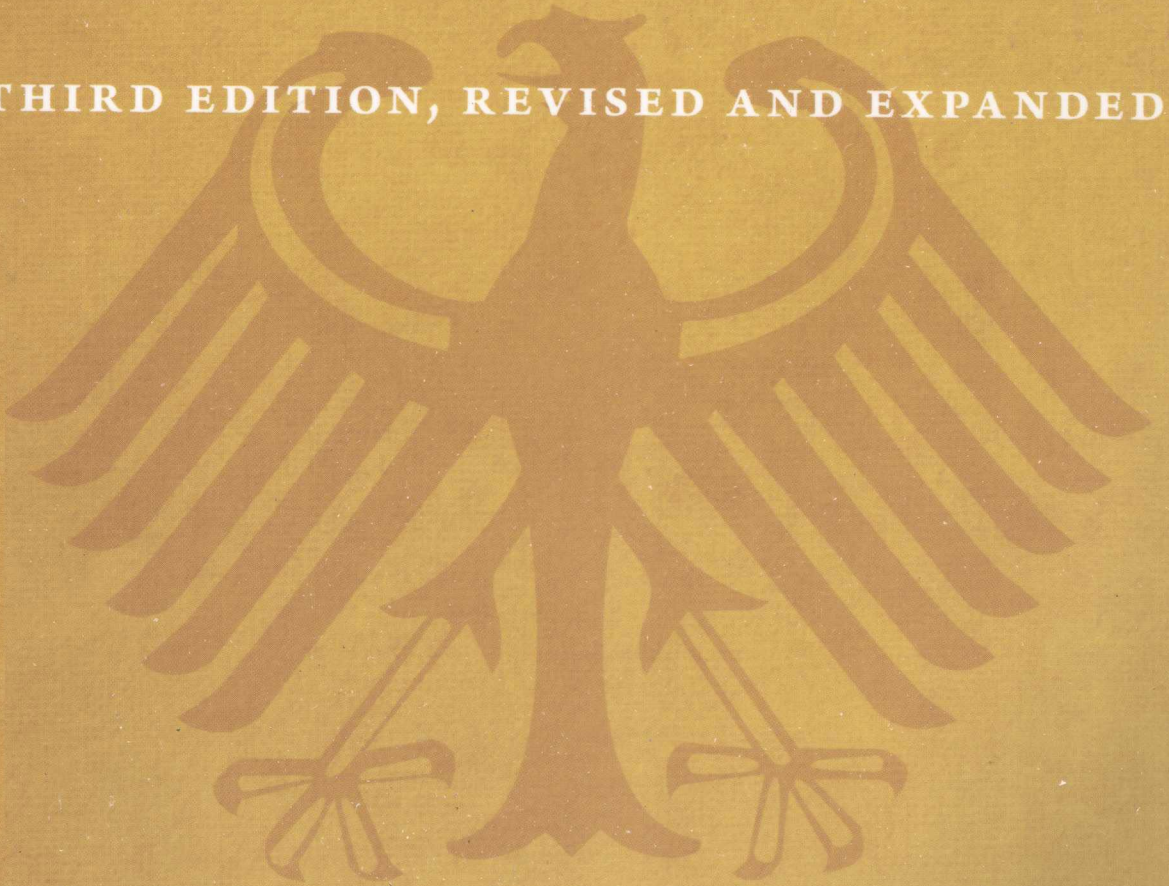


The Constitutional Jurisprudence of the Federal Republic of Germany

THIRD EDITION, REVISED AND EXPANDED



Donald P. Kommers and Russell A. Miller

With a New Foreword by Justice Ruth Bader Ginsburg

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The Constitutional
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of Germany



For Nancy
— DONALD P. KOMMERS

For Theresa, who gave me Germany
— RUSSELL A. MILLER

Foreword to the Third Edition

RUTH BADER GINSBURG

Associate Justice, Supreme Court of the United States

Exposing laws to judicial review for constitutionality was once uncommon outside of the United States. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred-up majorities. The Constitutional Court of the Federal Republic of Germany has been recognized as a paradigm in this regard.¹

