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The Concept of the Supremacy of the Constitution

Jutta Limbach*

The article compares and assesses the idea of the supremacy of the constitution found in Germany with the competing British tradition of parliamentary sovereignty. It concludes by examining the need for a supreme constitutional law in the European Union.

The concept of the supremacy of the constitution confers the highest authority in a legal system on the constitution. Stating this principle does not mean just giving a rank order of legal norms. The point is not solely a conflict of norms of differing dignity. The principle of the supremacy of the constitution also concerns the institutional structure of the organs of State. The scope of the principle becomes clear if we reformulate it: the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator.[1]

For the attentive British reader, the immediate association will be the contrary principle of parliamentary supremacy or sovereignty, which is a salient feature of English constitutional law. This principle of parliamentary sovereignty means – according to Dicey's definition – that Parliament 'has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[2] Dicey summed up this doctrine in a 'grotesque expression which has become almost proverbial': 'It is a fundamental principle of English lawyers, that Parliament can do everything but make a woman a man, and a man a woman'.[3]

As we all know, time's gnawing tooth has chipped away even at this principle; or more exactly, European integration has. Yet in its archetypal exaggeration the principle is well suited for legal comparison with the doctrine that marks the German constitution, the supremacy of the constitution. The principle's practical consequence may most easily be seen from a concrete example.

In 1957 the Bundestag enacted a law reordering family law in accordance with the constitutional requirement of sex equality. The Equal Rights Act removed the

* President of the Federal Constitutional Court, Federal Republic of Germany. This is the text of the twenty-eighth Chorley Lecture, delivered at the London School of Economics and Political Science on 31 May 2000.

1 As pertinently put by Rainer Wahl, 'Der Vorrang der Verfassung' *Der Staat* 4/81, 485.

2 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915, Indianapolis: Liberty Fund, 1982) 3ff. Dicey makes clear that, as a legal term, 'Parliament' means 'the King, the House of Lords, and the House of Commons'.

3 *ibid*, Dicey quoting De Lolme.

husband's right of decision in matrimonial matters. The Act also followed the case law that parental care and custody go to both father and mother. But in the case where the parents were unable to agree, the father was to have the last word. Only this parental casting vote was held suitable to safeguard family peace and marriage in its Christian, Occidental form. Parliament felt it could deduce from the natural difference of the sexes which parent was due the casting vote. Opinion survey findings from the nineteen fifties show that at that time there was not yet any clear majority view on the question among the population. The paternal right to final decision still had numerous supporters – especially among men.[4]

The Act had barely entered into force when four married mothers filed a constitutional complaint with the Federal Constitutional Court. They asked for repeal of the law giving fathers the last word on child-rearing, because it infringed Article 3 (3) Basic Law. This article of the German constitution reads: 'Men and women shall have equal rights'. The Federal Constitutional Court declared the paternal right of final decision null and void, a year after the Act came into force. It did so irrespective of the fact that the model of an equal footing for man and woman had not yet fully taken over in the legal reality. The Court was unable to see how far objective biological or functional differences or the special nature of woman could justify the paternal prerogative.[5]

The Federal Constitutional Court thus repealed a provision enacted by a majority of the legislators elected by the people. The judges disregarded majority rule. Yet the judges are neither elected by the people, nor owe them any responsibility. For they cannot be removed through new elections, and thus cannot be called to account.[6] Is this form of judicial review not deeply undemocratic?

We usually deny this by referring to the supremacy of the constitution. This principle in its mature form is a product of American constitutional legal thinking. No one has put it in stronger words than one of the fathers of the American federal Constitution, namely Alexander Hamilton. He wrote in the *Federalist Papers*:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.[7]

The principle of the legal supremacy of the constitution was then explicitly formulated for the first time in Art 6 of the US Constitution, as follows:

> [The] constitution ... shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

This notion of the constitution as paramount law made the nullity of unconstitutional acts conceivable. This theoretical perception was provoked by

4 R. König, 'Familie und Autorität: Der deutsche Vater im Jahre 1955' in R. König, *Materialien zur Soziologie der Familie* (2nd ed, Köln: Kiepenheuer & Witsch, 1974) 214, 224 ff, and Fröhner, Stackelberger and Eser, *Familie und Ehe* (Bielefeld: Stackelberg, 1956).

