

Res Publica

Jürgen Bröhmer (ed.)

The German Constitution Turns 60

Basic Law and Commonwealth Constitution

German and Australian Perspectives

ÖFFENTLICHES UND INTERNATIONALES RECHT

Herausgegeben von Udo Fink, Dieter Dörr
und Rolf Schwartmann

13

PETER LANG

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Preface

On 23 May 2009, the German Constitution, the *Grundgesetz*, turned 60. Not very old compared to Australia's Commonwealth Constitution or even the US-Constitution. It is perhaps an irony of history that old countries have young constitutions and young countries old ones. By any measure, 60 years of *Grundgesetz* has been and continues to be a success story. From post-war reconstruction, through the terror years of the seventies to the reunification of Germany after the demise of Communism in Eastern Europe, the *Grundgesetz* has weathered all challenges and found deep acceptance in the German populace at large.

The constitutional systems of Germany and Australia bear many differences but also some similarities. Fundamental rights and their protection figure prominently in the German *Grundgesetz* but not so much in the Australian constitutional context. Both countries are federations to name the most prominent similarity.

The anniversary of the *Grundgesetz* on 23 May 2009 was sufficient cause to assemble in Canberra at the ANU constitutional scholars from both countries to address some core issues from a German and Australian perspective respectively. This book contains the written versions of the presentations in the order in which they were presented.

The two-day conference on 22 and 23 May 2009 and the publication of this collection, perhaps the first in-depth comparative constitutional law study of the *Grundgesetz* and the Commonwealth Constitution, would not have been possible without the help of many people: Foremost I have to thank the authors of the essays contained in this book. They all followed my invitation without hesitation and they all helped in making the event a successful one. My Australian colleagues will forgive me when I extend my special thanks to the German colleagues who came to Canberra from the other side of the world to be part of this event. I am also grateful to the Australian National University and Dean *Michael Coper* from the College of Law for hosting this event and for their help in organizing it. Michael Coper and His Excellency Dr. Michael Witter, Ambassador of the Federal Republic of Germany to Australia opened the conference. Thanks are in order for the keynote speakers for their opening words on both days of the conference, the Honorable Justice *Chris Maxwell*, President

of the Court of Appeal in Victoria and the Honorable *Jon Stanhope*, MLA, Chief Minister of the Australian Capital Territory. The conference could not have taken place without the immense help of *Thomas John* in his role as Co-convenor of the European Focus Group of the International Law Section of the Law Council of Australia and of *Hendryk Flaegel*, also of the Law Council of Australia. The German Embassy provided a festive environment by organizing a memorable reception which brought together conference attendees and many others.

Jürgen Bröhmer
Armidale, August 2010

Biographies of Participating Authors

Nicholas Aroney

Nicholas Aroney is a Professor of Constitutional Law and a Fellow of the Centre for Public, International and Comparative Law at the TC Beirne School of Law, University of Queensland. He teaches constitutional law, comparative constitutional law and legal theory, and has published widely in these fields, with particular emphasis on free speech and federalism. He is the recent author of *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge UP) and editor of *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press). He is also currently writing *The Jurisprudence of a Federal Commonwealth* (Cambridge UP) and editing *Shari'a in the West* (Oxford UP).

Jürgen Bröhmer

Jürgen Bröhmer came to the University of New England in 2006 and has been the Head of the Law School since 2007. He received his law degree from Mannheim University in Germany and his doctorate and post-doctoral habilitation from Saarland University in Saarbrücken, Germany and worked at the Europa-Institute of Saarland University before coming to Australia. His areas of expertise are German Constitutional, European Union and Public International Law. Jürgen has authored two and co-authored one monograph, edited a number of other books (the latest, *60 Years German Basic Law: The German Constitution and its Court – Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* was published in late 2010), and published numerous articles and book chapters.

Simon Bronitt

Simon Bronitt is Director of the Centre of Excellence in Policing and Security (CEPS) and based at Griffith University in Queensland. He was previously a Professor of Law in the ANU College of Law and Associate Director of the Australian Centre for Military Law and Justice, ANU. Between 2006-9 he

served as the Director of the ANU Centre of European Studies in the Research School of Humanities. Drawing on comparative and interdisciplinary perspectives, Simon has published widely on criminal justice issues, including counter terrorism law and human rights, covert policing, telecommunications interception and international criminal law. His publications include *Principles of Criminal Law* (3rd ed, Thomson Reuters 2010) and *Law in Context* (3rd ed, Federation Press, 2006). He was the lead Chief Investigator of ARC-funded Discovery Project on counter-terrorism law (2005-2008), which culminated in the publication of Miriam Gani & Penelope Mathew (editors), *Fresh Perspectives on the "War on Terror"* (2008).

Craig Collins

Craig Collins is a lecturer with the College of Law at the Australian National University. He worked for 12 years as a litigation lawyer, including as a partner with Gadens Lawyers Melbourne, where he developed a specialist interest in defamation law. In practise, Craig represented and advised a range of clients, including a State Premier, State Attorney General, a former Prime Minister and the Olympian Ron Clarke - who obtained a record jury award for defamation damages of over \$1 million. Craig moved into academia 6 years ago at UNE, where he is pursuing PhD research on the legal history topic, 'Defamation, Law and Public Opinion in the Australian Colonies, 1824-1874'.