Just as U.S. experience and decisions may be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so too can we learn from others now engaged in measuring ordinary laws and executive actions against fundamental instruments of government and charters securing basic rights. “Wise parents do not hesitate to learn from their children,” U.S. Circuit Judge Guido Calabresi observed, noting as illustrative the first edition of *The Constitutional Jurisprudence of the Federal Republic of Germany*.²

A concrete example. I coauthored the Brief for the Appellant in *Reed v. Reed*, 404 U.S. 71 (1971), the first case in which the U.S. Supreme Court, in all its long history, ever declared a statute discriminating against women unconstitutional. *Reed* concerned an Idaho statute that directed: As between persons equally entitled to administer a decedent’s estate, “males must be preferred to females.” The Idaho Supreme Court had upheld the law against an equal protection challenge, reasoning that nature itself had established the gender-based distinction and that the preference for males conserved judicial resources. The *Reed* brief contrasted two decisions in which the then West German Constitutional Court invalidated similar gender classifications.

The first German decision, rendered in 1959, involved provisions of the German Civil Code declaring “if parents are unable to agree, father decides,” and mandating preference for the father as representative of the child.³ Holding both provisions incompatible with the constitution’s equality norm, the German court rejected alleged differences in lifestyles and administrative convenience as justifications for the discriminatory classifications. The second decision, announced in 1963, involved preferences for sons over daughters in agrarian inheritance law. In that instance, the German court held unconstitutional a classification resting on the assumption that men are better equipped than women to manage property.

1. See Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law*, 1st ed. (New York: Foundation Press, 1999), 204.

2. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

3. BVerfGE 10, 59 (1959).

I did not expect our Supreme Court to mention the German decisions, but thought they might have a positive psychological effect. Informed of the West German Constitutional Court's reasoning, the U.S. justices might consider: "How far behind can we be?"⁴

I consulted foreign and comparative legal materials in my advocacy endeavors, as the *Reed* brief illustrates, and I continue to do so as a judge. Foreign opinions, of course, are not authoritative; they set no binding precedent for the U.S. judiciary. But they can add to the store of knowledge relevant to the solution of trying questions.

No doubt, we should approach foreign legal materials with sensitivity to our differences and imperfect understanding of the social, historical, political, and institutional background from which foreign opinions emerge. But awareness of our limitations should not dissuade us from learning what we can from the experience and wisdom foreign sources may convey. In the endeavor to gain knowledge from the problems confronted and resolutions reached by our counterparts abroad, the work of Donald P. Kommers, now joined by Russell A. Miller, is a rich resource. Offering far more than excellent English-language translations of the decisions of a renowned tribunal, Professors Kommers and Miller supply incisive analyses and commentary. I am pleased to herald the publication of this third edition of a masterful text.

In addition to thoroughgoing updating, the third edition contains considerable new material and substantially recast sections. Entirely new, Chapter 6 deals with the sometimes intricate relationship between German constitutional law, on the one hand, and international and European law, on the other hand. Chapter 10, on social and economic rights, includes important property and occupational rights cases arising out of Germany's reunification. For the first time, Germany's equality jurisprudence, featured in Chapter 7, is treated independently. Of particular note, the authors discuss the Basic Law's requirement that the state actively pursue the achievement of gender equality through positive measures. The emphasis on substantive equality reflects a trend vibrant abroad but not similarly embraced in the United States.

Federalism reforms made between 2003 and 2009 are described in Chapter 3. Chapters 8 and 9 take up developments in recent years in Germany's free speech and religious liberty jurisprudence. Finally, in sections of several chapters, the third edition explores the Federal Constitutional Court's attempts to balance competing liberty and security interests in the post-9/11 world. Cases presented on this trying and vitally important topic contrast, sometimes strikingly, with current U.S. jurisprudence.

Brought right up to the moment by Professors Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* is an engaging, enlightening, indispensable source for those seeking to learn from the text and context of German constitutional jurisprudence.

