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Constitutionalism in Germany and the Federal Constitutional Court, by Edward C. McWhinney, with an Introduction by Gerhard Leibholz (Leyden: A. W. Sythoff, 1962). Pp. 71.

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a constitutional and historical background, an explanation of the sources of law, an outline of the work of Justinian, and an account of the revival of Roman law in the West. The remainder of the text is divided into four parts: Persons, Property, Obligations, and Successions. The part on Obligations is particularly well done, though it is unfortunate that greater space could not have been devoted to the area of quasi-contract.¹ There is little or no reference to the early Roman law, and no separate treatment of the law of actions (which is covered briefly in the introductory part under sources of law). But these omissions should not detract from the value of the text as an introductory work; and if it is used in conjunction with a class, such material can easily be filled in by lecture.

One characteristic of the book that may perturb some readers, but which is clearly in keeping with the author's purpose, is the lack of any extensive footnoting or cross-referencing either to institutes or digest or to other basic sources. It must be remembered that this is a basic text and that its great contribution lies in the author's own thorough understanding and clear expression of his ideas on the principal features and characteristics of Roman law. Because of this, it clearly deserves a place on the shelf of both the beginner and the expert.

*Walter J. Wadlington III**

Constitutionalism in Germany and the Federal Constitutional Court, by Edward C. McWhinney, with an Introduction by Gerhard Leibholz (Leyden: A. W. Sythoff, 1962). Pp. 71.

In the seven short chapters of this excellent study Professor McWhinney explores the salient features and growing trends in German constitutionalism, with particular attention to the new institution of Judicial Review and its relation to traditional German legal concepts and practices. This book represents McWhinney's most recent effort in his comparative studies of judicial review and constitutional change. The reader can only profit therefore from the broader setting in which an analysis of the Federal Constitutional Court of West Germany is made.

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1. Readers who are interested in the field of unjust enrichment would be well advised to read Professor Nicholas' comprehensive, two-part article on this subject, *Unjustified Enrichment in Civil Law and Louisiana Law*, 36 *TUL. L. REV.* 605 (1962), 37 *TUL. L. REV.* 49 (1962).

Since the inception of the Federal Constitutional Court in 1951, that body has been the target for a considerable volume of popular, mostly academic, criticism in Germany. McWhinney explains that much of the criticism of the Court is actually more generalized criticism of judicial control of constitutionality; in which case it probably stems from the black-and-white, positive law atmosphere of the German law schools and from the influence of Carl Schmitt. Still, it is probably not irrelevant that the marked expansion of judicial power under the Bonn Basic Law has tended to replace the traditionally regarded skill-group in German law, the law professors, in "the role as priestly interpreters of the law," with the judges of the Constitutional Court. No doubt too some of the antagonism is accounted for by the relatively new, instrumentalist approach to law of the Court, wherein the judges pay considerable attention to scientific opinion and social aspects before making judgment.

The main characteristics of the Court are specialization, anonymity, and collegiality. It is specialized in the sense that it handles only cases in public law, in contrast with the final appellate tribunals that exercise judicial review in the English-speaking countries. It is anonymous by virtue of the relative absence of publicity and by a failure to acknowledge authorship of opinions. The collegiality of the Court was somewhat compromised until 1956 by its awkward size — 24 in two distinct Senates — and by division of jurisdictional competences between the two Senates. The two-Senate system has often been the cause for embarrassment when litigants tailor the jurisdictional bases of their complaints in order to bring their cases to the Senate which they deem more favorably disposed.

The main weight of the book falls on the emerging balance between judicial innovation and activism on the one hand and judicial self-restraint on the other. As a rule — there have been some notable exceptions — the Constitutional Court has been cautious in approaching sensitive issues and has sought to delay these judgments until political instruments of the Republic can resolve the matter. Thus the judges have followed "a policy of non-involvement, as far as possible, in great political and social tension cases." (p. 32) In the case brought by the Federal Justice Ministry against the German Communist Party, for example, the matter lay before the Court for almost five years before the Party was declared unconstitutional; whereas the neo-

Nazi Socialist Reich Party, which was prosecuted at the same time, was firmly and promptly found unlawful. In the Communist Party case the Court resorted to the familiar "interests-balancing" formula to find that the problem of internal security in the Cold War raised by the German Communist Party must be balanced with the interests of free speech and association, the real problem being one of degree. In this instance the Court revealed its willingness to borrow from the legal experience of other countries, and indeed at one point came very close to enunciation of the American doctrine of "political questions" as a basis for judicial non-intervention.

Probably the biggest impact of the Court, however, has been on development of constitutional theory. This has been the special result of efforts in the last two or three years to resolve a political impasse by enforcing the principle of federal comity (*Bundestreue*). Professor McWhinney believes that with the accession to the Chief Justiceship of Dr. Gebhard Müller in 1959, the Court entered into a new phase and a new philosophy of liberal activism, in which the Court has been unafraid to challenge even the Adenauer régime itself. In deviating from the idea of self-restraint the Court also departs from the normal assumption of constitutionality of legislation. The departure has perhaps been most evident in cases involving election laws, and in two cases in 1960 the Court nullified local election codes on grounds that they violated the "Equality before the Law" principle.

When judicial activism led the Court into open conflict with Chancellor Adenauer in 1961, the ultimate result was to make the Constitutional Court the effective arbiter of the federal system. The basic question in the politically sensitive *Television* case was whether the Federal Government could assume competence and establish, a new television channel without the collaboration of the Land governments and, indeed, over their objections. The Court found against the Federal Government on all points. On the question of federal comity, and in a manner reminiscent of John Marshall's dressing down of the Jefferson party in 1803, the Court gave the Adenauer régime what might be interpreted as an extended lecture on political morality. The Court took express notice of the peremptory and obviously partisan handling of the whole affair by Adenauer in his relations with the Land governments. Understandably the Court's opin-

ion was badly received, but apparently it has survived the storm of abuse heaped on it and appears, withal, none the worse for wear.

Professor McWhinney's obvious admiration for the Federal Constitutional Court colors his conclusions to an extent. There would seem to be, for example, only an insubstantial basis for his confidence in the new Judicial Review to prevent a recurrence of the events that produced the downfall of the Weimar Republic. Still, and while written with no apparent distinction of style, this book is an important and very thoughtful contribution.

*Edward L. Pinney**

Rapports Généraux au Ve Congrès international de droit comparé, published by the Inter-University Center for Comparative Law, under the editorship of Prof. Jean Limpens. Bruxelles: Etablissements Emile Bruylant, 1960. Two volumes. Pp. XII, 948, 1,250 Belg. francs; bound: 1,650 Belg. francs.

Besides introductory materials, the two volumes recently published in Belgium contain general reports prepared for the Fifth International Congress of Comparative Law, which was held in Brussels in 1958. A few resolutions adopted by the Congress are also included.

The general reports were based more or less closely on special reports, submitted by legal scholars of 40 various countries, and numbering about 400. Some Americans were the authors of general reports: Professor Brendan F. Brown reported on "The Ordinary and Extraordinary Forms of Marriage in the Various Canon Laws"; Professor Max Rheinstein on "Judicial Administrative Control of the Liquidation of Decedents' Estates"; Thomas L. Coleman, Esq., on "Transfer of a Company's Principal Office"; Professor Karl Löwenstein on "The Legal Institutionalization of Political Parties"; Professor Oliver Schroeder on "New Procedures of Scientific Investigation and the Protection of the Accused's Rights." However, the great majority of reports (31) are in French; only 12 are in English.

Jurists specializing in any field of law will find some interesting reading in these two volumes. It must be admitted, how-

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