# 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.