

# Food for thought in Hungary

A team of South African lawyers and judges who recently visited the Hungarian Constitutional Court found many lessons for South Africa. **CHRISTINA MURRAY** reports.

**H**UNGARY has a young Constitutional Court entrusted with implementing an equally young Bill of Rights and watching over the government of a society in transition. Clearly it has much in common with South Africa's soon to be appointed Constitutional Court. Nevertheless, when I announced to colleagues in the Law Faculty at the University of Cape Town (UCT) that I was to take a week off to visit the court in Budapest, some eyebrows were raised.

Certainly, there are significant differences between the two countries and their legal systems, and the language barrier makes it impossible for most South Africans to get to grips with the details of Hungarian constitutional jurisprudence. Nevertheless, the week spent immersed in Hungarian constitutional law and procedure was fascinating – and immensely valuable.

The trip was arranged by Idasa and took place at the end of March. The group of South Africans, who went as guests of George Soros's Open Society Foundation, consisted of two judges, Laurie Ackermann and John Didcott; three academics, Gerhard Erasmus from the University of Stellenbosch, Albie Sachs who holds honorary professorships at UCT and the University of the Western Cape, and myself; and a practising lawyer, Pius Langa, from the Durban Bar.

South Africans are just coming to realise what a radically new constitutional dispensation the 1993 Constitution introduces. Not only does it establish the first



democratic legislature in our history but it also commits us to government under the Constitution. The new legislature and executive, like their counterparts in many other democratic countries, are constrained by the Constitution and, most importantly, by the values incorporated in the Bill of Rights. The Constitutional Court will have the critical job of ensuring that constitutional values are respected.

**PENSIVE PIUS:** Durban advocate Pius Langa poses against the skyline of Budapest.

**LEGAL TEAM:** South African legal eagles take time out with some of their hosts, from left, Christina Murray, the president of the Hungarian Constitutional Court, Pius Langa, Gerhard Erasmus, a judge of the Hungarian Constitutional Court, Laurie Ackermann, Albie Sachs and John Didcott.

South Africa and its new court face some difficult issues in the near future. Press speculation about likely Constitutional Court judges emphasises the political nature of the court. This is confirmed by the briefest consideration of the kind of issues it is likely to face early in its existence: abortion, the death penalty, the power of provincial legislatures, and the extent of police powers in investigating crimes and securing convictions, for instance.

No law is neutral, but many of the matters destined for this court are overtly political. Moreover, the Bill of Rights does not determine the way the court should resolve cases in which there is a conflict of rights, nor does it give more than very vague guidance on the manner in which it should be interpreted.

The Hungarian Court was established in 1989 and its first judges elected by Parliament in 1990. Most of the present nine judges were university professors before they were appointed to the court and most still teach a few days a week. They are all men.

The political role we predict for the South African Constitutional Court is a reality in Hungary. Every one of the Hungarian judges that we met emphasised the sensitivity of the court's role in guiding the country through its period of transition. Very early in its life the court dealt with the death penalty, difficult property cases, and abortion. In interpreting the Constitution, it was thrown into the centre of a dispute about the separation of powers.

Judges themselves characterised their role as guiding the country through the transition. One practical consequence of this is that they avoid divided decisions and, although dissenting judgments are occasionally delivered, they prefer to adopt a compromise position than to hand down a decision which reflects division.

The court is also alert to the fact that it can easily be drawn into disputes better resolved in the political arena. As a result it has effectively nullified its constitutional right to determine the constitutionality of a Bill *before* it is passed by parliament, recognising that this process was being used by minorities in parliament to interfere with democratic decision making.

While the judges emphasised that they were at pains to deal with the problems that they confronted in legal terms, providing clear, logical legal argument to back up decisions, the Speaker of Parliament reminded us of the highly political role of that court. Every move that the court makes, he said, is perceived as political. For instance, he claimed, decisions concerning which cases will be heard first are entirely political.