4. "A Conversation with Justice Ruth Bader Ginsburg," *University of Kansas Law Review* 53 (2005): 957, 961.

Preface to the Third Edition

The first edition of this path-breaking book appeared in 1989, the year in which the Federal Republic of Germany celebrated the fortieth anniversary of its constitution, designated officially as the Basic Law (Grundgesetz). Adopted in 1949, the Basic Law marked the beginning of a new German experiment in constitutional democracy. A key feature of this experiment was the Basic Law's provision for the creation of a constitutional court with vast powers of judicial review over legislative acts and other governmental activities. Two years later, on 12 March 1951, in compliance with this mandate, West Germany's first governing coalition enacted the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz; hereafter referred to as the FCCA), authorizing the tribunal's establishment and providing for the election of its original members. From the moment of its inception, the Federal Constitutional Court (Bundesverfassungsgericht) embraced a robust interpretation of the powers granted to it by the Basic Law. Few realized at the time that the Constitutional Court would play a vital role in shaping the politics and public philosophy of postwar Germany. Fewer still anticipated the Court's evolution into one of the world's most powerful and influential tribunals, serving as a model, alongside the U.S. Supreme Court, for other liberal democracies attracted by the prospect of placing fundamental law under the protection of independent courts of justice.

The publication of this book's first edition coincided with comparative constitutional law's emergence as a subject of serious scholarly inquiry. It was also a time when constitutional courts created in the post-World War II period were beginning to seriously engage one another's jurisprudence as an aid to the interpretation of their respective constitutions. Already by 1980 Germany's Federal Constitutional Court stood out as one of the most prominent of these postwar tribunals, not only for the fertility of the ideas folded into its constitutional decisions but also for the appeal of its jurisprudence beyond Germany's borders. But at the time few of the Court's decisions were accessible in English. The first edition sought to fill this gap. One of its purposes was to bring the Constitutional Court's leading decisions to the attention of English-speaking readers. The cases featured in translation were selected in part for their relevance to prominent areas of constitutional adjudication in the United States. The relevance seemed warranted by the similarities in the rights, values, and institutions protected by two of the world's most advanced constitutional democracies. Yet, with their differing perspectives on liberty and democracy—born of distinct social, legal, and cultural histories—the German cases provided a challenging contrast to many of the views reflected in the decisions of the American Supreme Court.

The first edition exceeded all expectations. Not only was it hailed for the useful role that German constitutional thought could bring to any fresh assessment of

American constitutional doctrine; it also helped to generate interest in the developing field of comparative constitutional law. Owing to the book's enthusiastic reception in the United States and abroad, a second edition was published in 1997. While adhering to the basic structure of the original volume, the second edition took into account major constitutional developments arising out of Germany's reunification as well as the new and groundbreaking cases handed down in the 1990s on freedom of speech, religious freedom, voting rights, and the equality of women in the workplace. It also featured more recent decisions relating to the domestic application of international and European law and the deployment of German military forces abroad.

Shortly after the publication of the second edition, the Federal Constitutional Court began publishing on its website English-language summaries and full translations of leading decisions in a wide variety of subject areas. By then, too, a large body of commentary on various aspects of German constitutional law was available in dozens of Anglo-American and other English-language journals and periodicals. For these reasons, it seemed initially that there would be no need for a third edition. Yet, despite the passage of time, *Constitutional Jurisprudence* continued to enjoy wide use in classes and seminars on German and comparative constitutional law, just as it continued to be consulted by constitutional scholars and judges alike in the United States and elsewhere. And so, encouraged by many friends and colleagues, and with the first-time collaboration of Russell Miller as coauthor, work started on a new, updated edition. It was a long and arduous exercise. More than a decade of proliferating constitutional decisions and commentary had to be taken into consideration, much of it in the original German. Once again, the objective was the production of a single, user-friendly volume that would explain the main principles of the Basic Law, describe the range and character of constitutional review in Germany, and feature leading judgments of the Federal Constitutional Court in selected areas of its jurisprudence. The cases treated in the third edition have been carefully selected with the hope that they are worthy of reflective comparison with the analogous case law of other advanced constitutional democracies.

