other laws of the land made by the ordinary courts, fall within constitutional limits. On each occasion, the ordinary courts diplomatically indicate that the c.c. should tend its own garden.

What, then, of constitutional complaints in Germany based on unconstitutional conduct? As we have seen, only two per cent of these are even heard by the c.c. This is because they have already been dealt with by the ordinary courts. The c.c. acts as a final court of appeal on one issue, and one issue only, that of whether the lower courts made their decisions within the limits of constitutionality. Put another way, the c.c. does not enquire into whether the lower courts made the right decision on the evidence before them. The c.c. is not a super court of appeal that sifts through every case to see whether or not state officials have behaved correctly. That is the function of the ordinary courts of appeal. The c.c., in other words, is not the

present A.D. with additional powers. It is an extremely specialised court with extremely important powers.

In the words of M. Robert Badinter, the function of the c.c. is not to correct error, but to determine the boundaries of constitutionality. The concept of constitutionality must itself have limits. If not, any disappointed litigant could say that his or her constitutional rights to a fair trial were violated simply because the judge did not come to the correct conclusion; every person sentenced to jail could claim his or her right to personal liberty was being infringed because of an incorrect judgement; everyone ordered to pay a fine could argue that the right to property was being violated; any order of delictual or contractual damages made or refused by the court could be said to raise a constitutional question because it involves the conduct of the judge violating or failing to uphold the personal and property rights of the litigants. Every case would become a constitutional matter, and the c.c. would be forced into the role of being a court of appeal. At the same time, the court of appeal would be deprived of an important part of its normal function - indeed, it could end up being completely by-passed, since every appeal could be said to be based on a violation of constitutional rights.

In my view, it would be just as inappropriate for the c.c. to be wading through the records of trial proceedings in lower courts as it would be for the court of appeal to be determining the validity of Acts of Parliament. Nor should the c.c. arrogate to itself or be burdened with the normal evolution and development of the common law and statute as applied to the everyday situations of life. In essence, its function is that of norm control, that is, the determination of the parameters and standards of constitutionality. The ordinary courts, the Public Protector, the Human Rights Commission, the Commission for Gender Equality and the Commission for the Restoration of Land Rights have responsibility for attending to the complaints relating to conduct by state officials. Naturally, there is an area of overlap where interpretation of the law becomes in fact a form of law-making, that is, where the ordinary courts are in practice not only applying norms but creating them. This area of overlap could then hopefully be subject to a form of ~~overlapping or~~ concurrent jurisdiction, with the c.c. focussing on the broad principles containing implications for the country, and the court of appeal concentrating on a fair adjudication in respect of the interests of the particular parties.

A streaming of responsibilities in this way will ensure a dignified and non-competitive role for both the c.c. and the court of appeal [A.D.]. Each would be able to adapt its rules and procedures to its appropriate functions. The court of appeal would continue to supervise the overall functioning of the judiciary. It would ensure that litigants got their day in court and were reasonably satisfied that the determination of claims and charges was being done fairly. The c.c., on the other hand, would be freed from the burden of sorting through each and every case to see if the right result had been achieved, and be able to confine itself to its true function, namely, to ensure that the principles, rules, procedures and standards of evaluation required by the constitution are maintained.

The net result then would be that the A.D. would carry on very much with its present functions, save that when a question of the constitutional validity of a law, proclamation, regulation or by-law was in issue, the matter would be referred to the c.c. Similarly, appeals from the provincial divisions of the Supreme Court would in all cases continue to go to the A.D. save where the validity of a statute etc was in question. Problems arising out of overlap could be reviewed from time to time, with the c.c. having the last word in the case of disagreement.

