ARTICLES

The Doctrine of Parliamentary Sovereignty in Comparative Perspective

By Markus Ogorek[*]

A. Introduction

For the German-trained lawyer, the process of coming to terms with the constitutional law of the United Kingdom can be disconcerting. This disorientation arises principally because the study of constitutional law on the other side of the English Channel seems to lack an appropriate object to deal with. State order in the United Kingdom is not based on a definitive constitutional document created at a particular point in history which would be in any way comparable to the German constitutional document, the Basic Law (*Grundgesetz*). In spite of this, as Helmut Weber so aptly noted in a talk before the Centre for British Studies of Berlin's Humboldt University, "British textbooks on constitutional law [...] are no less numerous and no less comprehensive than German textbooks on *Verfassungsrecht*"[1]. This observation is not in the least surprising. Even though it may be disputed that a UK constitution exists in the narrower and more common continental European sense of the term, it cannot be denied that the learned discourse forming the body of constitutional scholarship in the United Kingdom is regarded by jurists not only in Europe, but in all corners of the globe, as an important standard for the scholarly examination of their own constitutional systems. This is certainly due in large measure not only to the centuries-old traditions of English constitutional law, but also to its striking intellectual depth and variety.

Without doubt, the doctrine of parliamentary sovereignty may be found at the core of English constitutional law. Albert Venn Dicey, one of Britain's most prominent

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[1] Weber, *Wer hütet die Verfassung?*, in Verfassungspolitik und Verfassungswandel, Deutschland und Großbritannien im Vergleich 89-90 (GLAEßNER/REUTTER/JEFFREY EDS., 2001).

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constitutional scholars, defined this principle by explaining that "under the English constitution, Parliament has the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament"[2]. Where and to the extent that the doctrine of parliamentary sovereignty applies, it is not possible for an act of parliament to be substantively in violation of the constitution: under the doctrine of parliamentary sovereignty, any law that obtains the necessary approval is capable of overturning, at least implicitly, any prior conflicting law, including prior constitutional laws to the contrary. Even those legal principles that are essential for the political order in terms of their substance and significance are not immune. Although somewhat of an exaggeration, this pithy eight-word summation of the constitution of the United Kingdom to be found in the literature is thus not entirely unjustified: "What the Queen in Parliament enacts is law"[3].

B. Constitutional Policy and Constitutional Change in the United Kingdom

The United Kingdom, generally considered a prime example of a state whose constitutional development is characterized by continuity, has in recent years experienced "a period of unprecedented constitutional change"[4]. A "New Labour" government came to power following the 1997 general election. One of the most important points of Labour's political agenda was the referendum held on 11 September 1997, in which three quarters of those voting gave their consent for the creation of a Scottish Parliament.[5] Just one week later, on 18 September 1997, the Government achieved a further major success with a referendum for a Welsh assembly. As a consequence of these referendums, legislation was introduced and the Government of Wales Act 1998[6] and the Scotland Act 1998[7] were passed, both devolving parts of Westminster's legislative powers to Wales (the National Assembly for Wales) and

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[2] DICEY, THE LAW OF THE CONSTITUTION 39 (10TH ED., 1985); see further BERNSDORFF, EINFÜHRUNG IN DAS ENGLISCHE RECHT 30-40 (2ND ED., 2000), who gives a short overview over the historic background of parliamentary sovereignty.

[3] Selway, *The Constitution of the UK: a Long Distance Perspective*, 30 COMMON LAW WORLD REVIEW 4 (2001).

[4] Hazell, *The New Constitutional Settlement*, in CONSTITUTIONAL FUTURES. A HISTORY OF THE NEXT TEN YEARS 230 (HAZELL, ED., 1999).

[5] Nearly 75% of those voting agreed that there should be a Scottish Parliament, but this represented under 45% of the electorate, see http://www.scottish.parliament.uk/corporate/history/aDevolvedParliament/results.htm.

[6] *Halsbury's Statutes*, 10 CURRENT STATUTES SERVICE,133 (1999).

[7] *Halsbury's Statutes*, 10 CURRENT STATUTES SERVICE, 363 (1999).

Scotland (the Scottish Parliament) respectively.[8] Far-reaching changes of the UK constitution were also accomplished by the passage of the Human Rights Act 1998[9], which embedded numerous guarantees of the European Convention on Human Rights (ECHR) into all three jurisdictions of the United Kingdom. Further reforms affected the processes of the House of Commons, the composition of the House of Lords (which to a large extent consisted of hereditary nobility[10]), and established legal rights to obtain information from public authorities under the Freedom of Information Act 2000[11].

