

MEMORIAL: DONALD P. KOMMERS – A MEMORIAL COLLECTION

## Donald Kommers and Comparative Constitutional Law

By Vicki C. Jackson\*

Donald Kommers made enormously important scholarly contributions to our understanding of the German constitution and its Constitutional Court. Moreover, he made great contributions to the field of comparative constitutional law, both in the way his insightful writing worked back and forth between understandings of the U.S. and German systems and in how his thoughtful work explored the purposes of comparative constitutional study.

His short essay, from 1976, on the “Value of Comparative Constitutional Law” captured in very few words so many important possibilities in the study of comparative constitutional law.<sup>1</sup> That essay is republished in this memorial collection. As he noted there, “comparative constitutional law in the sense [of studying judicial review of constitutional issues] . . . hardly exists as a taught discipline in the United States.”<sup>2</sup> Political scientists, he observed, engaged in comparative study of the institutional structures of judicial review, and the recruitment of judges, but not the “art of constitutional interpretation.”<sup>3</sup> He urged expanding constitutional study beyond “the common law legal community,” to Japan, Italy, West Germany, Austria and India,<sup>4</sup> while also noting that judicial review had, at that time, “succumbed to authoritarian rule” in several nations in Asia and Africa.<sup>5</sup>

He offered several thoughtful arguments for reflection on the possibilities of comparison, using the then-recent, close-to-contemporaneous – and conflicting – abortion decisions from the U.S. Supreme Court and West Germany’s Federal Constitutional Court. He argued that “nothing was inexorable” about either ruling, given the relevant constitutional texts and their need for interpretation.<sup>6</sup> In seeking to explain the differences between the two decisions in countries that he described as both “commit[ed] to political democracy and constitutional government, especially in the area of civil liberties and human rights,”<sup>7</sup> Professor Kommers considered and rejected difference in structural design as an explanation.<sup>8</sup> Instead, he suggested that the courts’ differing conclusions may reflect “general philosophical values and historical traditions that inform the meaning of constitutions.”<sup>9</sup>

Acknowledging the great challenges for advancing the study of comparative constitutional law – including the need for good translations of decisions rendered in different languages – Professor Kommers offered five thoughts on the value of such systematic study. First, it could provide Americans with insights “into the experience of other constitutional democracies, including that

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<sup>1</sup>Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 John Marshall J. Pract & Proc. 685 (1976).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at 688.

<sup>4</sup>*Id.* at 686–687.

<sup>5</sup>*Id.* at 686.

<sup>6</sup>*Id.* at 689.

<sup>7</sup>*Id.* at 690.

<sup>8</sup>*Id.* at 688–89.

<sup>9</sup>*Id.* at 689.

of non-western cultures.”<sup>10</sup> With an enduring eloquence, he wrote that people “who call themselves free ought to be acquainted with the range of human experience expressed by these ideals in order to provide them with a greater sense of the community they share with the peoples of other constitutional democracies.”<sup>11</sup> Second, such study could help develop “a theory of the public good and right political order,” because “constitutional courts are reflective institutions.”<sup>12</sup> Third, he argued, comparative constitutional law can enrich the study of comparative politics, restoring “the linkage of constitutional norms to political ideologies, intra-governmental relations, and public policies.”<sup>13</sup> Fourth, “the comparative perspective can enrich the study of American constitutional law” by providing “critical standards for reviewing the work of the U.S. Supreme Court.”<sup>14</sup> Finally, Professor Kommers argued that comparative perspectives can contribute to the growth of American constitutional law, by enabling U.S. courts to benefit from the perspectives of judges elsewhere and thereby improve their own reasoning.<sup>15</sup>

Although Professor Kommers and I did not always agree on substantive constitutional law decisions, my discussions with him were always enlightening, respectful, and on the merits. I cannot overstate his immense intellectual generosity. When I was starting out in the field of comparative constitutional law in the 1990s, he was generous in every way that a scholar can be – answering my many questions, inviting me to conferences to engage in broader academic exchange, sharing his work, and allowing me and Mark Tushnet to reproduce some of his work in our casebook on Comparative Constitutional Law.<sup>16</sup> His generosity of intellectual spirit in these ways should be a model for us all.

He shall be greatly missed.

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<sup>10</sup>*Id.* at 691.

<sup>11</sup>*Id.* at 692.

<sup>12</sup>*Id.* at 692.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 693.

<sup>15</sup>*Id.* at 693-694.

<sup>16</sup>This generosity extended from the first edition of our casebook in 1999 through the most recent edition, VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (3<sup>rd</sup> ed. 2014).