Thus, the spirit, purport and objectives of the declaration of rights contained in Chapter 3 of the constitution have to be taken into account in the interpretation of statutes and the development of the common law and customary law [sec 35.3]. One thinks of the issues raised in the recent Neethling case: this would appear to me to be a matter of concrete norm control, where the constitutional matter would be to determine what are reasonable and acceptable limits to free speech in a democratic society, balancing them against the individual right to dignity, and then to indicate the rules and criteria governing the onus of proof at a trial where the competing interests are involved. The trial court then evaluates the evidence in terms of the constitutionally prescribed principles. The A.D. sees to it that the trial court has applied the constitutional principles correctly.

The purpose of this rather lengthy exposition has been to lay the basis for a possible re-think of the jurisdictions of the c.c. and the A.D. as laid down in the constitution. If necessary, much of the division of labour which is proposed above could be achieved by the rules of court of the two judicial bodies. The c.c. could even in the exercise of its judicial 'majesty' acknowledge the right of the A.D. to make prior determinations in respect of concrete

violations by state officials where the alleged violation is based on conduct rather than on the application of an unconstitutional norm. The c.c. could then formally endorse the decision of the A.D. In my view, however, if there are going to be other amendments to the constitution to make it more effective and to achieve its aims, then it would be preferable to review the formulation of the exclusive powers granted to the c.c., and especially to fine-tune section 98 [2] a. and b., read with sections 98 [3] and 101 [5]. In particular, consideration should be given to ensuring that the questions of constitutional complaint based on violatory state conduct should work their way up the ordinary courts in the ordinary way, allowing the A.D. to act as the court which corrects error, while the c.c. concentrates on its primary function of determining the parameters of constitutionality.

As far as I am aware, the issues raised in this discussion have not been fully discussed on any occasion. I would wish to hear counter-arguments before definitely saying that my proposal will solve more problems than it will create. The plea, then, is that a suitable forum be established for the matter to be calmly and objectively visited or re-visited, with a view to achieving a workable consensus that satisfies all and gives the best start to what has the promise to be a brilliant new court system.

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 two ~~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 Ackerman, 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 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 ~~is~~ makes itself party to the limitations on its powers. The Bundestag [lower house] and the Bundesrat 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] ~~as~~ 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 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.

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 politics. Furthermore, in order for the court to give effective judgements fine-tuned to the political and administrative reality of the country, it was 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 to strike 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 ~~do not have an~~ are not very active ~~role~~. 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 would 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 dwarfed by 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 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 ~~over a long period~~ been trying to

Resources need rights, while rights need resources

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 rersources 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. 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 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 then are 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 acqainted 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 aqainst 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 constituional 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 fact situations is left to the ordinary courts. In Germany this means 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 if my assumption ~~about the way~~ the German c.c. limits itself to decisions on the constitutionality of laws, rules and practices, rather than on behaviour in concrete cases, ~~was correct~~.

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, ~~[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 was sent to them as a summary of my main impressions.

WHY HUMGARY?

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 ~~related to between~~ eighty ~~and ninety~~ per cent of the old constitution, but the notional form of covered more than

that was permanent

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 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~~. accepted human rights values as ~~a point of reference~~ providing the inner spirit of the text. 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 ~~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

from an auth. state with a non-enforceable const. to one of

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.~~ bench.

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 ~~refrain~~ from exercising ~~a part of~~ its competence and only review a Bill after it has been finally adopted. 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 ~~so~~ adopted but before he has promulgated them. Apparently on four occasions the President had in fact 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 ~~openness of the court~~ accessibility 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, turning it into an organ of complaint rather than a 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 ~~involve~~ 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 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 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 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 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 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.

the benefit of

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~~ was 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. 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 ~~permitted~~ 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 ~~in~~ 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 those to which we in South Africa are accustomed.

The judges acknowledged that their own values played an important part in influencing the ~~way~~ 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 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 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 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 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 ~~of~~ 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.

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 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 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."

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.

AN OVERVIEW

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 ~~manifest~~ evident in relation to state control of the electronic media, where the court had failed to go against the government, and 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.

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. ~~The court~~ A const 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 const. 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.