That the third edition of *Constitutional Jurisprudence* should appear shortly after the sixtieth anniversary of the Federal Constitutional Court's founding is a happy coincidence. This edition has been greatly expanded and reorganized to account for new developments in the jurisprudence of free speech, religious liberty, elections and voting, international affairs, and executive-legislative relations in the sensitive areas of foreign and military policy. Chapter 5 now includes an extended discussion of constitutional cases and issues arising out of Germany's response to international terrorism since the 11 September 2001 terrorist attacks in the United States. Chapter 7 contains fresh material on gender discrimination and affirmative action in a new section on equality. Similarly, recent cases on marriage and the family, including the rights of homosexual and transsexual persons, are taken up in Chapter 9, which considers religion and the rights of conscience. And, in the interest of greater coherence and clarity, several cases included originally in the chapter on dignity and personal liberty have been shifted to the chapter on freedom of speech. Finally, the chapter on

economic rights now appears as the last instead of the first chapter in Part III of this book to reflect the sequence of the provisions on fundamental rights in the Basic Law.

Initially, in working on this edition, we planned two new chapters to focus respectively on the constitutional law relevant to Germany's reunification and on the increasingly prominent interplay in the Constitutional Court's jurisprudence between the Basic Law, European law, and international law. German unity generated numerous constitutional controversies related to electoral law, property rights, land reform, pension law, disbarment proceedings, and the occupational rights of persons dismissed from the civil service and other categories of employment. Each of these controversies raised critical issues under several fundamental rights clauses of the Basic Law, prompting the Court to reexamine some of its earlier rulings under these provisions. To keep the book as a manageable single volume, however, we decided to omit this chapter and limit our discussion of the Court's discrete reunification jurisprudence to a concluding section of Chapter 10. We think the constitutional themes and issues with which the Court grappled in relation to "economic liberties and the social state" are representative of much of the rest of its reunification jurisprudence.

On the other hand, we felt that it was absolutely essential to include a new chapter—Chapter 6 in this edition—on the nexus between German constitutional law and international law and European law. A central feature of the Basic Law is its openness to participation in and constitutional engagement with supranational legal orders such as the European Union and the Council of Europe. Article 23 of the Basic Law, for example, commits Germany to the further development of the European Union, just as other provisions permit the transfer of sovereign powers to international organizations (Article 24) and incorporate into domestic law the general rules of international law (Article 25). Several of the cases featured here reveal the Court's struggle to respect the domestic constitutional order created by the Basic Law as well as the Basic Law's commitment to internationalism. Needless to say, these interests sometimes seem irreconcilable, perhaps most significantly when the Court has considered the force that decisions of supranational and international tribunals will have in the German legal order. Of capital importance are the Court's *Maastricht Treaty* and *Lisbon Treaty* cases. In both judgments, the Constitutional Court raised questions about the amending treaties' compatibility with the essential and unamendable features of Germany's constitutional democracy. Moreover, in *Lisbon*, the Court set procedural and substantive limits on the further transfer of German sovereignty to the European Union.

Finally, we have made two changes in the appendices. We thought it would be useful in this edition to provide brief biographical sketches of all the presidents and vice presidents who have been selected to preside over the Court's First and Second Senates, which are independent of each other and speak in the name of the German people. These short biographies are revealing; they tell us much about the personalities of the Court's presiding justices and the change in the pattern of their recruitment over the years. Until 1987 the president and vice president served as the presiding justices respectively of the First and Second Senates. In recent decades, however, this

practice has not held up. As the biographical sketches in Appendix B disclose, a president or vice president may be elected to preside over the First or Second Senate. Finally, we are dropping the appendix that included selected provisions of the Basic Law. The relevant constitutional provisions at issue in our discussion of the Court's decisions are now presented in the various chapters and are, in any case, easily available in English-language translations on the Internet. In particular, we have relied on the official English-language version published by the German Bundestag. The most recent version of this translation by Christian Tomuschat and Donald Kommers was produced in cooperation with the Bundestag's Language Service Department. It is available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

Acknowledgments

Each of us used the second edition and early drafts of the third edition in our advanced seminars on German and comparative constitutional law. The response of our students—mainly doctoral candidates in political science, third-year law students, and foreign law graduates pursuing LL.M. degrees in international human rights law—has been enthusiastic, reinforcing our determination to go forward with this edition. Their critical engagement with the cases and issues featured in the volume helped us greatly to rethink certain aspects of its organization and analysis.