5 BVerfGE 10, 59 <74 f.>.

6 Ronald Dworkin, "Gleichheit, Demokratie und die Verfassung: Wir, das Volk und die Richter", in *UK Preuß, Zum Begriff der Verfassung* (Frankfurt am Main: Fischer Taschenbuch Verlag, 1994) 171.

7 Alexander Hamilton, The Federalist No. 78, in Gary Wills (ed), *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* (New York: Bantam Books, 1982) 395.

the unfortunate experience of a legislature that saw itself as sovereign.[8] The experience of the North American colonies had been that a Parliament can also do injustice through the repeated attempts by the British Parliament, without any involvement of the colonists' assemblies, to tax articles of everyday necessity in the colonies. The assemblies declared the Acts unconstitutional and insisted on the right of all British citizens to be taxed only on the basis of a law in which they had been involved at least through elected representatives: 'No taxation without representation'.

These revolutionary events, to which we can only allude here, led to a fundamental rethinking of the problem of the limits to State power. This culminated in the image of a State order that is both democratic and guarantees the individual's fundamental rights.[9] This is the principled answer to the accusation that judicial review is incompatible with the democratic principle. Majority rule does not by itself constitute the essence of Western-style democracy. Democracy means not just that State power derives from the people and politics is determined by their elected representatives. Another part of democracy comprises particular fundamental values, to which all organs of State are committed. It is not only the two dictatorships on German soil that have taught us that democracy cannot be upheld without the validity of human rights. 'Democracy is thus a delicate balance between majority rule and particular fundamental values, such as human rights'.[10]

The judges' criterion is the Basic Law and not public opinion or what the majority of the population think – however desirable society's acceptance of the judgments may be. Thus the judges have to '*defy the general will* as soon as constitutional guarantees are at stake'.[11] Should, however, the *protection of a minority* be concerned, then concern at public protest or public conflict cannot oblige the Court to remain reticent. This advantage of judicial activity may be one of the reasons why politics is sometimes very ready to leave unpopular decisions to the Federal Constitutional Court.

Instead of pursuing the concrete development of the primacy of the constitution through American constitutional history, let us use the German constitution as an example. For the framers of the Basic Law in 1948–9 transformed American experience and achievements into written constitutional law. This also applies to judicial review, which was born with the US Supreme Court's judgment in *Marbury* v *Madison*.[12]

There are three traits that primarily characterise the principle of supremacy of the constitution: 1. The possibility of distinguishing between constitutional and other laws; 2. the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and 3. an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.[13]

The Basic Law opens with a catalogue of human rights, crowned by the principle of human dignity. The failure of the Weimar Republic and the experience of the totalitarian Nazi regime did not only induce the framers of our constitution to cast

8 As well put by Wahl, n 1 above, 489 f.
9 *ibid* 490.
10 Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989) 125.
11 Ronald Dworkin, n 6 above, 172. See also Eric Barendt, *An Introduction to Constitutional Law* (New York: Oxford University Press, 1998) 24.
12 1 Cranch 137 (1803).
13 cf n 1 above, 490f, who requires as a further prerequisite that the constitution be understood as a self-binding of the sovereign people in favour of the individual's human rights. cf also n 2 above, 40, though here speaking of features of a 'non-sovereign law-making body'.

human rights and freedoms as enforceable subjective rights. Additionally, they allotted the fundamental rights a special rank: the Basic Law explicitly orders that the basic rights shall bind the legislature, the executive and the judiciary as directly applicable law (Article 3 (3) Basic Law). As Dieter Grimm rightly emphasised: 'It was the firm consensus of all political forces active in the constitutional assembly to prevent another failure of representative democracy in Germany and to establish effective safeguards against dictatorship and disregard of human rights. The constitution should therefore be the paramount law of the land and claim priority over any government act'.[14]

It is not only the basic rights that limit the right of the majority to decide as it pleases. There are special provisions in our Constitution for its own amendment. Moreover, basic constitutional principles which structure the State – such as democracy, separation of powers, the rule of law and respect for human dignity – may not be altered at all. The aim was to prevent the enemies of democracy from overturning it using its own instruments – like majority rule.