PART TWO

TOWARDS A CONSTITUTIONAL COURT IN SOUTH AFRICA

The new South African constitution contains a number of clauses governing the composition, selection and jurisdiction of the South African constitutional court. A number of issues have been thoroughly discussed and the agreements embodied in the constitution will have meticulously to be honoured.

These include the procedure for selecting the judges. Whether or not European experience turns out to be useful for the final constitution, there is little likelihood that anyone would wish to tamper in any way with the painfully achieved agreement entrenched in the present constitution. The other immutable element must be the specific role of the court in ensuring that the new constitution to be drawn up by the Constitutional Assembly embodies and does not violate the agreed Constitutional Principles. Perhaps uniquely in the world, the constitution-making process has been expressly made justiciable - the c.c. will be in the unusual position of being able to declare the constitution unconstitutional. The present constitution is in effect a constitution for achieving three things simultaneously: getting a final constitution, providing for continuity of government and ensuring the protection of human rights during the process. The court will have a key role to play in regard to seeing to it that all three aspects are 'controlled' by the strict application of the provisions of the present constitution.

At the same time, legislation will be needed to govern the establishment of the court, and the court will in turn have to adopt rules regulating its functioning. What follows is an attempt to link some of the reflections on German and

Hungarian experience with current discussions on the about-to-be-created South African c.c.

A number of practical and functional proposals can be made.

1. The autonomy of the c.c. can be emphasised by ensuring that it has its own budget and is administratively independent of any government ministry.

2. Consideration should be given to providing professional support for the judges in the form of organised assistance from well-qualified legal and other professionals. While the American system of young law clerks has its merits, something more advanced should be investigated. The German and Hungarian practice of seconding a relatively large number of judges and law professors to the court might be too costly for South Africa. Yet it should be possible to involve at least legal academics in the work of the court, even if only on a part-time basis. A limited number of political scientists might also be considered. This could be combined with the attachment for specified periods of law clerks as well. I refer here to systematic and organised intellectual backing for the court, something that involves far more than library legwork - new ideas, options, experience in other countries, even possible outlines for elements of judgements, what might be called internal heads of argument. In addition to contributing towards the direct enrichment of the work of the court, having a body of assistants will ensure a revolving door of ideas between the court and wider intellectual communities, and also helps to prepare new generations for future work on the bench.

3. Materials will have to be made available on an organised and continuing basis. International jurisprudence on human rights and constitutional questions will be vital for helping to determine such questions as defining the meaning of rights, establishing how competing rights are balanced against each other, and indicating what limitations might be acceptable. It is not only the c.c. which has to have a full set of documents and reports. Documentary collections should be freely available to the courts, practitioners and interested parties in every province. It will be important to make the collection as truly international as possible, so that together with reports from Europe and North America materials from countries such as Namibia and India were made available.

4. Special attention will have to be given to procedural matters so as to enable the court to function speedily and

fairly and with appropriate focus on the most important matters. This would include:

a. Procedures for sifting and grouping petitions and deciding on admissibility;

b. Procedures for the internal circulation of dockets and opinions and generally the distribution of judicial tasks;

c. Rules governing the reception of briefs from interested persons and public interest groups which can inform and assist the court;

d. Procedures to enable the court to commission sociological and economic impact studies which will help it arrive at correct decisions;

e. Rules concerning the relationship between oral presentation and advocacy ~~through documents~~ - in Hungary there is no oral argument at all, in the U.S.A. counsel are allowed no more than an hour between them: should there be similar restrictions in South Africa?

All the above matters can be dealt with by means of legislation and rules of court. The last proposal has a wider sweep, and might be achievable only if consensus can be reached ~~with relative ease~~ on an amendment to the constitution.

