BOOK REVIEW

Constitutionalism in Germany and the Federal Constitutional Court, By Edward McWhinney; pp.71 (1962); A. W. SythofT, Lyden. Price Dutch Florins 11.50.

Until recent years legal scholars, other than students of comparative law, outside the United States have not been concerned with the workings of a supreme court which exercises an ultimate authority to define the respective competencies of the central and the state governments and also is the protector of certain fundamental rights and liberties against infringing legislative or administrative action. Consequently, only American political life and legal thought have been profoundly and pervasively influenced by the resulting "judicialization" or "legalization" of many issues that in other societies are political questions in the narrow sense. Some day scholars will seek to analyze and describe comprehensively the consequences of a thorough-going constitutionalism for a society and its legal system. Such an effort will study not only the already mature American experience but also the experiments with constitutionalism recently launched in societies such as India and West Germany.

Until the fourth and fifth decades of the twentieth century, only the United States had significant experience with constitutionalism in the sense of ultimate judicial regulation of a functioning federalism and judicial enforcement of constitutionally guaranteed rights. For various reasons, perhaps especially the political excesses of the 1930's and early 1940's, several countries have in recent years adopted constitutional arrangements more or less on the American pattern. The two most interesting of these experiments are the Indian and the West German, the latter of which Professor McWhinney analyses for us in considerable detail. His small book discusses the work of the German Federal Constitutional Court during the first decade of its existence (1951-61) and sketches the political the intellectual forces that affected the Court's work during this formative period.

The story of how this new institution established itself firmly on the German legal scene is fascinating. Institutionally, the Constitutional Court occupies an exposed position as its jurisdiction is limited to constitutional issues. Each constitutional problem must ordinarily be faced when it first arises; ordinarily decision cannot be postponed until a more propitious time by disposing of the case on a

non-constitutional basis.[1] Moreover, constitutional problems **arc** inevitably somewhat divorced from the full context in which they arise ; the Court must, therefore, always be on the alert if it is to see each constitutional problem as the fragment that it is of a larger and more complex reality.

Nor is the internal structure of the Constitutional Court ideal. The Court is a rather large body (originally twenty-four, with an eventual reduction to sixteen contemplated under legislation enacted in 1956),[2] and is divided into two separate senates.[3] In consequence, the dignity of the Court suffers and it runs some risk of speaking with two voices. This possibility can—and has—encouraged political manoeuvre of a kind that could undermine the society's faith in the Court's objectivity. The European Defence Community litigation, in which partisans of the Defence Community treaty sought to raise and frame the issue in such a way as to render one Senate competent, while their opponents used comparable tactics to bring the matter before the other Senate, is a classic example of the dangers inherent*in such a divided structure.[4] Greatly to the Court's credit is the courage and imagination it showed in using the situation thus created to demonstrate its independence and integrity.

An idea of the scope and emphasis of Professor McWhinney's treatment of the Constitutional Court during this formative period is gained from a glance at a few chapter headings. Chapter **III** (pp. 31-40) deals with "Judicial Self-Restraint. The Early Years of the Federal Constitutional Court." "Judicial Experimentation and Judicial Innovation. The Judges Gather Strength" is the subject of Chapter IV (pp. 41-53). Chapter VI (pp. 60-64) concerns itself with "Judicial Activism. The Constitutional Court as Umpire of the Federal System. The Fernsch (Television) Decision." In these and other chapters, Professor McWhinney has thoughtfully reviewed and analyzed the work of an institution that represents a new departure in German legal and political thinking.

A decade or two are, in oae life of a social institution, a very short period of time. What the future holds for constitutionalism in

1. The Court has at times found delay a useful tactic, although one perhaps hard to justify technically. For examples of this tactic, see the discussions of the *Communist Party* case (pp. 32-34) and of the European Defence Communit y litigation (pp. 34-40).

2. Pp. 25-26.

3. Pp. 26-27:

4. Pp. 34-40.

societies such as India and West Germany is still very uncertain. Much will depend upon the skill and imagination of the bench and bar; general political and economic developments will be of importance. Looking back over the first decade of the work of the Federal Constitutional Court as chronicled and analyzed by Professor McWhinney, one is impressed by the extent to which the Court dealt imaginatively and constructively with the issues that came before it. *Constitutionalism in Germany and the Federal Constitutional Court* discusses in a thoughtful fashion what may, in the course of time, come to be looked upon as the formative years of a judicial body of great prestige and a long tradition.

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