The legislation of the Labour Government has altered the constitutional landscape of the United Kingdom in a variety of ways. In particular, the creation of the Scottish Parliament and the passage of the Human Rights Act have reanimated scholarly debate over the principle that the Parliament at Westminster is subject to no limitations in its authority.[12] In the following paragraphs, these two constitutional reforms, which are among Labour's most important legislative initiatives, are examined more closely with respect to their effects on the primacy of the doctrine of parliamentary sovereignty. Corresponding points of German constitutional law are also discussed where these promise further enlightenment. A comparison with the legal situation in Germany is useful not least because the unique constitutional features of the United Kingdom are highlighted clearly when contrasted with a federal national order such as exists in Germany. According to the principle of democracy, as it is defined by Article 20 I and II Basic Law (BL), constitutional law is neither a limitation nor a prerequisite of the sovereignty of the people.[13] In contrast to the United Kingdom, however, the *Bundestag* (Federal Parliament) is not granted

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[8] The partial autonomy of Northern Ireland was embedded into the Good Friday Agreement of 10 April 1998. This agreement paved the way for new legislation (the NORTHERN IRELAND ACT 1998), defining the future institutions of government in Northern Ireland. The Northern Ireland Act entered into force on 19 November 1998. However, the resulting Northern Ireland Assembly was first suspended during February to May 2000, and has now been suspended since 15 October 2002.

[9] *Halsbury's Statutes*, CURRENT STATUTES SERVICE, Bd 7 497 (1999).

[10] For Information about the reform of the House of Lords see http://www.parliament.uk/documents/upload/HofLBpReform.pdf.

[11] Compare Singleton, *Freedom of Information Act 2000*, 24 CONSUMER LAW TODAY 5 (2001); Johnson, *The Freedom of Information Act 2000*, 151 NEW LAW JOURNAL 1030 (2001).

[12] See Poole, *Back to the Future? The Theory Of Common Law Constitutionalism*, 23 OXFORD JOURNAL OF LEGAL STUDIES 435 (2003); Morgan, *Law's British Empire*, 22 OXFORD JOURNAL OF LEGAL STUDIES 729 (2002); Selway, *supra* note 3, at 4.

[13] See Degenhart, *Staatsrecht I*, (20TH ED. 2004), § 1 marginal note 15a; Dreier, in GRUNDGESETZ VOL. 1, (DRIER, ED., 2ND ED. 2004), Präambel, marginal note 64; more restrictive Jarass, in, GRUNDGESETZ (JARASS/PIEROTH EDS., 7TH ED. 2004), Präambel, marginal note 2.

any power which could be compared to people's sovereignty, since it itself is a creature of the constitution and therefore under the obligation to abide by its regulations (Articles 1 III, 20 III BL). Even though the Basic Law may be amended by a majority of two thirds of the members in both the Federal Parliament and the *Bundesrat* (Federal Council), the legislature has to accept that no amendment is admissible which would affect any of the principles laid down in Article 79 III BL, such as human dignity or the democratic character of the federal government.

C. Legislative Powers in the Scottish Parliament and the German *Länder*

The Scotland Act, passed by the Westminster Parliament on 17 November 1998, mandated the establishment of a Scottish Parliament as the first body in almost 300 years to exclusively represent – and be accountable to – the people of Scotland.[14] Legally, the authority of the Scottish Parliament, consisting of 129 members elected for a term of four years, is established through a general devolution of powers subject to express exceptions. The areas reserved to the Westminster Parliament include in particular foreign policy, defence, constitutional law as well as citizenship and immigration law.[15] Overall, the legislative authority of the Scottish Parliament, extending as it does to a broad array of matters, is closely comparable to that of the German *Lander*. However, it must be noted that the process of devolution has not transformed the United Kingdom into a federal system; unlike the German *Lander*, the various nations of the United Kingdom are not states. Further more, the Scotland Act has not in any way affected the unlimited and undivided legal authority of the Parliament at Westminster. Thus, the UK Parliament could repeal the Scotland Act, or legislate on matters which are within the powers devolved to the Scottish Parliament.[16]

The governments in London and Edinburgh recognized early on the desirability of avoiding a situation where both seek to promote legislation on the same issues. Thus, in an accord named after Lord Sewel, the UK government pledged that it would not seek the passage of legislation at Westminster on matters which have been devolved to the Scottish Parliament without the agreement of the latter.[17] The

[14] The last Scottish Parliament was dissolved following the Acts of Union in 1707.

