MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW

Republicaiton – Book Review – David P. Currie's *The Constitution of the Federal Republic of Germany*

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[David P. Currie, *The Constitution of the Federal Republic of Germany*. University of Chicago Press, 1995. 448 pp. $35]

Professor David Currie, chronicler of the United States Supreme Court,[1] has turned his attention to the German Constitutional Court. *The Constitution of the Federal Republic of Germany* provides an excellent introduction to the jurisprudence of one of the few courts in the world that rivals the U.S. Supreme Court in political significance. After briefly familiarizing his readers with the history and structure of the German constitution, which is still known by its blueprint title of "Basic Law" even after reunification, Professor Currie discusses a wide variety of subjects, including federalism, the separation of powers, freedom of expression, church and state, and fundamental rights. Drawing on his familiarity with the jurisprudence of both the U.S. Supreme Court and the German Constitutional Court, Professor

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[1] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS 1789-1888 (1985); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 (1990).

Currie repeatedly stops to explore illuminating differences and similarities between the two systems. As the book's many and detailed footnotes indicate, Professor Currie manages to pull off a feat all too rarely accomplished: a well-documented and well-balanced work of comparative legal scholarship that will be of interest to scholars of German law and of American constitutional law alike.

By focusing his interest on the doctrine of German constitution law as it has been developed by the Constitutional Court since World War II, Professor Currie also managed to avoid another cardinal sin commonly committed by scholars of comparative law: the futile effort to cram the theory and practice of an entire legal culture into a few hundred pages. As a result, Professor Currie is forced to leave the exploration of certain aspects of the German constitutional system for another day. One of these aspects comes to light when Professor Currie's approach to German constitutional law is contrasted with the approach of the German commentators of the Basic Law. It would have been unusual for a German book on the constitution to rely as heavily on opinions of the German constitutional court as does Professor Currie's. The German commentators are still having a hard time acknowledging that the deference to written law texts, characteristic of a formalistic civil law system that has developed marvelously complex interpretative techniques to subsume particular fact scenarios under statutory principles, goes out the window as soon as these techniques are applied to such texts as the guarantee of human dignity in Article 1(1) of the Basic Law. Occasionally the venerable authors of the German commentaries and treatises on the constitution can be heard grumbling over the encroachment of Constitutional Court opinions on the authority of the constitutional text that the Court is supposed merely to apply (preferably according to its true meaning as revealed in the tomes of the commentators).[2] Signed concurring and dissenting opinions were unknown until 1970 (when they were officially authorized by law and only for the Constitutional Court)[3] and Constitutional Court opinions remain as cumbersome to keep track of as the published opinions of any other German court because they continue to be identified by volume and page number only (in a few cases they have acquired nicknames). The uninitiated therefore may never discover such gems of constitutional interpretation as the Constitutional Court's recent abortion decision, which illustrates the Court's rhetorical style.[4] The issue before the Court was not, as

[2] The critical commentary on the growing significance of judicial opinions by Roman Herzog, erstwhile Chief Justice of the German Constitutional Court, is an example. *See* Roman Herzog, *Art. 20*, *in* 2 GRUNDGESETZ: KOMMENTAR 209 n.2, 222 (Maunz and Dürig eds., 1993).

[3] *See generally* ROLF LAMPRECHT, RICHTER CONTRA RICHTER (1992).

[4] BVerfGE 88, 203 (1993).

in the U.S., whether the state was constitutionally permitted to criminalize abortions, but whether the state was constitutionally permitted to *decriminalize* certain abortions. The Court concluded that the state must criminalize abortions to protect the fetus's constitutional right to life. Although the Basic Law was held to require that all abortions remain criminal acts, a woman can escape prosecution for a first trimester abortion if at least three days before the abortion she attends a counseling session designed to discourage abortions. A summary of the Court's reasoning in all its wordy complexity would exceed the scope of this review. Suffice it to say that, employing a curious mixture of philosophical speculation and moral communitarianism not uncharacteristic of its general approach to constitutional interpretation, the Court relied on the "twoness in oneness" of the mother-fetus relationship and on the detrimental effect that decriminalizing some abortions would have on the moral fibre of the community.

With this thorough and competent guide through some of the thickest thickets of the jurisprudence of the German Constitutional Court, Professor Currie has laid a solid foundation for further exploration in the fertile field of comparative constitutional law.

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