

MEMORIAL: DONALD P. KOMMERS – A MEMORIAL COLLECTION

Remembering Don Kommers

By Kim Lane Scheppel*

I think we met first over abortion. For at least a few Americans, the German Federal Constitutional Court's first abortion decision was one of the very few foreign judgments that cut through the general American fog about law in the rest of the world.¹ Of course, the US Supreme Court had just decided *Roe v. Wade*,² determining that a woman had the right to choose to end a pregnancy, a right that was more unqualified the earlier in the pregnancy she was deciding. That made the topic legally salient. When the German Federal Constitutional Court reached the question two years later, its decision was remarkable for having found a more complex and less polarizing balance, neither rejecting the claims of the woman to her own freedom and self-determination nor treating the fetus as if it were any other bit of tissue.

At the time, I didn't work on comparative law at all. In fact, I did not yet have a passport to travel beyond the boundaries of the United States. But the idea that two high courts in different parts of the world could reach such different judgments fascinated me. Surely, there were others fascinated too? But no, the number of Americans steeped in the study of comparative constitutional law at that time was relatively small.

And then I met Don Kommers.

Don was at the time working away, as he often did, on some project that would benefit the discipline even more than himself. I think he was putting finishing touches on his magnificent book *Judicial Politics in West Germany*.³ That project made the point, obvious after he made it but not before, that other courts in the world also were enmeshed in a complex political environment that they must heed. I think Don and I were first put together on a common panel at the American Political Science Association to talk about the differences in the two high court opinions on abortion, and we went on talking about related subjects for all the remaining time he had on this earth.

When discussing the abortion decision, Don was particularly fond of the Federal Constitutional Court's statement about life: "Everyone" within the meaning of Article 2 (2) [1] of the Basic Law is "every living human being." Expressed otherwise, the German constitution extended its protections to every human individual possessing life; "everyone" therefore also includes the as yet unborn human being.⁴ I was particularly fond of the part of the judgment in which the Court said that mere financial reasons alone were not weighty enough to bring an end to what could

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¹Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1975 (Ger.).

²*Roe v. Wade*, 410 U.S. 113 (1973).

³See DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY* (1976).

⁴Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1975 (Ger.) (Translated and published as *West German Abortion Decision: A Contrast to Roe v. Wade* *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605, 638 (1976) (Robert E. Jonas & John D. Gorbey trans.)).

yet be a human life – and for that reason the state must provide for women who would otherwise want to have children, except that they were beset by the financial burden involved. (I might add that that bit never made it into his treatise.)⁵ We used to argue about the case, not to quarrel over the outcome, but instead to consider which element of the decision was most revolutionary – the protection of the life of the fetus or the creation of a system of social supports for women.

Back in those days the field of comparative constitutional law was small – and in my experience largely inhabited by Catholics drawn to the Christian democratic themes in the opinions of the Federal Constitutional Court. Walter Murphy. Mary Ann Glendon. And, of course, Don. Comparative constitutional law was a relatively more conservative field than American constitutional law at the time. As someone who tiptoed into the field then, I was struck by the magnanimousness of those already working there even though I must have seemed to have breached the usual norms of entry. Don was especially welcoming.

Of course, by now, comparative constitutional law is viewed as the methodology or discipline to which the Left turns to get too many foreign ideas. That cynical understanding was promoted by Justice Antonin Scalia, who failed to recognize that, for many on the Left, comparative constitutional law is where we turn to avoid being depressed about the state of American constitutional law. But back then, comparative constitutional law was a place to study Christian democratic values in action. The field had a gently conservative tilt. And I might emphasize the “gentle.” Don was someone who had many “students,” most of whom had never taken a course with him or had the privilege of having him supervise dissertations. I was one of those “students” – always learning from him, always benefiting from his generosity, always being drawn into the intellectual world of German constitutional law by him.

His last book project was an attempt to turn those who were present at the constitutional drafting assembly in Germany after the war into the Founding Fathers of the Basic Law. I thought it was a terrible idea to give the faceless authors of the text biographies and more public notoriety. The idea that a hit musical about one of them might become the most popular show in Berlin still haunts me; I think that Founding Fathers (especially when there are few Mothers) are best left in the shadows. Their very modesty is a good sign for the fate of constitutions, I thought.

But Don, having educated generations of Americans in the ways of German constitutional law was also determined to educate the other way around. Americans honor their Founding Fathers – why not Germans? Don was determined to bring the drafters of the Basic Law into full view – as men with important ideas, real lives and much to admire. He thought it was important to give credit where credit was due.

In the end, he left his book unfinished – and, even though I argued with him all the way through the draft as far as he got, I am very sad that he didn’t get to see it through. Don had ideas until the end – stubborn, well-formed and well-argued ideas. Mostly I am sad, however, because I miss arguing with him – those long, gentle arguments in which I always learned so much, especially because we often saw things differently and because Don always treated our differences with respect. With Don’s passing, it seems the end of an era, when people could find so much in common across that which divides them, a time when an open-hearted, gentle mentor like Don could adopt all manner of academic children, eager to send them out into their own new worlds.

⁵See DONALD P. KOMMERS & RUSSELL A. MILER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (3rd ed. 2012).