[15] See Schedule 5 of the SCOTLAND ACT 1998.

[16] See Section 28 (7) of the SCOTLAND ACT 1998.

[17] Lord Sewel, a former Scottish Office Minister, was the first to articulate during the proceedings on the Scotland Bill that the "UK Parliament will not normally legislate in relation to devolved matters in Scotland without the agreement of the Scottish Parliament."

same applies for provisions which modify the competences of the Scottish Parliament or the administrative authority of the Scottish Executive.[18] In cases where such legislation should prove to be necessary for the welfare of the nation as a whole, the British government declared its willingness to obtain the consent of the Scottish Parliament before passing any such act. The mechanism for obtaining such consent is known as a Sewel motion, which the Scottish Executive submits to the Scottish Parliament for a vote and in which the Members of the Scottish Parliament (MSPs) effectively invite the Westminster Parliament to pass acts which impinge on Scottish Parliament competences. If the Parliament approves a Sewel motion, the Minister for Parliamentary Business will write to the Leader of the House of Commons conveying the Parliament's agreement and informing him of the terms of the Parliament's resolution.

The way in which this procedure is exercised has recently come in for some sharp criticism. Critics maintain that the Scottish Parliament has been subverting the devolution process by carelessly surrendering the legislative authority delegated to it. Particularly in the case of highly controversial issues such as the Gambling Bill 2004 or the reduction of the age of consent for homosexual acts, the MSPs have been accused of ceding the legislative initiative to the UK Parliament in order to avoid political responsibility.[19] Certainly, the current parliamentary practice seems to evidence a dynamic of its own. Although originally conceived of for use in exceptional circumstances, 51 Sewel motions were agreed by the Scottish Parliament by the end of November 2004. Aside from the erosion of political responsibility which follows the Scottish Parliament's failure to exercise its legislative competence, the ultimate result of this ongoing use of Sewel motions is that legal standards for political areas that were intended to lie within the proper purview of Scottish authority are being established by Westminster's legislative process. However, the proven deficiencies of the parliamentary procedures in Westminster provided the impetus for the constitution of national parliaments in the first place. It is at least doubtful whether the founding principles of the Scottish Parliament (sharing of power, accountability, access and openness, and equal opportunities) can be served as well by the legislative process in Westminster.

The often bitter disappointment which the great number of Sewel motions have engendered can be primarily attributed to the fact that the constitutional promotion of the nations of the United Kingdom is the product of extremely varied, and sometimes opposing, political agendas. Whereas the central government regards its pol-

[18] More detailed information about the Sewel Convention is available under http://www.scotland.gov.uk/Topics/Government/Sewel/KeyFacts.

[19] See Denholm, *Executive Hands Over All Its Aces On Gambling Bill*, THE SCOTSMAN, 15 December 2004, 6.

icy of devolution as a means of preserving political stability, at least some portions of the regional population regard it as the first step on the road to national independence.[20] In spite of these patently irreconcilable positions, which have brought the parliamentary sovereignty of Westminster into overt conflict with the popular sovereignty of the regional population,[21] a federal order, such as was reestablished in Germany following the Second World War, has not to date been considered as a feasible approach for resolving the conflict of interests between the central government and the nations.

A federal system requires that the competences of the various levels of government be balanced in such a way that the nation as a whole and the constituent states remain viable and complement each other. In Germany, the fundamental principle respecting the division of legislative authority is articulated in Article 70 BL. According to this provision, the *Lander* retain legislative authority, provided that the Basic Law has not reserved this legislative authority to the federal government. A legal situation comparable to Scotland, in which both the federal legislature and the individual state legislatures may pass acts regulating the same matters, does exist under the concurrent legislative authority. In accordance with the legal definition of Article 72 I BL, where concurrent legislative power exists, the *Lander* shall have power to legislate as long as and to the extent that the Federation has not exercised its legislative power by enacting a law. However, according to Article 72 II BL, regulation through federal legislation is only permissible where and to the extent that it is necessary to ensure comparable living conditions throughout the national territory or to preserve legal and economic unity in the interest of the nation as a whole.