The court's quest to protect fledgeling democratic institutions may sometimes seem to backfire. Thus, in an important and controversial case about state control of the

media, the court argued that "a legal vacuum is worse than an unconstitutional law" and stopped short of declaring legislation controlling the media unconstitutional. Instead the court demanded that it be amended by the legislature. At the end of March, about a month before elections, the challenged legislation was still in place.

In addition, the court's recognition of the important role it has been given in the process of transition has not simply led to a "legalisation of politics". It has also provided the basis for the provocative assertion that it is the role of the Constitutional Court to create what it terms an "invisible constitution" which is above the present constitution. This self-proclaimed role, as protector of constitutionality itself, is justified

**Albie Sachs has documented his impressions of the trip and provides more detailed information on the operation of the Hungarian Court in a publication of the South African Constitutional Studies Centre, University of the Western Cape, entitled "Visit to the Constitutional Courts of Germany and Hungary" (April 1994).**

by some judges on the grounds that the present constitution was adopted through a process of negotiation in which no party had political legitimacy and that it is intended to be temporary.

The notion of the "invisible constitution" and the court's related protection of legal certainty led to one of its most controversial decisions, the "retroactivity case". This case concerned legislation which made crimes committed during and after the 1956 revolt punishable, although the Hungarian Statute of Limitations provides that offences cannot be tried more than 20 years after their commission. The court ruled that, although it was unjust to allow criminals to go unpunished, the law infringed the principle of legal certainty and was therefore unconstitutional.

Although our judges might do well to avoid a decision such as the one in the "retroactivity case" and the rather sweeping terms in which the Hungarian judges claimed authority over an "unwritten" constitution, this debate and the judges' discussion of their role in interpreting the Constitution will be repeated here. Like the Hungarian Bill of Rights, our Bill of Rights does not provide direct answers to the many questions that will come before the courts. As our judges deal with these questions, rank rights and

develop methods of interpretation, they will also be contributing to the development of the constitutional framework within which South Africa will be governed in the future.

The Hungarian Constitutional Court prides itself on being accessible to all Hungarians. A provision very similar to one contained in our Bill of Rights entitles anyone to challenge the constitutionality of legislation before the court. As a result it receives thousands of petitions every year. We were told – by Hungarians – that Hungarians are complainers, but whether or not this is the case, the volume of complaints is evidence of the accessibility of the court to the public.

In another way, to those accustomed to courts in the Anglo-American mould, the court is very inaccessible. Proceedings are held behind closed doors and cases are seldom actually argued. Instead, the issues are researched by the judges' legal advisers and decisions taken after consideration of comparable cases from many jurisdictions. Although members of government and, even more rarely, members of interested groups, may occasionally be asked to address the Bench, the court is not keen on the practice. Judges point out that the court is concerned with abstract issues only, which do not need further argument, and, the president of the court adds, where parties are permitted time to argue they usually merely rehearse well-known political positions.

This absence of any real argument before the court reflects one of the major differences between our system and the Hungarian one. We consider argument an essential part of legal decision making, which could not be replaced by research by judges' clerks. If we are to learn from our North American counterparts, moreover, we will not limit appearances to the immediate parties to cases but will encourage other interest groups to intervene as well, thus ensuring that the court is fully informed of the possible range of arguments and the social consequences of decisions before it reaches one.

In these, and many other ways, the practices and experiences of the Hungarian Constitutional Court provide food for thought for South Africans. But the value of the trip was not restricted to our many meetings with Hungarians. Over steaming goulash and noodles spiced with fresh paprika, over long cool glasses of Urquell Pils, overlooking the Danube, and often interrupted by 1950s melodies supplied by the two judges in our group, we discussed incessantly the implications of what we were hearing for South Africa.

I learnt at least as much from conversation with my fellow travellers as from our hosts, and for this reason too the trip was extremely valuable to me. ■

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