The observations that follow do not deal with two questions that have been raised in legal circles and that are presently being debated, namely, whether the competence of magistrates to apply the new principles of the constitution in their day-to-day handling of cases should not be expressly spelt out, and whether judges of the provincial divisions of the Supreme Court should not have the power to declare pre-April 27 legislation unconstitutional. They refer instead to the streaming of cases between the Appellate Division and the c.c., and consequently to the specific functions of each court.

Most of us are roughly familiar with the US Supreme Court ~~prototype~~ model, in terms of which that court sits at the apex of the judiciary to determine questions of constitutionality which arise in the course of litigation in the courts beneath it. The concept of case and controversy is fundamental to the way in which constitutional questions are posed and resolved. In other words, concrete cases involving particular disputes between actual litigants are the

foundation of the Supreme Court's jurisdiction. Major issues take years, even decades, to ripen before they are finally decided. The processing of cases on the way up to the court and the determination by the court as to what matters it should hear, has as much impact on the legal scene as the actual decisions.

The Austrian c.c. represents the other main model. Established after the First World War, the Austrian c.c., if I understand correctly, has jurisdiction only in relation to what is called abstract norm control, that is, determining the constitutionality of laws and regulations and, possibly, patterns of state practice, ~~independently of their impact on particular individuals~~. Only certain figures in the institutions of government, whether from the ruling party or the opposition, have the right to raise questions of the validity of such laws.

Most post-dictatorship c.c.'s in fact combine elements of both systems. The German system permits direct referral of laws and regulations to the c.c. without going through the normal court system. Certain state officials have the right to petition directly, as have specified numbers of members of the law-making bodies. This abstract norm control is supplemented by concrete norm control, in terms of which the ordinary courts can suspend the hearing of a case in order to get the determination by the c.c. of the validity of a law which affects the outcome of the matter. In addition, the c.c. can hear constitutional complaints by individual citizens alleging violation of fundamental rights, subject to the proviso that the latter must first exhaust all available remedies, which means that they must work their way up through the ordinary court system.

The Hungarian system is both wider and narrower. It is broader in the sense that any person can petition the c.c. directly to have a state norm declared unconstitutional. He or she need not be a high functionary or a member of Parliament or even have a direct interest in the matter. Even we South Africans passing through could invoke something that had virtually disappeared in our own country, namely, namely, an actio popularis. Similarly, judges presiding in cases of concrete litigation could refer questions of the constitutionality of relevant laws to the c.c. What was tighter in Hungary, however, was the absence of the right of citizens to launch constitutional complaints based on violatory state conduct. The effect of this division was that the ordinary courts retained their full jurisdiction to determine whether or not in concrete cases conduct of state officials violated the constitution. At the

law and the

Put simply: court compl. – based on ~~invalid~~ unconst. normative premiss. but not const. compl. derived from unconst cond.

same time, only the c.c. could declare invalid a legal rule in terms of which the state acted. ~~In other words,~~ a clear distinction is made between norm control and conduct control: the former is a question of constitutional validity of a law, which belongs exclusively to the c.c., while the latter is a matter of interpretation and implementation of the law, which lies in the sole domain of the ordinary courts. From time to time, the c.c. claims the right to determine whether the interpretations of the Codes and other laws of the land made by the ordinary courts, fall within constitutional limits. On each occasion, the ordinary courts diplomatically indicate that the c.c. should tend ~~to~~ its own garden.

based on unconst – conduct

What, then, of constitutional complaints in Germany? As we have seen, only two per cent of these are even heard by the c.c. This is because they have already been dealt with by the ordinary courts. The c.c. acts as a final court of appeal on one issue, and one issue only, that of whether the lower courts made their decisions within the limits of constitutionality. Put another way, the c.c. does not enquire into whether the lower courts made the right decision ~~or not~~ on the evidence before them. The c.c. is not a super court of appeal that sifts through every case to see whether or not state officials have behaved correctly or not. That is the function of the ordinary courts of appeal. The c.c., in other words, is not the present A.D. with additional powers.

