

Law Must be Grounded in Political Power and Capable of Dialogue

Plans for “Handbuch des Verfassungsrechts –
A Transnational Perspective on German Constitutional Law”

An interview with the co-initiator and German Federal
Constitutional Court Justice Prof Dr Johannes Masing



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Editorial

“Handbuch des Verfassungsrechts” (“Manual of Constitutional Law”) – behind this simple title lies an ambitious project embarked upon by German constitutional law scholars. The novel objective of the project is indicated by its subtitle, “Deutsches Verfassungsrecht in transnationaler Perspektive” (“A Transnational Perspective on German Constitutional Law”). German constitutional law is to be prepared in German and English for a German and foreign specialist readership with the goal of promoting a cross-border dialogue among legal systems or, in some places, starting such a discussion in the first place. The initiators and editors of the project are constitutional scholars Prof Dr Ferdinand Gärditz and Prof Dr Matthias Herdegen of the University of Bonn and Prof Dr Johannes Masing and Prof Dr Ralf Poscher of the University of Freiburg. The Bonn-Freiburg axis marks both the spectrum of legal and ideological views that, in addition to various approaches to interpreting constitutional law, the manual is to take into account. The project represented by the book has also received support from a group of high-ranking legal scholars from Europe, Asia, South Africa and the United States. This supporting group’s task is to help ensure that the book connects internationally.

Co-initiator and German Federal Constitutional Court Justice Prof Dr Johannes Masing explains the plans for the “Manual of Constitutional Law”. He was interviewed by Dr Katja Gelinsky, coordinator for law and policy in the Konrad-Adenauer-Foundation’s Politics and Consulting department.



The planned *Manual of Constitutional Law* claims to offer a “new perspective” that is not to be found in all of the previous literature on the subject. What is new and unique?

What is special is the view of the issues in constitutional law. We want to step away from the domestic German perspectives from which such constitutional principles as democracy and the rule of law are usually considered and assess our legal system from a distance. What do we German constitutional law scholars do compared to those in other countries? And why do

Sometimes worlds collide.

we see things the way we do? The goal of this change in perspective is to build bridges between the German constitutional law debate and the discussions going on in other legal systems. This requires critical self-reflection and represents a real challenge. The difficulties begin with the differences in understanding of fundamental terms such as democracy, rule of law, administration, and legal protection between closely related countries such as Germany and France. The divergence is even more pronounced when you bring the Anglo-Saxon countries into the discussion. This has to do with specific historical experiences, social embedding, and problems peculiar to particular countries. In concepts of state structure, too, and of the organization of public administration and the judiciary, there are grave differences that manifest themselves in constitutional law as well. This leads not only to diverging assessment, but also to differing questions and problems that reach as far as methodology and the very understanding of jurisprudence as a discipline.

Promoting dialogue among legal systems.

This is something that I have often experienced as a judge in exchanges with other constitutional courts and in interaction with even internationally experienced jurists: worlds often collide in this respect. There is often astonishment about questions in our respective countries and approaches to problems, but it is accompanied by the desire to understand these issues better. Many problems in our

increasingly interconnected world can only be solved by cross-border solutions. That is why it is so important that we promote international dialogue, especially where the fundamentals of constitutional law are concerned. The book we have planned is intended to contribute to this effort while closing a gap in the existing constitutional law literature.

Do you intend to break new ground in the selection of issues with which the book deals as well?

We had an intense discussion on this point and then decided to follow the classical organisation of constitutional law presentation. So there will be

We aren't trying to do everything differently.

for example the financial or the environmental system. We are not trying to do everything differently with this book. That would not fit well with the composition of our group – all of our authors are representatives of the classic constitutional law.

a “Fundamentals” chapter, a “Principles of Constitutional Law” chapter, a “State Organisation” chapter, a “Fundamental Rights” chapter, and a “Subsystems of Constitutional Law” chapter, the latter dealing with the constitutional aspects of

Where did the ideas and motivation for the project come from?

As is often the case with complex projects, several disparate items converged. It started with the publisher’s desire for a current book on

Recognising barriers to access to our own legal system.

our constitutional law. From that we developed the idea for a transnational work. We want to expose and develop the connections to other legal systems. This involves critical assessment of what barriers there are to access to our system of constitutional law. Our medium-term goal is to reduce the disparity in understanding that exists between us and other legal systems and to make what we have in common more fruitful.

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But don't misunderstand me: The project is and shall not be about adapting or aligning the various legal systems. The differences that exist, especially at the institutional level, are far too great. Our system of constitutional law, for example, is greatly influenced by the institution of the German Federal Constitutional Court. That is why we in Germany have discussions on some issues that are entirely different from those in other countries such as the Netherlands and Switzerland, which have no comparable constitutional jurisdiction. The United States, where the competence for constitutional review lies within the purview of the normal jurisdiction, has no parliament law like we do. In France, the framework and the authority of constitutional jurisprudence are fundamentally different from ours, too. From electoral law to data protection law, from the question of whether only laws or also decisions can be subjected to a constitutional review, there are enormous differences from legal system to legal system. Sometimes there are tremendous differences in approach which then affect judicial control, for instance. We need to become better informed and engage in richer exchanges of such topics.

Do the difficulties in understanding also have to do with the fact that German constitutional law is becoming increasingly complex?

I rather consider our constitutional system and the level of legal differentiation in theory and practice to be an achievement. The book we plan does not manifest some secret self-recrimination – we have no cause for that. Our concern is to make our discussions more accessible and to open them to other points of view. But we mustn't forget that our legal system is a very challenging one. It thrives on conditions that other countries maybe do not have in the same form and cannot be quickly brought about, or there may be good reasons why those conditions are not desirable elsewhere. The relationship between law and politics in various countries is calibrated very differently. That has to do with historical developments and the political framework, among other things.