Even though the competences of exclusive and concurrent federal legislation (Articles 70 *et seq*. BL) greatly exceed those of the *Lander*, the latter still possess extensive scope for independent legislative initiative. In addition, the *Bundesrat*, or Federal Council, provides the *Lander* with sufficient, institutionally safeguarded participatory rights (Article 79 III BL) in respect to federal legislation (Articles 50, 77 *et seq*. BL). Thus, the federal legislature is obligated to obtain the consent of the Federal Council before it passes legislation on a great number of issues which are set out in the Basic Law (see e.g. Articles 84 I, 87 III, 105 III BL).[22] Should the Federal Council

[20] See MacCormick, *Is there a Constitutional Path to Scottish Independence?*, PARLIAMENTARY AFFairs 721 (2000).

[21] See MUNRO, STUDIES IN CONSTITUTIONAL LAW 168 (2ND ED. 1999); Little, *Scotland and parliamentary sovereignty*, 24 Legal STUDIES 540 (2004).

[22] In the 14th legislative period (1998-2002), 54.8% of the statutes passed by the federal legislature had to be consented by the Federal Council; see Bannas, *Widerstand aus den eigenen Reihen,* FRANKFURTER ALLGEMEINE ZEITUNG of 20 December 2004, 4.

withhold its consent to a bill on such a matter, the Federal Parliament cannot then enact it (no matter the level of support for it within the Federal Parliament).

In contrast to the Scottish Parliament, which cannot prevent the UK Parliament legislating on any matter by refusing its consent to a Sewel motion, the *Lander* have legal recourse in the event that their participatory rights are not sufficiently observed. This takes the form of the *abstrakte Normenkontrolle* (Article 93 I No. 2 GG, §§ 13 No. 6, 76 ff. BVerfGG), or abstract judicial review before the Federal Constitutional Court. Further more, the *Lander* can seek an *Organstreitverfahren* (Article 93 I No. 1 GG, §§ 13 No. 5, 63 ff. BVerfGG), a legal proceeding specified in the Basic Law for resolving conflicts between constitutional organs. In the past, the *Lander* have made impressive use of these instruments. One powerful example from recent rulings of the Federal Constitutional Court is the decision respecting the Immigration Act of 20 June 2002[23], during the passage of which irregularities occurred with respect to the voting process in the Federal Council.[24] On the application of the state governments of Baden-Wurttemberg, Bavaria, Hessen, Saxony, the Saarland and Thuringia, the Constitutional Court justices found that majority consent of the Federal Council to this bill had not been effectively granted. Since the votes of the state of Brandenburg, which would have decided the issue, had not been properly cast, the Federal Constitutional Court in its ruling of 18 December 2002 declared the Immigration Act as irreconcilable with Article 78 BL and thus void.

D. The Adoption of the ECHR into UK and German Law

As one of the most important human rights instruments of the Council of Europe, the European Convention on Human Rights (ECHR) of 4 November 1950 recognizes a broad range of fundamental rights and freedoms. Specifically, these include the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to freedom and security, the right to a fair trail, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to effective remedy and the prohibition of discrimination. The supplementary protocols of the Convention guarantee further rights (for example, Protocols No. 6 and 13 mandate the complete elimination of capital punishment). As the European Convention on Human Rights is an agreement under international law, it is not directly applicable within the member states of the Council of Europe. Rather, individuals can only cite the human rights guaranteed in the ECHR in disputes with national authorities when the national legisla-

[23] BGBl I p. 1946.

[24] See BVerfG NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 339 (2003).

ture has implemented the Convention in the form of national law. Large parts of the Convention were given effect in the law of the United Kingdom in the form of the Human Rights Act 1998 (HRA), which came into force on 2 October 2000.[25] The Human Rights Act 1998 adopts the European Convention on Human Rights Articles 2-12, 14, 16-18, the First Protocol Articles 1-3 and the Sixth Protocol Articles 1-2 into UK law, allowing proceedings to be brought before UK courts if a public authority has contravened the act.[26]

In accordance with Section 6 HRA, the aforementioned Convention rights are binding for all public institutions and authorities, including the courts. Correspondingly, Section 3 (1) HRA stipulates that, as much as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. Section 3 (2) HRA clarifies that this provision is not meant to imply that the legislature is bound by the Convention. Accordingly, Section 1 HRA does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; the same applies for the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

