

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>.