

CONSTITUTIONALISM IN GERMANY AND THE FEDERAL CONSTITUTIONAL COURT. By E. McWhinney. [Leyden: A. W. Sythoff. 1962. 71 pp. D.fl. 11.50]

This small volume by Professor McWhinney is a very welcome addition to the not voluminous works in English on what is certainly one of the most interesting of post-war constitutions. To get the quite limited adverse comments out of the way, it must be admitted that Professor McWhinney's style of writing is sometimes clumsy, if not ungrammatical. In the paragraph spanning the last of page 34 and the

beginning of page 35 one finds this sentence: "For the Bonn Constitution, as adopted in 1949 when the Allied military and political influence in Germany was still predominant and in the recent memory of the Nuremberg Tribunal counts against the former Nazis regime leaders for the crime of "aggressive war", contained no provisions as to military defence". In the same paragraph the author repeatedly uses the verb form "would be" when he clearly means "would have been." But the occasionally infelicitous writing detracts but little from the real worth of the book.

The work is informative as to the development of constitutionalism in modern Germany and, more specifically, of the working of the Federal Constitutional Court. Professor McWhinney has not only made a study of the cases emanating from the Court; but he demonstrates that his acquaintance with the personnel of the Court and its mode of operation, made possible through his stay in West Germany in 1960-61, has produced insights not readily available to the scholar whose research is limited to the library. He speaks with ease of the personality and backgrounds of the leaders of the Court and of the influence he feels such factors have exerted on the Court's decisions. In this connection, his observation is instructive that "several members of the Second Senate [a divisional bench of the Court], as *Auswanderer* (refugees abroad) from the Nazis era, have extensive knowledge of foreign (especially Anglo-Saxon) constitutional law, and do not hesitate to draw on it for purposes of arriving at their decisions in German cases." (p. 42)

The parallels and contrasts which Professor McWhinney perceives between the German Constitutional Court and the early Supreme Court of the United States, especially under Chief Justice Marshall, are interesting. He says (page 32) the German Court concluded in its first years "that its main initial task was to promote public acceptance and recognition of the role of the court as an interposing or arbitral power" between the different organs of Federal and Land (State) government, when those should come into conflict. Although appearing contradictory, as is the situation in the United States, he nevertheless asserts in the same paragraph that the German Court followed a policy of "limiting itself from being drawn into essentially political controversies." Considerable attention is given to the first decision in which the Court could be said to have come into direct conflict with the national government. In that case, the *Fernseh* (Television) decision, (p. 60) the holding went against the Federal Government in favour of the lander. It is encouraging to note from Professor McWhinney's writings that although the Adenauer Government received the decision with bad grace (p. 65), the position of the Court appears firmly established.