As the Human Rights Act does not take precedence over other primary legislation, courts may not ignore the legislative will expressed by Parliament through the passage of an Act even when this Act violates the ECHR.[27] Ultimately, the courts must apply such an Act even if it is impossible to interpret it such that it complies with the Convention. However, Section 4 of the Human Rights Act allows some higher courts, including the House of Lords and the Judicial Committee of the Privy Council, to issue a *declaration of incompatibility* in the event that an Act of Parliament cannot be squared with the Convention. This declaration of incompatibility does not, however, affect the validity of that Act of Parliament.[28] Even if a court should find that a statute contravenes the Convention, this does not mean that the incompatible law must be repealed or amended. Rather, the Government may determine

[25] In the academic literature it is sometimes said that the Human Rights Act 1998 "incorporates" the ECHR into the UK legal system. However, the use of this term has been criticized as being imprecise. The reason is that the HRA only enables people in the UK to enforce their existing Convention rights and freedoms in courts, see Lords Hansard, Vol. 305, 29 January 1998, Col. 421-422.

[26] See Section 1 HRA.

[27] See Bamforth, *Parliamentary Sovereignty and the Human Rights Act*, PUBLIC LAW 572 (1999); see further Mc Goldrick, *The UK Human Rights Act 1998 In Theory And Practice*, 50 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 901 (2001), regarding the fast track option for remedial legislation.

[28] See Section 4 (6) a) HRA.

at its own discretion whether, and in what way it will respond to a finding of incompatibility with respect to a Convention right.[29] Thus Parliament is in no way bound by the rights guaranteed by the Convention.[30]

In the Federal Republic of Germany, as in the United Kingdom, the important role that the ECHR plays in the interpretation and application of the law is undisputed. German courts frequently cite the ECHR to support a particular interpretation of a statute.[31] One example of the consideration of the European Convention on Human Rights in the construction of German statutory provisions is the widely discussed judgement of the German Federal Court of Justice (*Bundesgerichtshof*), regarding the admissibility in court of a diary seized from an accused.[32] In this decision, the Federal Court of Justice expressly stated that the reading of diary entries into evidence might be proscribed not only on the basis of the right of free personality development guaranteed in Article 1 I in connection with Article 2 I BL; the respect for private and family life guaranteed in Article 8 ECHR would similarly proscribe such an occurrence.[33]

With respect to the legal status of the European Convention on Human Rights in national law, the legal situation in Germany would seem to resemble that in the United Kingdom – at least at first glance. The European Convention on Human Rights was incorporated into the German legal structure on 7 August 1952.[34] In the course of a dispute in the 1950s, the opinion that the Convention had the character

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[29] Critical therefore Black-Branch, *Parliamentary Supremacy or Political Expediency?: The Constitutional Position Of The Human Rights Act Under British Law*, 23 STATUTE LAW REVIEW 59 (2002).

[30] Interestingly, this is not true for the Scottish Parliament: See Section 29 of the SCOTLAND ACT 1998.

[31] See Dreier, in DREIER, *supra* note 13 at Vor Art. 1, marginal number 28 f; Kirchhof, *Verfassungsrechtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?*, 16 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 25 f (1994); Staebe, *Die Europäische Menschenrechtskonvention und ihre Bedeutung für die Rechtsordnung der Bundesrepublik Deutschland*, 75 JURISTISCHE ARBEITSBLÄTTER 80 (1996) with further reference.

[32] See BGHSt 19, 325. See further BGHSt 34, 397 and BVerfGE 80, 367; Amelung, *Der Grundrechtsschutz der Gewissenserforschung und die strafprozessuale Behandlung von Tagebüchern*, NJW 1002 (1988); Amelung, *Die zweite Tagebuchentscheidung des BVerfG*, NJW 1753 (1990); Küpper, *Tagebücher, Tonbänder, Telefonate - Zur Lehre von den selbständigen Beweisverwertungsverboten im Strafverfahren*, JURISTENZEITSCHRIFT (JZ) 416 (1990); LABER, DIE VERWERTBARKEIT VON TAGEBUCHAUFZEICHNUNGEN IM STRAFPROZESS (1991); SACHS, VERFASSUNGSRECHT II, GRUNDRECHTE 191 (2ND ED. 2002).

[33] BGHSt 19, 325 at 326.