To have laid down the principle of supremacy of the constitution with distinctness is much, as Dicey says, 'but the great problem was how to ensure that the principle should be obeyed'.[15] As we all know, a Bill of Rights, embodied in the constitution, is not by itself sufficient to establish a stable democracy committed to fundamental values and the rule of law. Democracy must be continually cherished and defended. The challenge must be met not only by those engaged in politics as a profession. Accordingly, in the German system all constitutional organs have to respect and enforce the human rights. This duty has to be observed by all administrative bodies, and by the judiciary.

But the principle of supremacy of the constitution attains its practical point only with the introduction of constitutional jurisdiction.[16] The authors of the Basic Law established a special institution designed to enforce the constitution against any other government authority. It was also to be a safeguard against dictatorship and disregard of human rights. This institution is the Federal Constitutional Court, endowed with ample powers, among them judicial review of legislation as well as of executive acts and judicial decisions.

Only this Court may find that a law is incompatible with the Basic Law. Should another court consider a law to be unconstitutional and therefore wish not to apply it, it must first obtain the decision of the Federal Constitutional Court.[17] This Court is not a general court of review which examines the decisions of ordinary courts for any error of fact or law. Its exclusive responsibility is to decide questions of constitutional law and to interpret and apply the Basic Law with final binding force.[18] The Court enjoys the last word on the meaning of the Basic Law, and its word is law.[19]

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14 Dieter Grimm, 'Human Rights and Judicial Review in Germany' in David M. Beatty, (ed), *Human Rights and Judicial Review, A Comparative Perspective* (Dordrecht: Nijhoff, 1994) 267–295, 270.

15 n 2 above, 88.

16 n 1 above, 485.

17 Additionally, the Federal Government, a State Government or one third of the members of the Bundestag may have the constitutionality of a legal norm reviewed. We speak with regard to this kind of proceedings of abstract norm control.

18 See Art 31(1) of the Federal Constitutional Court Act: 'The decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as all courts and authorities.'

19 See Art 31(2). If a law is declared to be compatible or incompatible with the Basic Law or other federal law or to be null and void, the decision shall be published in the Federal Law Gazette by the Federal Minister of Justice, because these decisions shall have the force of law.

In recent history, the concept of constitutional jurisdiction has become, in Europe and globally, a consistent feature of democratic governance. At present, this no longer applies only to Europe. Constitutional courts also operate, for example, in South Korea, in Mongolia, in the Republic of South Africa, and in most of the countries of Central and South America. The widespread appearance of constitutional jurisdiction in Western European countries following World War II was a clear reaction to authoritarian and totalitarian forms of government. This institution was perceived as a necessary guarantee of a democratic legal system. The mass emergence of constitutional courts was also a characteristic feature of the system transformations in Central and Eastern Europe at the turn of the 1980s, in the countries of so-called 'real socialism'. By this means political reforms were often started, and the constitutional courts became their guarantor. In this development, the German system served as a model, in the same way as the authors of the Basic Law looked to the US Supreme Court as a model for establishing a special court of constitutional review.

The power of judicial review is a chief legal instrument in the system of checks and balances. Nevertheless, it is not a universal or necessary element of a democratic constitution. We know some democracies that have neither constitutional jurisdiction nor judicial review in the strict sense, although – or just because – their constitution is firmly based on the separation of powers. Consider the Scandinavian countries, or the Netherlands. Britain in particular had no judicial review until its membership of the European Union. In 1915 Dicey was still able to say imperturbably: 'No British Court can give judgment, or ever does give judgment, that an Act of Parliament need not be obeyed because it is unconstitutional',[20] because the doctrine of parliamentary supremacy is 'the very keystone of the law of the [British] constitution'.[21]

The dominance of this principle in Britain likewise has historical reasons. The doctrine of fundamental rights has – as we all know – important British sources. Consider Magna Carta of 1215, the Petition of Rights of 1628, the Habeas Corpus Act of 1679 and the Bill of Rights of 1689. In early 17th century Britain there were even delicate beginnings of the idea of the primacy of fundamental rights and principles.[22] Yet this idea 'became eclipsed at the end of the seventeenth century by the concept of absolute Parliamentary sovereignty,' as Anthony Lester and David Pannick put it.[23] While judges had at the time fought both for their independence and for judicial review, they won only the fight for judicial independence. That was more or less the price they had to pay for their alliance with Parliament against the Crown. In the words of Lester and Pannick, 'The "glorious bloodless" revolution was won by Parliament; and although the Bill of Rights of 1688–89 and the Act of Settlement of 1700 recognised some important personal rights and liberties, the terms of the constitutional settlement were mainly concerned with the rights and liberties of Parliament. The alliance of Parliament

20 n 2 above, 47.