We have benefited tremendously from the help and advice of several legal scholars, political scientists, and other academicians. For their generous assistance and helpful comments on this and previous editions, we owe a special word of thanks to Winfried Brugger, David Currie, and Walter Murphy. We regret that we will not be able to share the fruits of this effort with these departed friends and colleagues. We have relied on the advice and inspiration of other colleagues and peers, including David Beatty, Armin von Bogdandy, Michael Bothe, Sujit Choudhry, David Danel-ski, Erhard Denninger, Edward Eberle, Mary Ann Glendon, H. Patrick Glenn, Ran Hirschl, Vicki Jackson, Alexandra Kemmerer, Pierre Legrand, Ralf Michaels, Christoph Möllers, Vlad Perju, Peter Quint, Georg Ress, Kim Lane Scheppele, Bernhard Schlink, Eberhard Schmidt-Assman, Miguel Schor, Anja Seibert-Fohr, Torsten Stein, Klaus Stern, Christian Tomuschat, Mark Tushnet, Dieter Umbach, Uwe Wesel, Ingrid Wuerth, and Peer Zumbansen.

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Donald Kommers spent the spring semester of 2009 as the Axel Springer Berlin Prize Fellow at the American Academy in Berlin where he continued to reflect and write on aspects of German constitutional law and politics. For that support he is grateful to Gary Smith, the Academy's gracious and capable director. Russell Miller was awarded a Fulbright Senior Research Fellowship in 2009–10. The fellowship permitted him to work on this and other comparative law projects while in residence at Heidelberg's Max Planck Institute. He is indebted to the Fulbright Commission for that honor and generous support.

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Finally, we wish to thank Justice Ruth Bader Ginsburg of the U.S. Supreme Court for graciously consenting to write the foreword to this edition.

Note on Translation and Judicial Opinions

Edmund Wilson once remarked that “the best translations—the *Rubaiyat*, for example—are those that depart most widely from the originals—that is, if the translator himself is a poet.” However sound such advice might be with respect to the translation of novels and poems, it is normally bad advice when rendering foreign legal documents into English. The judicial opinions featured in this volume are collegial in nature. They are institutional products often pounded out on the anvil of negotiation and compromise. Personalized dissenting opinions on the Federal Constitutional Court were not allowed until 1971 and since then, as now, they are relatively rare. Less than 1 percent of the Court’s published decisions have featured dissenting opinions. The deliberation and trade-offs that drive this penchant for consensus lead to judicial opinions often marked by abstract, repetitious, and convoluted prose. The job of the translator is to render such prose as much as possible into idiomatic English and to produce approximate English equivalents to the legal and technical terminology of the original German. This has been an arduous task for all the translators whose work contributed to the English-language case excerpts published in this volume. The final result, we trust, are translations that are both readable and faithful representations of German constitutional thought.