In the words of M. Robert Badinter, its function is not to correct error, but only to determine the boundaries and standards of constitutionality. The concept of constitutionality must itself have limits. If not, any disappointed litigant could say that his or her constitutional rights to a fair trial were violated simply because the judge did not come to the correct conclusion; every person sentenced to jail could claim his or her right to personal liberty was being infringed because of an incorrect judgement; everyone ordered to pay a fine could argue that the right to property was being violated; any order of delictual or contractual damages made or refused by the court could be said to raise a constitutional question because it involves the conduct of the judge violating or failing to uphold the personal and property rights of the litigants. The c.c. would be forced into the role of being a court of appeal, while the court of appeal could be completely by-passed.

In my view, it would be just as inappropriate for the c.c. to be wading through the records of trial proceedings in

lower courts as it would be for the court of appeal to be determining the validity of Acts of Parliament. Nor should the c.c. arrogate to itself or be burdened with the normal evolution and development of the common law and statute as applied to the everyday situations of life. In essence, its function is that of norm control, that is, the determination of the parameters of constitutionality. The ordinary courts, the Public Protector, the Human Rights Commission, the Commission for Gender Equality and the Commission for the Restoration of Land Rights have responsibility for attending to the complaints relating to conduct by state officials within those boundaries. Naturally, there is an area of overlap where interpretation of the law becomes in fact a form of law-making, that is, where the ordinary courts are in fact not only applying norms but creating them. This area of overlap could then hopefully be subject to ~~mutual~~ a form of overlap or concurrent jurisdiction, with the c.c. focussing on the broad implications for the country, and the court of appeal concentrating on the interests of the particular parties.

In my opinion, a streaming of responsibilities in this way will ensure a dignified and non-competitive role for both the c.c. and the court of appeal. Each would be able to adapt its rules and procedures to its appropriate functions. The court of appeal would continue to supervise the overall functioning of the judiciary, its work and ensure that litigants got their day in court and were reasonably satisfied that the determination of claims and charges was being done fairly. The c.c., on the other hand, would be freed from the burden of sorting through each and every case to see if the right result had been achieved, and be able to confine itself to its true function, namely, to ensure that the principles, rules and procedures required by the constitution are being understood and accepted by all who are under a duty to do so.

The net result then would be that the A.D. would carry on very much with its present functions, save that when a question of the constitutional validity of a law, proclamation, regulation or by-law was in issue the matter would be referred to the c.c. Similarly, appeals from the provincial divisions of the Supreme Court would in all cases continue to go to the A.D. save where the validity of a statute etc was in question. Problems arising out of overlap could be reviewed from time to time. The court provides in Ch

Thus, the letter and spirit of the declaration of rights have to be taken into account in the interpretation of statutes and the development of the common law. One thinks of the issues raised in the recent Neethling case: this

would appear to me to be a matter of concrete norm control, where the constitutional matter would be to determine what are the reasonable and acceptable limits to free speech, balancing them against the right to dignity, and then to indicate the rules and criteria governing the onus of proof.

The purpose of this rather lengthy exposition is to lay the basis for a possible re-think of the jurisdictions of the c.c. and the A.D. as laid down in the constitution. If necessary, much of the division of labour which is proposed above could be achieved by the rules of court of the two judicial bodies. The c.c. could even in the exercise of its its judicial 'majesty' acknowledge the right of the A.D. to make prior determinations in concrete violations by state officials based on conduct rather than application of an unconstitutional norm. The c.c. could then formally endorse the decision of the A.D. In my view, however, if there are going to be other amendments to the constitution to make it more effective, and to achieve its aims without altering its balance, then it would be preferable to review the formulation of the exclusive powers of the c.c. In particular, consideration should be given to ensuring that the questions of constitutional complaint based on violatory state conduct should work their way up the ordinary courts in the ordinary way, allowing the A.D. to act as the court which corrects error, while the c.c. concentrates on its primary function of determining the parameters of constitutionality.