21 *ibid* 25.

22 One of England's most famous judges, Sir Edward Coke, stated in a judgment in 1610 (in the case of Dr Thomas Vonham) that if a law run counter to common right and reason, then it is contradictory and therefore unenforceable. He pronounced it null, in the words: 'the common law will control it and adjudge such act to be void.' Reported in Gerald Stourzh, *Vom Widerstandsrecht zur Verfassungsgerichtsbarkeit: Zum Problem der Verfassungswidrigkeit im 18. Jahrhundert* (Graz: Styria, 1974) 14.

23 Anthony Lester and David Pannick (eds), *Human Rights – Law and Practice* (London: Butterworths, 1999) 1.

and the common lawyers ensured that the supremacy of the law would mean the supremacy of Parliament'.[24]

It would, though, be wrong to believe that fundamental values played no part in the case law of states without constitutional jurisdiction. Each democratic judiciary will develop tools to perform judicial control of legislative acts, for example by interpretation in the light of a fundamental principle. Thus, the British courts apply a kind of implicit constitution-conformable interpretation. This means that if the wording of the statute so allows, the court will interpret parliamentary legislation in such a way as to avoid a violation of fundamental principles.[25] Since the passage of the European Communities Act 1972 the British courts play 'a key role by seeking, wherever possible, to interpret national law consistently with Community law, thus ensuring that the latter takes effect throughout the Union'. So said the Lord Chancellor at the Millennium Lectures a few weeks ago.[26]

Moreover, the House of Lords decided that parliamentary legislation should not be applied when it is incompatible with a provision of Community law. The grounds of the House of Lords ruling state that Parliament 'had voluntarily accepted a limit on its legislative powers through the passage of the European Communities Act 1972',[27] in which Parliament directed the courts to give priority to directly effective Community law. While this is not the end of the principle of parliamentary supremacy, it is nonetheless a not inconsiderable limitation of it.

This experience associated with European integration has not managed to shake British loyalty to the principle of parliamentary supremacy. On the contrary, it strongly influenced the debate as to how – and with what judicial powers – the European Convention on Human Rights ought to be incorporated into national law.[28] The key provision of the Human Rights Act imposes a duty upon all public authorities to act compatibly with Convention rights. But just as before, British courts are not entitled to set aside parliamentary legislation on the ground that it violates human rights.

The Human Rights Act 1998 does not alter this position. It lays down the following procedure. First, courts have to interpret national legislation, wherever possible, in a way which is compatible with Convention rights. Where this is not possible, the higher courts have to make a formal declaration that national legislation is incompatible with a Convention right. Such a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in question, nor is it binding on the parties to the proceedings in which it is made. The declaration merely sets in motion a fast-track procedure to amend incompatible legislation.[29] Thus, the power to amend parliamentary legislation is strictly reserved to Parliament itself and – under certain provisions[30] – to the government. The same rules apply if the European Court of Human Rights states the incompatibility of British national law with the Convention.

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24 The sentence continues: 'more realistically, the supremacy of the central government in Parliament, Lord Hailsham of St Marylebone's "elective dictatorship"'. *ibid.*

25 Rob Bakker, "Verfassungskonforme Auslegung" in Rob Bakker et al (eds), *Judicial Control – Comparative Essays on Judicial Review* (Antwerpen: Makeu, 1995) 20.

26 Lord Irvine of Lairg, 'The Influence of Europe on Public Law in the United Kingdom' in Basil Markesinis (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law*, (Oxford: Hart, 2000) 11, 12.

27 n 11 above 99.