[34] BGBl. 1952 II, p. 685.

of an ordinary statute came to predominate in academic literature and case law.[35] The transformation norm of Article 25 BL – which provides that the generally recognized rules of international law are simultaneously a component of federal law, taking precedence over federal and state laws and giving rise to rights and duties for the residents of the federal territory directly – is broadly seen as not being applicable to the European Convention on Human Rights. To justify this, commentators note that the requirement of universality of the rule in question, stipulated by Article 25 BL, excludes the adoption of regional international custom such as the Convention (assuming that it has even risen to this level). Given that the European Convention on Human Rights applies only to those states that belong to the Council of Europe, there is no universal consensus as to the binding nature of its content.

In recent years, however, the view that the European Convention on Human Rights has only the status of an ordinary statute in Germany has been challenged ever more frequently.[36] In fact, the proposition that the European Convention on Human Rights is not a generally recognized rule of international law within the meaning of Article 25 BL reveals serious shortcomings under closer examination. The whole purpose of Article 25 BL, which aims to establish an extensive congruity between the generally recognized rules of international law and national law, rather encourages a broad interpretation of what is covered. Accordingly, it should be sufficient in establishing the applicability of Article 25 BL to show that the norm in question "is recognized and applied by the majority of states who are affected by it in an objectively or geographically demarcated fashion on account of their special relationships or joint interests."[37] There can be no serious doubt that the members of the Council of Europe fulfil the prerequisites of geographic and objective demarcation. In addition, the treaty character of the Convention does not undermine its classification as regional international custom. In principle, law derived from inter-

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[35] See Wendt, *Zur Frage der innersaatlichen Geltung und Wirkung der EMRK*, MONATSSCHRIFT FÜR DEUTSCHES RECHTS (MDR) 658 (1955); Echterhölter, *Die ERMK in der juristischen Praxis*, JZ 142 (1956); Herzog, *Das Verhältnis der Europäischen Menschenrechtskonvention zu späteren deutschen Gesetzen*, DÖV 44 (1959); Münch, *Zur Anwendung der Menschenrechtskonvention in der Bundesrepublik Deutschland*, JZ 153 (1961). The present majority opinion is expressed by Kirchhof, *supra* note 31 at 26; Limbach, *Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur*, EUGRZ 418 (2000). See further BVerfGE 74, 358 at 370.

[36] Vgl Bleckmann, *Verfassungsrang der EMRK?*, EUGRZ 152 (1994); Pernice, in GRUNDGESETZ (DRIER, ED., VOL. 2 1998), Art. 25, marginal note 21; Walter, *Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß*, ZAÖRV 961 (1999).; Stöcker, *Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik*, NJW 1905 (1982) (regarding the legal effects of judgements of the European Court of Justice); Hoffmeister, *Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland*, DER STAAT 349 (2001).

[37] Pernice, in DREIER, *supra* note 36 at Art. 25, marginal note 20; see further Koenig, in GG (MANGOLDT/KLEIN/STARCK, EDS., VOL. 2 2000), Art. 25, marginal note 28; Bleckmann, *supra* note 36 at 153.

national treaty is not considered to belong to the "generally recognized rules of international law".[38] However, the situation is different when a treaty embodies generally recognized international standards, or in other words when its content has developed to such an extent as to become international custom.[39] Consequently, declaring the human rights guaranteed by the Convention a part of the German legal structure on the basis of Article 25 BL is justifiable. At least those guarantees of the Convention that have already been developed to international custom are thus applicable in the Federal Republic without the necessity of any further formalising action.[40]

According to the wording of Article 25 BL, the generally recognized rules of international law take precedence over legislation to the contrary. Parliamentary acts that contravene the provisions of the ECHR are thus void *ab initio*. In the decisions of the Federal Constitutional Court, one can now even find indications that the ECHR is being accorded a super-constitutional standing. To avoid conflict between the German constitution and the European Convention on Human Rights, the Federal Constitutional Court has for some time been applying an interpretation of the Basic Law that relies heavily on international law. For example, the provision of a law of the state of Baden-Wurttemberg governing fire brigades, which mandated a para-fiscal levy, the so-called "fire protection levy", for men but not for women, was for decades held to be constitutional by the courts of the Federal Republic. It was not until the European Court of Human Rights ruled in its decision of 18 July 1994 that this provision was incompatible with Article 14 in conjunction with Article 4 III ECHR that the Federal Constitutional Court changed its opinion. In its decision of 24 January 1995 the Federal Constitutional Court declared the challenged provision unconstitutional and void on the grounds that it violated the prohibition of discrimination embodied in Article 3 III BL.[41] Although the Federal Constitutional Court continues to assert that the Convention is not equal in rank to constitutional law, it views the "content and developmental state" of the European Convention on Human Rights as binding for the interpretation of the Basic Law. The same applies for the decisions of the European Court of Human Rights, which according to the Federal Constitutional Court are to be used as an interpretive aid in determining the content and scope of the fundamental rights established in the constitu-

