**Buffalo Law Review**

Volume 13 | Number 1 Article 53

10-1-1963

# Constitutionalism In Germany And The Federal Constitutional Court. By Esward McWhinney.

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# BOOK REVIEWS

CONSTITUTIONALISM IN GERMANY AND THE FEDERAL CONSTITUTIONAL COURT. By Edward McWhinney; Leyden, Holland: A. W. Sythoff, 1962. Pp. 71. $3.85.

In recent years there has been a steady flow of writings by legal scholars and political scientists on the role of the Supreme Court in our constitutional and political system. But little attention has been given to comparable bodies in other Western countries—such as the Italian, German or Austrian constitutional tribunals—which, possessing similar powers, create and confront similar problems as our Supreme Court.

Professor Edward McWhinney is one of the few non-German scholars who have written about the most powerful and active of these tribunals, the Federal Constitutional Court of West Germany. His *Constitutionalism in Germany and the Federal Constitutional Court*, which is for the most part an adaptation of an article previously published in the *Harvard Law Review*,[1] briefly explains the powers and operations of the Court, analyzes some of the developments in its jurisprudence and offers some lessons from the German experience for American students of constitutional politics.

The Federal Constitutional Court was created by the Bonn Constitution of 1949, and is a product of both American influence and of earlier German practice. It possesses the power, *inter alia*, to review the constitutionality of legislative and executive acts, to decide disputes involving the members of the federation and even disputes among organs of the national government, to resolve election disputes, to act as the impeachment tribunal for judges and the Federal President, and to hear so-called "constitutional complaints" from citizens about alleged deprivation of their constitutional rights by governmental action.

The Federal Constitutional Court is remarkable not only for the wide scope and political sensitivity of its jurisdiction. American readers will be particularly interested in the bifurcated structure of the Court (two separate 10-judge "senates" both handing down decisions as "the Federal Constitutional Court"); the anonymity of its decisions (neither the outcome of its votes nor dissenting views are, normally, published by the Court); its narrow specialization in constitutional questions (separate supreme courts for civil, criminal and administrative matters having been created in accordance with traditional German practice); and the election of its judges by the two houses of the national legislature.

The Federal Constitutional Court began its work in 1951 and has since then received over 1,000 cases of varying constitutional and political importance, and some 10,000 constitutional complaints. Assessing its work over the first ten years, McWhinney distinguishes three periods roughly paralleling the tenure of the

1. *Judicial Restraint and the West German Constitutional Court*, 75 Harv. L. Rev. 5 (1961).

Court's three chief justices. The early years (1951-1954) are described as mainly characterized by self-restraint; a period of political caution and institutional consolidation during which the Court "tried to build for the future and seems to have accepted as a main instrument for achieving this result a policy of hastening slowly, and of preventing or limiting itself from being drawn into essentially political controversies." Thereafter, McWhinney argues, "the judges gathered strength," and entered into a period (1954-1959) of judicial experimentation and innovation. As illustrative of this phase, McWhinney cites the development of the doctrine of "federal comity," a doctrine imposing on the partners in the West German federation an ill-defined and only implied constitutional obligation of reasonableness and cooperation in federal relations. Also characteristic of this middle period, McWhinney suggests, was the decision in which the Court ruled that the 1933 German-Vatican treaty could not control subjects reserved by the constitution to the states, regardless of the obligations of implementation which international law might create for the national government—a rule in notable contrast to our Supreme Court's *Missouri v. Holland*.[2] Other illustrative examples include the Federal Constitutional Court's generous and imaginative interpretation of the equal rights clause of the constitution and an "interests-balancing" approach in the decision outlawing the Communist Party.

Beginning roughly in 1959, McWhinney writes, the Court began a new phase in which it "grasped the nettle and entered into a new philosophy of almost liberal activism, in terms of which the judges seem not afraid to challenge the Bund regime itself." As evidence of this new trend, McWhinney cites a series of decisions in which the Court has acted as the "guardian of the election process," invalidating several election laws that discriminated against independent candidatures. But his most striking example is the so-called *Fernseh* (Television) case[3] in which the Court struck down the Adenauer government's attempt to set up a second, federally-controlled television network over state government opposition. It was with this case, McWhinney maintains, "that the Federal Constitutional Court may really be said to have come of age, for, for the first time, a court decision put the Court into direct conflict with the Bund government on a matter of policy which the Bund government considered vital . . . ."

McWhinney's thesis of a gradual and distinct development from early caution to current activism has a certain plausibility; but it is not quite persuasive. For instance, one could point to the Court's lack of caution when it invited the government's wrath, and provoked a serious crisis, by refusing to accommodate it in the litigation over the abortive European Defense Community treaty in the winter of 1952-53; or one could point to its enunciation of quite controversial doctrines in its early years, such as its formulation of a constitutional defense of legislation aimed against splinter parties and its discovery of principles "superior" to the constitution.