28 See n 23 above, 11–12, and n 26 above, 14–16.

29 Human Rights Act 1998, s 3(1), ss 4(2) and (6).

30 Human Rights Act 1998, s 10.

This scheme, which has its roots in the New Zealand Bill of Rights Act 1990, is described by Anthony Lester as 'an ingenious and successful reconciliation of the principles of parliamentary sovereignty and the need for effective domestic remedies'.[31] Whether this mode of proceeding is in fact the philosopher's stone is something we shall learn from coming years of British court practice. Comparative lawyers and legal sociologists will find a research field here that is as interesting as it is important. For not just in Britain, but in all countries with a Bill of Rights, it is a thorny question how to draw a line between the law-making power of the legislature and judicial review.

Allow me to bring this out by looking at the key problem the concept of primacy of the constitution brings, as illustrated by German constitutional law. It should first be stated that the Federal Constitutional Court performs a predominantly checking function, delimiting and restraining power. Its job is to tie policy to law, and subordinate it to law. For the Basic Law has 'resolved the age-old tension between power and law in favour of the law'.[32] The Court's task is the limited one of interpreting the Constitution in Court proceedings; considerations of expediency found in politics are not its concern.[33] The Federal Constitutional Court is 'designed as an organ of law, not of politics'; even if its decision may, inevitably, have political repercussions.[34] Nonetheless it is a crucial question whether constitutional adjudication can at all be separated with logical distinctness from lawmaking.

This difficulty has to do with the specific nature of the text. The Articles of the Basic Law are marked by a low degree of definiteness. The Basic Law, considered from a structural viewpoint, is a framework order (*Rahmenordnung*). With very few exceptions, it formulates no directly applicable provisions. Its articles are norms with great openness, and margins of interpretation that are hard to delimit.[35] The Basic Law essentially contains – apart from the law on the organisation of the State – principles that must first be spelled out before they can be applied.[36]

Let us take as an example an important article devoted to the family. It opens with the sentence: 'Marriage and the family shall enjoy the special protection of the State.' (Article 6(1) Basic Law). What is meant by the term 'family'? Only a family founded on marriage? That was the opinion of the framers of the Basic Law. Or should we understand 'family' in the light of present-day circumstances, and interpret the term in line with the sociology of the family? That was and is a recurrent dispute not just among German constitutional scholars. The Federal Constitutional Court too has repeatedly dealt with, for instance, the question

31 n 26 above, 15.

32 Helmut Simon, "Verfassungsgerichtsbarkeit" in E. Benda, W. Maihofer and H. Vogel (eds), *Handbuch des Verfassungsrechts* (Berlin/New York: de Gruyter, 2nd ed, 1994) 1137 ff, 1661.

33 So the Federal Constitutional Court refrains from considering whether the legislature has chosen the wisest, most just, and most expedient solution. Cf BVerfGE 36, 174 <189>, 38, 312 <322>.

34 As rightly put by Thomas Clemens, 'Das Bundesverfassungsgericht im Rechts- und Verfassungsstaat: Sein Verhältnis zur Politik und zum einfachen Recht; Entwicklungslinien seiner Rechtsprechung' in Michael Piazolo (ed), *Das Bundesverfassungsgericht – ein Gericht im Schnittpunkt von Recht und Politik* (Mainz – München: Hase & Köhler, 1995) 13ff, 16f; and Dieter C. Umbach, 'The German Democracy and the Federal Constitutional Court as Promoter and Guardian of the Rule of Law' in *Democracy and the Rule of Law in Germany* (Jordan: Konrad Ackenauer Foundation, 1992) 25f.

35 K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: Muller, 1995) 20, and Wolfgang Zeidler, *Verfassungsgerichtsbarkeit, Gesetzgebung und politische Führung, Ein Cappenberger Gespräch* (Köln: Grote, 1980) 46.

36 On the foregoing cf Ernst-Wolfgang Böckenförde, "Die Methoden der Verfassungsinterpretation" in Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie* (2nd edn, Frankfurt a.M: Suhrkamp, 1992) 53 ff, 58.

whether there could be a family in the legal sense where father and mother lived together unmarried with their child. At first the Federal Constitutional Court took the view that the child born out of wedlock had a constitutionally protected relationship with each of its father and mother. It was not, however, prepared to treat extramarital cohabitation, with a child, as a family within the meaning of the constitution.[37] This distinction, felt to be odd not to say grotesque, could hardly be made comprehensible to the legal layman.

