

## Preface to the German Law Journal's *Constitutional Reasoning* Special Edition

By *Andreas Voßkuhle*\*

“Courts don’t do what they say, and they don’t say what they do.”<sup>1</sup> This phrase from German legal linguist Ralph Christensen names one of the many difficulties in understanding how courts come to their judgments—constitutional courts being no exception to this. I would like to congratulate the editors of this well-composed special edition of the German Law Journal, which contains a colorful collection of highly interesting and valuable insights into the nature of constitutional reasoning. All those interested in this field, from legal practitioners to scholars, will profit from reading the contributions collected in this volume. As a small appetizer, I would like to outline a few thoughts on three misunderstandings about constitutional reasoning. Readers will find further and much more elaborate considerations of each of these thoughts in the articles contained in this issue.

In my view, the first misunderstanding seems to be that there is always one single correct decision in difficult constitutional cases. The recently deceased Ronald Dworkin could probably be cited to defend this thesis. He thought that even if the “normal judge” might not be able to discover the right answer to legal questions, the answer still existed, and that the ideal judge—in his metaphor called “Judge Hercules”—would find it. In my opinion, this fails to take into account that it matters who decides the law. As United States Supreme Court Justice Sonia Sotomayor points out,<sup>2</sup> it seems to be not only evident, but also legitimate, that different people, or different judges, have, according to their different personalities, gender, experiences, etc., different views regarding the just solution of difficult legal cases. This applies, in particular, to the fundamental questions often raised in challenging constitutional cases. Hercules’ answer to a given legal question—as wise as it may be—can thus only constitute one right answer among many. Obviously Hercules cannot, for example, fully comprehend how a female judge would decide the same case. At least in theory, most legal orders have found a practical solution to this problem, namely that in every constitutional court important decisions are made not by one justice alone,

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<sup>1</sup> See RALPH CHRISTENSEN, *WAS HEIßT GESETZESBINDUNG?: EINE RECHTSLINGUISTISCHE UNTERSUCHUNG* 64 (1989).

<sup>2</sup> Cited by Fernando Muñoz, *Not Only ‘Who Decides’: The Rhetoric of Conflicts over Judicial Appointments*, 14 GERMAN L.J. 1195 (2013).

but by a group of justices. Ideally, the composition of a constitutional court should be based on the principle of diversity. In this regard, however, most judicial appointment systems still need some improvement, at least concerning the practical choice of judges. Nevertheless, in principle, the legitimacy of differing views on difficult constitutional questions seems to be widely accepted. The practice of publishing dissenting opinions is one sign of this, which has, fortunately, become a clear trend even in non-common-law countries.<sup>3</sup>

The second misunderstanding seems to be that constitutional courts only decide cases. In my opinion, this assumption overlooks the fact that, apart from deciding cases, these courts also develop a system of concepts called *Verfassungsrechtsdogmatik* in German, a term that has apparently no equivalent in English.<sup>4</sup> As I have explained elsewhere, the notion of *Rechtsdogmatik* describes a coherent system of concepts referring to legal texts or legal decisions that are established and discussed by the professional actors of the *Rechtsstaat* (e.g. in courts, government agencies, law schools), which have a normative character.<sup>5</sup> These concepts help structure the legal materials, stabilize the decision-making process, foster foreseeability, and facilitate the development of the law. In fruitful cooperation with public law scholarship, the Federal Constitutional Court has, in over sixty years of jurisprudence, developed a number of *Verfassungsrechtsdogmatik*-concepts, perhaps the most successful being the proportionality test,<sup>6</sup> which has even been incorporated into common law jurisdictions.<sup>7</sup> This incorporation is surprising because the proportionality test tends to grant the courts more leeway in controlling, especially acts of parliament, and a strong group of authors in some common law jurisdictions contest the overall legitimacy of judicial constitutional review for democratic reasons.<sup>8</sup> Nonetheless, “the principle of proportionality is on the rise,”<sup>9</sup> as are other *Verfassungsrechtsdogmatik*-

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<sup>3</sup> See Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

<sup>4</sup> See András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L.J. 1215 (2013).

<sup>5</sup> Andreas Voßkuhle, *Was weiß Dogmatik?*, in *WAS LEISTET UND WIE STEUERT DIE DOGMATIK DES ÖFFENTLICHEN RECHTS?* 111–14 (Gregor Kirchhof, Stefan Magen & Karsten Schneider eds., 2012).

<sup>6</sup> See Giovanni Sartor, *The Logic of Proportionality: Reasoning with Non-Numerical Magnitudes*, 14 GERMAN L.J. 1419 (2013) (examining its structure further); see also Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387 (2013).

<sup>7</sup> See AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 181–210 (2012).

<sup>8</sup> See Richard Bellamy, *Democracy as Public Law: The Case of Rights*, 14 GERMAN L.J. 1017 (2013).

<sup>9</sup> See Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387 (2013).

concepts. It is quite interesting to see how the international judicial dialogue<sup>10</sup> stimulates a worldwide spread of those concepts—*Drittwirkung* or *verfassungskonforme Auslegung* being only two of them.<sup>11</sup>

To me, a third widespread misunderstanding seems to be that courts in non-common-law countries are not bound by their own jurisprudence. Although it is true that there is no elaborate doctrine of *stare decisis* in non-common-law jurisdictions, constitutional courts, at least, follow their own case law very strictly. There are, for example, only a few cases where the Federal Constitutional Court openly departed from its previous decisions. If this were otherwise, the often-undetermined wording of constitutional guaranties would inevitably lead to great legal uncertainty. The (at least factually) binding nature of precedents is also an important means to minimize judicial activism and prevent constitutional courts from overriding Parliament's legislative competences. Therefore, I tend to think that the differences in the application of precedent, for example between the United States Supreme Court and the Federal Constitutional Court, are, at least, exaggerated.<sup>12</sup>

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<sup>10</sup> See Konrad Lachmayer, *Constitutional Reasoning as Legitimacy of Constitutional Comparison*, 14 GERMAN L.J. 1463 (2013); Christa Rautenbach & Lourens du Plessis, *In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges*, 14 GERMAN L.J. 1539 (2013).

<sup>11</sup> For example, to Hungary, South Africa, or Spain. See Jakab, *supra* note 4; Rautenbach & Plessis, *supra* note 10; Zoltán Sente, *The Interpretive Practice of the Hungarian Constitutional Court—A Critical View*, 14 GERMAN L.J. 1591 (2013).

<sup>12</sup> See also Mher Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, 14 GERMAN L.J. 1297 (2013).