2. 245 U.S. 416 (1920).
3. 12 BVerfGE 5 (February 28, 1961).

Such exceptions do not prove McWhinney's rule; they suggest that the pattern of the Court's behavior is still open to other interpretations. It might perhaps have been fruitful to examine patterns of restraint and activism not on a chronological but on a subject-matter basis. Certainly, McWhinney's attempt to determine distinct trends in the performance of the Court invites the question whether an examination of landmark cases in particular important areas is an adequate method for arriving at significant generalizations. By 1962 the Court had decided almost 500 cases (in addition to nearly 7,000 constitutional complaints); it did not hand down a decision on the merits in over 500 cases (plus some 2,500 constitutional complaints) which had been brought before it. Conclusions about judicial self-restraint will need analysis not only of the Court's important decisions and *obiter dicta*, but also of such matters as its opportunities and refusals to act or the frequency at which it disappoints the government in litigation. Quantitative analysis of a court's work can obviously not provide fully adequate conclusions about its policy of self-restraint; but neither will such imprecise references as McWhinney's mention of a "handful" of federal statutes having been invalidated by the Court before 1960: The Court, in fact, invalidated portions of no less than 27 federal statutes in that period.

McWhinney's assessment of the work of the Court is almost uniformly favorable, and in this respect he is at one with other American, although certainly not with all German, writers on the Federal Constitutional Court. He expresses particular approval of the "judicially assisted revival of federalism" through numerous decisions of the Court, arguing that the case law which the Court has developed both strengthened the West German federal system and offers instructive examples to other federal states.

Also of interest to American students of constitutional law are McWhinney's remarks on the question of judicial self-restraint. German experience confirms, he believes, that "the theory and practice of judicial self-restraint are larger than the shadow of a single United States Supreme Court judge and are indeed a necessary part of the informed techniques of every constitutional court, and especially perhaps of the constitutional court that would essay a liberal activist role."

Some of the conclusions which McWhinney reaches seem to lack fully convincing or sufficiently detailed evidence. For example, his statement that "to the extent that judicial legislation should be called for in aid of or in substitution for the formal constitutional amending power, a more highly personalized judicial rule than the present essentially anonymous one seems certain to emerge on the Court." Might it not be possible that judicial anonymity would be a useful and welcome protection from political retaliation in such circumstances? Also, there is the contention by McWhinney that the Court decided to outlaw the Communist Party after a delay of five years only "to allay some judicial doubts as to the continuity of the Court's personality before and after its renewal through the regular periodical election of judges." This completely ignores the fact that the

Court Reform Act passed in 1956 forced the first senate of the Court to hand down a decision or be deprived of jurisdiction over the case.

McWhinney's book represents a modest chapter in the still rather neglected but potentially fruitful study of comparative constitutional politics. American readers will probably find this volume most interesting and useful for its concise summaries of the more important decisions of the Federal Constitutional Court although the book will be of limited value to the specialist. A full-length scholarly work on the Court remains yet to be written, in either German or English.

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LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO. By Jerome E. Carlin; New Brunswick, New Jersey: Rutgers University Press, 1962. Pp. 234. $6.00.

This book should be of interest and of some value to practicing lawyers, law teachers and students, bar association officers, judges and all those concerned with the legal profession.

The author, who is both a sociologist and a lawyer, made a statistical study in depth, in the summer of 1957, in the City of Chicago, of 84 lawyers engaged in, or who listed themselves as engaged in, private practice as individual practitioners. At that time there were approximately 12,000 lawyers in Chicago, of whom about 7,000 were individual practitioners. The 84 lawyers interviewed were chosen at random. The interviews were based on a long, detailed prepared list of searching questions and each interview lasted on the average about two hours. By and large, says the author, the lawyers interviewed were extremely cooperative and far more candid than he had expected. The answers were taken down verbatim.

The number of lawyers interviewed was small, being only a little over one percent of the total number of individual practitioners in Chicago. Actually, the percentage may have been even smaller. The 84 interviewees included 6 young salaried lawyers just getting started, and 11 lawyers who were no longer in private practice. In the analysis of the interview data, the information about these 17 was taken into account in the conclusions set forth in the first chapter of the book, but, for the most part was not considered in arriving at the conclusions discussed in the rest of the book.

The author classified the remaining 67 of those interviewed as engaged essentially in full-time, independent private practice. However, of these: (a) 7 worked to some extent for other lawyers, but half or more of their time and income was devoted to or derived from their own private practice; (b) 8 had considerable outside business interests, but none of these derived more than half of his income from such pursuits; and (c) 3 each had a principal corporate