Gradually the insight dawned on the Court that the constitutionally regulated protection of the family could not be made dependent on whether the parents had found their way to the registry office. For what deserves protection is the fact that people live together and collaborate in order to raise and bring up children. The Court gradually adjusted its legal concept of the family to social reality. The legislator too then renewed family law accordingly. Among other things, parents living together unmarried today have the possibility of joint custody.

At present one vigorously argued question is how the constitutional concept of marriage is to be understood. Is it essential to marriage within the meaning of the constitution that it be between partners of opposite sex, or is this state-protected institution also open to homosexual couples? The Federal Constitutional Court has to date confined constitutional protection to a life partnership of man and woman, so that same-sex couples in Germany are still barred from the registry office.[38] The institution of marriage could accordingly not even be opened up to same-sex couples by an ordinary Act.[39] It would take a constitutional amendment by the requisite qualified majority.[40] But how would the Federal Constitutional Court decide, if one day the social conception of marriage were to have fundamentally changed? Here the fact that more and more and more children are being brought up in such partnerships might shift social thinking and opinions.

The openness and breadth of the Basic Law sketched out here ought not to be pointed to as defects. On the contrary: a constitution can generally be regarded as successful if it is couched tersely and vaguely. For a constitution that were not open and therefore to some extent capable of ever-new interpretation would inevitably soon come into hopeless contradiction with its object.[41] That is why a constitution has to be understood as a living instrument that has to be interpreted in the light of current circumstances.[42]

We must accordingly concede that judicial decision making is not only law-finding, but always also law-making. The judge creates law in the process of finding a decision. Adjudication thus always has a political dimension too. This is certainly true of constitutional jurisdiction. But though interpreting the constitution cannot be reduced to textual exegesis, the question where constitutional jurisdiction's area of action ends and that of politics begins demands an answer, however imperfect. For an institution which, like the Federal Constitutional Court, reviews the functioning of the constitutionally set limits must in turn be mindful of the limits to its own decisional power.

To be honest there is no binding constitutional theory or catalogue of useful criteria that could serve as a signpost in the ridge-walking between law and

37 BVerfGE 56, 363 <386>.
38 BVerfG (3rd chamber of the First Senate) in NJW 1993, 3058, and the case law cited there.
39 See Walther Pauly, 'Sperrwirkungen des verfassungsrechtlichen Ehebegriffs' in NJW 1997, 1955.
40 Meaning two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat: Art 79(2) Basic Law.
41 Willi Geiger, *Verfassungsentwicklung durch das Bundesverfassungsgericht* (Karlsruhe: private manuscript 1965) 4.
42 As the European Court of Human Rights said in relation to the ECHR, in NJW 1999, 3109.

politics.[43] Attention is therefore increasingly being paid to theorems that circumscribe a line of thought that takes as its object the relation between constitutional jurisdiction and the other organs of State laid down in the Basic Law.[44] What could be more appropriate than to look for the information, or better the stimulus to thought, in the constitutional principles whose infringement is continually alleged in cases of boundary disputes? In the forefront here are the principle of the separation of powers and the democratic principle.

The maxims derived from those principles are necessarily very abstract. And they denote only stages in a thought process which has to be paced off in each and every case of constitutional decision-making.[45] These topics of reflection are very similar to the arguments used in Britain to justify the principle of parliamentary supremacy.

One of the good reasons for the supremacy of Parliament is for Lord Irvine the 'pragmatic imperative'. The courts, he argues, have considerably less expertise than the parliament, particularly on substantive matters of policy. It is therefore desirable 'that the authority [i.e. Parliament] itself should make such decisions because it is better equipped to do so'.[46] We speak of the functional aspect of the principle of separation of powers. This – according to the Federal Constitutional Court – is aimed primarily at having 'government decisions taken as correctly as possible, that is, by the organs best meeting the requirements for them, because of their organisation, composition, function and procedures'.[47] British lawyers call this a 'pragmatic imperative'.