Dieter Dörr

Dieter Dörr is Professor for Constitutional Law, International and European Union Law and Media Law at the Johannes-Gutenberg University in Mainz, Germany and Director of the Mainz Media Institute. Previously he has served as in-house counsel for one of the state broadcasting networks. He is a member and former chairman of the German Commission for the Determination of Concentration in the Media Sector and serves as ad-hoc judge at the Superior Provincial Court (Court of Appeal, Oberlandesgericht) Koblenz.

Katharine Gelber

Katharine Gelber is an Associate Professor in Public Policy at the School of Political Science & International Studies at the University of Queensland. She completed her undergraduate degree at the University of Tasmania, an Honours (I) degree at the University of Sydney and her PhD at the University of Sydney. She worked at the University of New South Wales for nine years, before

commencing an appointment at UQ. Her research interests are in human rights policy, with a particular emphasis on freedom of speech and the regulation of hate speech. Katharine is the recipient of several ARC grants, including the current ARC DP 'The Impact of Hate Speech Laws on Public Discourse in Australia' (2010-2012) with co-CI Professor Luke McNamara (University of Wollongong), as a co-CI on the ARC Linkage 'Democratic Dialogue and Capabilities: New Opportunities in Post-Reconciliation Era Australia' with Prof Pat Dodson and A/Prof Sarah Maddison (UNSW), and the now-completed ARC DP 'Securing Freedom: Freedom of Political Speech in Australia'. She is the President of the Australian Political Studies Association, a member of the human rights research streams of the International Political Science Association, the International Studies Association and the American Political Science Association. Her recent books include Vromen, Gelber & Gauja *Powerscape: Contemporary Australian Politics* (Allen & Unwin, Sydney, 2009); Gelber & Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, Sydney, 2007) and Gelber, *Speaking Back: the free speech versus hate speech debate* (John Benjamins Ltd, 2002). She has recently published articles in *Review of International Studies*, the *Australian Journal of Human Rights*, the *Australian Journal of Political Science* and *Melbourne University Law Review*.

Saskia Hufnagel

Saskia Hufnagel is a Research Fellow at the ARC Centre of Excellence in Policing and Security (CEPS). She completed her PhD studies at the Australian National University (ANU) on the topic 'Comparison of EU and Australian cross-border law enforcement strategies' in 2010. Saskia worked as an Assistant Professor at the University of Canberra (Faculty of Law) between 2009 and 2011 and taught and convened a range of courses at the ANU College of Law and the ANU Centre for European Studies since 2007. Her current research interests are comparative criminal and constitutional law, regulation of police cooperation techniques and emergency law. Her publications include 'German perspectives on the right to life and human dignity in the "war on terror"' (2008) 32 Crim LJ 1000 and "'The Fear of Insignificance': New Perspectives on Harmonising Police Cooperation in Europe and Australia" (2010) 6(2) JCER 165. Saskia is a qualified German legal practitioner and accredited specialist in criminal law.

Thomas John

Thomas John is the Co-convenor of the European Focus Group of the International Law Section of the Law Council of Australia. Holding law degrees from the University of Konstanz, Germany, and the University of Queensland, Thomas John is admitted to practice as a barrister at the High Court of Australia as well as the Supreme Courts of Queensland and the ACT. His previous and current roles at the Attorney-General's Department, the Australian Government Solicitor, the Federal Parliament's Research Services and Queensland's Crown Law equipped Thomas with a particular expertise in constitutional law. He co-authored 'Australian Constitutional Law: Commentary and Cases' published in 2007 by Oxford University Press.

Cornelia Koch

Cornelia Koch is a Senior Lecturer in the Adelaide Law School at the University of Adelaide. Before coming to Australia in 1998, Cornelia lived in Germany where she obtained her undergraduate law degree. Her postgraduate qualifications, a Master of Comparative Law and a Juris Doctor degree, are from the University of Queensland. Her primary research interests are constitutional law, comparative law and European Union law. Her research has been published in leading international journals and she is a co-author of Australian Constitutional Law: Commentary and Cases (Oxford University Press).

Andrew Lynch

Andrew Lynch is the Director of the Gilbert + Tobin Centre of Public Law and an Associate Professor in the UNSW Faculty of Law. Andrew's research in recent years has concentrated on the topics of judicial dissent in the constitutional law decisions of the High Court of Australia, federal reform and the intersection of public law and legal responses to terrorism. He is an author of Equity and Trusts (2001 and 2005), What Price Security? Taking Stock of Australia's Anti-Terror Laws (2006) and a co-editor of Law and Liberty in the War on Terror (2007), as well as journal articles, conference and seminar papers in these and other areas. Additionally Andrew has frequently been called before parliamentary and non-government inquiries to speak to submissions on matters of public law and Australia's counter-terrorism legislative scheme. He writes regularly on public law issues in the media. He teaches Public Law and Federal Constitutional Law.