No cause for self-recrimination.

Nevertheless, we sometimes hear that the German Basic Law is no longer as exportable as it once was, that Germany's international attraction, even in such areas as jurisprudence, has weakened in the last few years.

It is difficult to assess whether such observations are accurate. My experience as a German Federal Constitutional Court justice rather leads me to believe that there is lively interest in our legal system abroad. In any case, the German Federal Constitutional Court has more contacts than ever before, and it has trouble dealing appropriately with the numerous queries it receives. Of course a new dynamic has arisen as the significance of the European Court of Human Rights has increased over the years. While we used to be almost the only ones in Europe to have developed standards for human rights that were generally applicable, more and more courts are making significant decisions, especially the Strasbourg court, which decisions on the observance of human rights in the 47 Member States of the Council of Europe, composed in English and French. This is a welcome development. In view of the various fora and actors in the area of fundamental rights protection, it is the more important that we exchange ideas and promote understanding for our legal system.

Lively interest abroad in the German legal system.

Some things here in Germany are viewed very critically, such as the increasing opacity of the system for electing representatives to the Bundestag and the coherence and efficiency of our federal system.

Basic legal principles should be clearly recognisable.

First of all, those are domestic discussions. Of course we must ensure that our basic legal principles retain a form that is sufficiently clear. If they are to keep their significance, they must not devolve completely into ad hoc decision-making. But I don't think that it is a danger for the German electoral law – if anything, we need to consider how strictly the principle of equality before the law is to be interpreted in view of the difficulties involved in consistent implementation. An international comparison shows that

there is probably no country where federalism follows clear principles; instead, it tends to follow pragmatism shaped by tradition – although it is, of course, desirable that it is based on consistent structures in each case. The perspective of external observers can be especially effective at revealing any excessive complexity.

An international group of high-ranking foreign constitutional jurists has been supporting work on the book. What ideas have you received from your foreign partners so far?

Give more thought to the political dimension of law.

In our discussions with the project support group, we realised just how normative the character of our German thinking on constitutional law is. Several of our foreign partners were of the opinion that we should give greater weight to the political dimension of legal questions in our interpretation of legal norms and more space to it in the analysis of such questions. One of the many challenges that this project involves is giving political and social factors the attention they deserve.

We in Europe are currently experiencing how fundamental constitutional principles are being ignored or twisted. Did this erosion of principles play a role in your project?

Our project had its beginnings earlier. But current developments show how important it is to have cross-border discussions about the fundamentals of constitutional law and to broaden the

Building bridges in times of crisis.

foundation of our common understanding. It is in critical times such as these that it is crucial to understand legal thought in the various countries and to be better understood abroad. This is the basis upon which I hope, although with limited optimism, that despite all our differences, we can identify and shore up a common foundation for democracy and the rule of law.

But how can resistance to constitutional principles abroad, born of the perception that such demands are excessive, be avoided?

Our project focuses on the field of jurisprudence, and is not a political strategy paper. The book makes no demands of other countries; instead,

Consider local power structures.

it focuses on linking existing discussions on issues of constitutional law with one another, thus enhancing the force of their ideas. This may help provide impetus where the concept of a constitution, built on freedom, equality, and social coherence, has not yet taken root to any great extent. I do not have any silver bullet for making constitutional principles fruitful elsewhere. Such developments are greatly dependent on conditions on the ground. In general, law must be grounded in political power if it is to be appreciated. It cannot be so out of touch with reality that people say “That won’t work anyway.” That is especially true of the many countries that are still a long way from democracy and the rule of law. Sometimes progress can be made only in small steps that must be painstakingly achieved and do not at first seem to have anything to do with our German perceptions of democracy and the rule of law. This does not mean that we can dispense with fundamental legal principles or limit their meaning. Instead, we need a comprehensive program that allows things to develop. There is no question that this is a balancing act, but we must persevere if we wish to contribute to strengthening democracy and the rule of law internationally through our constitutional concepts.



Johannes Masing

Johannes Masing has been a professor of constitutional law at the University of Freiburg since 2007 and was appointed as a judge to the German Constitutional Court in April 2008.

Masing was born in 1959 in Wiesbaden. After one year of studying French at Grenoble University in 1979 Masing came to Freiburg im Breisgau where he studied law, philosophy and piano. He graduated in law with the first state examination in 1985 and completed the second examination in 1989. He additionally received his Artist Diploma in piano in 1986.

From 1992 till 1996 Masing worked as an academic assistant for Judge Ernst-Wolfgang Böckenförde at the German Constitutional Court before he received his doctorate in 1996 and habilitation in 1997 from the University of Freiburg.

After teaching at the University of Bielefeld and the University of Heidelberg, Masing joined the Faculty of Law at the University of Augsburg as a Professor in 1998 where he taught constitutional and administrative law.

During the following years he was a visiting professor and did several research projects at the University of Michigan Law School in Ann Arbor, the University of Krakow in Poland, the University of Lyon 3 (Jean Moulin), the University of Paris 2 (Panthéon-Assas) and at the University of Paris 1 (Panthéon-Sorbonne). Together with Prof Jouanjan (Strasbourg) he founded and led the German-French research group for public law in 2001/2002. Masing worked in several other academic groups, many with French and Polish scholars. In 2007 he received the German-French Gay-Lussac-Humboldt-Prize for his research work as well as the promotion prize of the Daimler Financial Services AG. From September to October 2013 Masing was visiting professor at the University of Pennsylvania Law School (USA).

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