[38] Jarass, in JARASS/PIEROTH, *supra* note 13 at Art. 25, marginal note 6.

[39] Streinz, in GRUNDGESETZ (SACHS, ED., 3RD ED. 2003) Art. 25 marginal note 31.

[40] Against this background the question arises which guarantees of the ECHR can already be regarded as international custom, see Pernice, in DREIER, *supra* note 36 at Art. 25, marginal note 31.

[41] See BVerfGE 92, 91 *et seq.*

tion.[42] Therefore, at least *de facto*, the European Convention on Human Rights already enjoys precedence, even over the constitutional law as codified in the Basic Law.

E. Conclusion

The question as to how far the legislative branch is bound by the assignment of legislative competences to the various levels of government has generated differing answers in the United Kingdom and in Germany. The legal status of the ECHR and its relation to parliamentary legislation is also evaluated differently in the two countries. Neither the Scotland Act nor the Human Rights Act are legally binding on the Parliament at Westminster in any way.[43] In spite of this, the constitutional principle of parliamentary sovereignty is increasingly coming under critical scrutiny. Thus, it is noted that while it is theoretically possible that the public trust placed in MSPs may rapidly decline in future, so that Westminster will disband the Scottish Parliament, such a scenario is considered virtually impossible on account of political realities.[44] Likewise, observers maintain, no government could politically survive non-observance or repeal of the Human Rights Act.[45] In view of these considerations, it is at least debatable whether a legal principle which persists unchanged when viewed in isolation, but which cannot, or only with great difficulty, be asserted politically, should continue to apply.

The prevailing opinion in the British literature continues to find good reason in Westminster's unlimited sovereignty.[46] In this context, commentators specifically

[42] BVerfGE 74, 358 at 370; BVerfG NJW 2245 (2001).

[43] Munro, *supra* note 21 at 168.

[44] Little, *supra* note 21 at 541.

[45] See Mc Goldrick, *supra* note 27 at 945.

[46] This is not in the least surprising. In the past, the doctrine of parliamentary sovereignty has even been proven to be immune against the influence of European Community Law. In principle, the British courts recognize that European Community acts overrule national laws (see for this the "Factortame"-decision of the House of Lords: R v Secretary of State for transport, ex p Factortame (no. 2) [1991] 1 AC 603, 659). However, according to the UK courts this supremacy is based on the European Communities Act 1972, in which the British parliament classified legal acts of the European Communities as being supreme in relation to national laws. Against this background, the supremacy of European law does not outplay the doctrine of parliamentary sovereignty. This has been expressly stated by Lord Denning in the Court of Appeal's decision *Macarthys Ltd v Smith* [1979] 3 All ER 325, 329: "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of Parliament."

cite the democracy deficit of the courts, which Alexander Bickel has termed the "countermajoritarian difficulty"[47]. Whenever the judges take their duty of asserting constitutional standards seriously, they will inevitably have to hand down decisions contrary to the will of the majority of elected representatives or of the population. That is not without its difficulties. For whenever a court rules that a particular act of parliament is invalid because it violates the constitution, the decision as to the validity of legal standards lies in the hands of judges, whose legitimacy does not derive directly from the will of the body politic as expressed through the act of election. In addition, the boundaries between constitutional review on the one hand and establishment of constitutional standards through constitutional court rulings on the other hand can in some cases be anything but clear-cut. There is, therefore, also the danger that the courts could elevate themselves to the level of an ersatz legislature through the assertion of their role as constitutional guardians.[48]

Particularly in Germany, the fact that legislative conformity with the constitution is subject to judicial review has led to a "judicialization" of politics which is, at the very least, dubious with respect to the principle of democracy and to the division of powers. Whatever side is unsuccessful in the contests of day-to-day politics all too often speculates on being able to ultimately prevail by taking its case to the Federal Constitutional Court.[49] Since it was constituted in 1951, the Federal Constitutional Court has had to adjudicate virtually all major political controversies. Some particularly significant examples include the decisions relating to the banning of the Communist Party of Germany (KPD), the constitutionality of the prohibition of abortion through criminal statute, the participation of German military units in NATO-missions, and the introduction of the Euro.[50]

The Federal Constitutional Court has recognized the problem and attempts to counter it through the exercise of judicial self-restraint.[51] The refusal to "play politics" expressed by this attitude seeks to preserve the constitutionally guaranteed

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[47] BICKEL, THE LEAST DANGEROUS BRANCH, 16 (1986).