Another good reason for parliamentary supremacy is the so-called 'democratic imperative'. This says that the electoral system operates as an important safeguard against misuse of public power by requiring many public authorities to submit themselves to the verdict of the electorate at periodic intervals. In the German system the democratic principle calls for self-restraint by the Federal Constitutional Court.[48] It is argued that the openness of the political process essential to democracy takes account of the fact that the Basic Law leaves political decision-making up to as broad as possible a political debate, in which the common welfare is defined.[49] This applies above all in questions where the Basic Law is not very eloquent. For in all areas not adequately provided for in constitutional law, 'the democratic principle requires that only those may decide who can be called to account again through the vote'.[50]

Response by the citizens in regular elections does not apply to the members of the Federal Constitutional Court. The judges are outside the day-to-day political struggle. Their personal and material independence, guaranteed in the Basic Law, is intended to make them immune specifically to political requirements, and

43 Jutta Limbach, 'The Law-Making Power of the Legislature and the Judicial Review' in Basil Markesinis (ed), *Law Making, Law Finding, and Law Shaping* (Oxford: Oxford University Press, 1997) 161.

44 cf eg Brun-Otto Bryde, *Verfassungsentwicklung* (Baden-Baden: Nomos, 1982) 325ff; Grimm, 'Verfassungsgerichtsbarkeit – Funktion und Funktionsgrenzen im demokratischen Staat' in Wolfgang Hoffmann-Riem (ed), *Sozialwissenschaften im Studium des Rechts II, Verfassungs- und Verwaltungsrecht* (Munich: Beck, 1977) 83ff, 98ff; Konrad Hesse, 'Funktionelle Grenzen der Verfassungsgerichtsbarkeit' in *Recht als Prozeß und Gefüge, Festschrift für Hans Huber* (Bern: Staempf, 1981) 261ff, and n 32 above, 1665ff.

45 See n 43 above, 169–175.

46 See n 26 above, 22.

47 BVerfGE 68, 1 <86>.

48 n 43 above, 171–174.

49 Bryde, n 44 above, 343.

50 Grimm, n 44 above, 100.

guarantee that the law alone counts. To decide on the optimum realisation of the common welfare is by contrast a matter for politics.

The British and the German constitutions are equally committed to the principles of democracy and the separation of powers. All the same, we have chosen different patterns of solutions to the same problems. Neither of these two principles – parliamentary supremacy and the primacy of the constitution – can claim absolute rightness for itself. The decisive question is what principle best suits the relevant legal system, political culture and historical experience. We Germans cannot say with the same pride as one old English lawyer did that we owe the advantage of a long and uninterruptedly increasing prosperity of our country to the spirit of our laws.[51] We have to grapple with a disastrous past, which has told us that a democracy cannot be maintained without the positive validity of fundamental rights.

Yet, despite our differing approaches to solutions, it is fruitful to consider from a comparative law viewpoint how these differing approaches stand up. For any system is susceptible of improvement in the light of new experience and new insights. What is more, the problem of norms that compete with each other is not just a national but also a supranational – i.e. European – one. And the point here is not just conflicts of norms but the rights and duties of European and national authorities.

With the advance of European integration, constitutional questions in the supranational framework are becoming ever more pressing. The Charter of Fundamental Rights should be a first step along this road. European citizens do not want to have to extricate their fundamental rights laboriously out of hundreds of judgments and the chaotic tangle of the treaties. I do not share the concern that the Charter may prove to be a Trojan horse and undermine the sovereignty of Member States. The automatic association of constitution with statehood has become anachronistic and questionable. The historically-grown European nation States will remain the indispensable basis of international and supranational organisations. But just because that is so, there is need of a constitution to confirm and to delimit the power of Brussels. A constitution could at long last provide clarity, and not just about the rights of Union citizens. It could set bounds on Europe, and once and for all settle the tension between European and national law. That is why it is important for us to ponder from a comparative-law viewpoint how we are in future to organise the European Union democratically and in accordance with the principle of separation of powers in some sort of basic law. For it is the prime task of a modern constitution to set bounds on political rule, in order to guarantee the freedom of the citizens.

51 As Hallam did in 1818, cited in n 2 above, cxxv.