As noted in the preface to this edition, English-language translations of excerpts from the most noteworthy decisions of the Federal Constitutional Court are less rare today than they were when the first edition was published. We, the authors, translated several judgments featured in this edition; other translations were prepared for us by Mark Hepner, Peggy Fiebig, Matthias Schmidt, Catriona Thomas, and Albert Wimmer. But no one has done more to expand English-language access to the Court’s jurisprudence than Hedwig Weiland, the Constitutional Court’s staff translator. She has masterfully supervised the translation of scores of the Court’s most important decisions, sometimes on breathtakingly short notice. A number of these translations have been reproduced here, often with extensive adaptation by us. These editorial changes reflect the very different aims of her project and ours. While the Court strives to produce the most accurate translations of its decisions, we often have sought to strike the all-too-elusive balance between faithfulness to the original German and literary grace. Of course, the official decisions always remain the Court’s published German-language opinions. The Court has generously granted us the right to make use of its translations in this book. And we have relied on other translations produced under Ms. Weiland’s supervision to expedite and enrich our work. This collaboration has required us to correspond frequently with her. She has consistently been a gracious and insightful interlocutor. We owe her much, but above all she has our enduring respect.

The opinions of the Federal Constitutional Court compete, in their length, with those of the U.S. Supreme Court. Many of them exceed five thousand words. But

they follow a uniform structure. The typical opinion begins with a listing of the leading sentences (*Leitsätze*) or propositions of law advanced in the judgment. The caption following the *Leitsätze* identifies the senate deciding the case, along with the date of the decision, the nature of the proceeding, and a short statement of the ruling (*Entscheidungsformel*). Subsequently and sequentially, in major parts of the case, the opinion proceeds to describe the factual background of the case, including the parties in dispute, the constitutional issue or issues up for decision, and the statutes or regulations requiring interpretation. It continues with a detailed presentation of the arguments on both sides, first on behalf of the petitioner, then on behalf of the respondent. The opinion concludes with sections addressing the Court's jurisdiction over the case and, finally, the Court's reasoning on the merits.

One practice in particular distinguishes German judicial decisions from those handed down in common-law jurisdictions. German cases do not reveal the names of the parties before the courts, a convention that also prevails at the Federal Constitutional Court. Cases are cited by number, date, and jurisdictional category. An example is the *East German Disbarment Case* (1995; no. 10.15) in which East German lawyers filed constitutional complaints contesting their disbarment following reunification. The case appears as Nr. 11 in Volume 93 at page 213 of the official reports (*Entscheidungen des Bundesverfassungsgerichts*), cited as 93 BVerfGE 213 (1995). The opinion begins with the caption, "Judgment of the First Senate of 9 August 1995," immediately followed by reference to "1 BvR 2263/94." The numbers refer to the 2,263rd constitutional complaint (the jurisdictional category) filed with the First Senate in the year 1994. (The case was combined with the similar complaints of two other lawyers.) The unnamed lawyer challenging the constitutionality of his disbarment is described simply as the "complainant." We found it convenient, however, to label this case *East German Disbarment* to identify its subject matter. It is a common practice among constitutional scholars to name a case by its main topic (e.g., *Abortion I Case*), its institutional focus (e.g., *Bundesrat Case*), its documentary source (e.g., *Lisbon Treaty Case*), or by some other prominent feature such as the geographic location of a major event (e.g., *Lebach Case*) or the name of the prominent public figure involved (e.g., *Princess Soraya Case* or *Princess Caroline of Monaco II Case*).

The translations in this book are confined largely to selected passages from the Court's reasoning, preceded by our bracketed summary of the facts of the case and its procedural posture. The original opinions are lavish with citations to the Court's existing decisions and to the secondary literature, including the Court's rehearsal of the views advanced in academic treatises and commentaries on the Basic Law. With rare exceptions we have omitted string citations to the Court's decisions and references to the secondary literature. We have translated the terms *Beschwerdeführer* and *Antragsteller* variously as "complainant," "plaintiff," and "petitioner." Complainant refers to an entity (juristic person or association) or natural person who files a constitutional complaint (*Verfassungsbeschwerde*) with the Federal Constitutional Court. All other proceedings before the Constitutional Court involve petitions or referrals by legislators, other public officials, and governmental entities. A petitioner

is an agency or official who initiates one of these proceedings. We often label the plaintiff as the litigant before an ordinary court where the latter refers a constitutional issue in the pending case to the Federal Constitutional Court in an action known as a concrete judicial review proceeding. Other practices and conventions followed by the Court in deciding constitutional cases are described in more detail in Chapter 1.