[48] See EWING/GEARTY, DEMOCRACY OR A BILL OF RIGHTS 4 (1991); Morgan, *supra* note 12 at 744-745.

[49] A good example for this attitude is a statement of the Bavarian Prime Minister Edmund Stoiber regarding the Same-Sex-Partnership-Bill: "If we had no other choice to prevent this socio-political change as by means of the Federal Constitutional Court, then we would even go before the Court." FRANKFURTER ALLGEMEINE ZEITUNG 13 July 2000, 6.

[50] KPD: BVerfGE 5, 85 *et seq.*; Abortion: BVerfGE 39, 1 *et seq.*; 88, 203 *et seq.*; 98, 265 *et seq.*: Nato-mission: BVerfG NJW 1994, 2207 *et seq.*; Euro: BVerfG NJW 1998, 1934 *et seq.*

[51] Vgl BVerfGE 36, 1, 14-15; Schlaich/Korioth, DAS BUNDESVERFASSUNGSGERICHT (6TH ED. 2004) marginal note 505.

scope for independent political action on the part of the other branches of government.[52] In the past, the justices of the Federal Constitutional Court have taken this approach extremely seriously. To cite just one instance, Paul Kirchhof, member of the Second Senate of the Federal Constitutional Court from 1987 to 1999, repeatedly warned that "adjudication [is] not legislation", and that "constitutionally, the legislature [...] is the primary interpreter of the Basic Law and the judiciary the secondary interpreter".[53] Naturally, the understanding that the judicial branch must refrain from entering the political arena must be constantly reinforced, and also applied in the nomination of judges. The question as to whether this is practised to a sufficient extent is the subject of ongoing controversy.[54]

The ability to rapidly adapt the constitution to emerging needs which is inherent in parliamentary sovereignty forms a clear contrast to the "reform sclerosis" so often bemoaned in Germany, of which the modernization of the federal system was the most recent victim.[55] However, it is important to consider that such flexibility is gained at the expense of the personal liberties of citizens and the autonomy rights of nations, as these can be curtailed by Parliament at any time. In spite of this, however, reservations respecting the omnipotence of Parliament are not widely shared in the United Kingdom. In this regard, it is noteworthy that the concept that the courts, as guardians of the constitution and the liberties which it guarantees, have a duty to protect subjects against Parliament, is only gradually starting to (re)gain[56] ground.[57] This is one further manifestation of a self-understanding of a constitutional order in which the Parliament is traditionally seen not as a threat to but as a guarantor of liberty.[58]

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[52] BVerfGE 36, 1 at 14.

[53] Kirchhof, *Verfassungsgerichtsbarkeit und Gesetzgebung*, in Badura/Scholz (eds.), Verfassungsgerichtsbarkeit und Gesetzgebung. Symposion aus Anlass des 70. Geburtstages von P. Lerche 5 (1998).

[54] Not only in Germany: See on the one hand GRIFFITH, THE POLITICS OF THE JUDICIARY, 230 (2ND ED. 1981), on the other hand WADE, CONSTITUTIONAL FUNDAMENTALS 95 (1981).

[55] See Bannas, *Widerstand aus den eigenen Reihen*, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) of 20 December 2004, 4.

[56] It was in 1610 when Sir Edward Coke, Chief Justice of the Court of Common Pleas, propounded the view that "it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void" (*Dr. Bonham's Case* [1610], 8 Co. Rep. 107a at 118a, 77 E.R. 638).

[57] SIEGHART, THE LAWFUL RIGHTS OF MANKIND 88 (1985); LOVELAND, CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION 610 (1996); Allan, *The Limits of Parliamentary Supremacy*, PUBLIC LAW 614 (1985).

[58] See Poole, *supra* note 12 at 451.