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WHO GUARDS THE CONSTITUTION?

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English version of a paper
delivered on 22nd October 1999
at the Centre for British Studies, Humboldt University Berlin
Colloquium of the Graduiertenkolleg „Das neue Europa“

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Who guards the constitution?

To include the United Kingdom of Great Britain and Northern Ireland in a comparative treatise on the respective guardians of the constitution presupposes that there is such a thing as a British constitution. From a Continental European or a North American point of view such a presupposition may well be challenged - suffice it to refer to the French jurist and politician Alexis de Tocqueville (Bradley 1945: 100) or the American Chief Justice John Marshall[1] as two early examples of important authors who have indeed done so. To this very day the fact remains that there is no British constitution in the usual or narrow sense of the word. The main argument for such a statement, however, is not the lack of a particular and comprehensive constitutional *document* set in force at a specific point in time - although this often appears to be the only issue when the question is dicussed. A constitution assembled from a number of statutes about various fundamental matters over the course of some time or even an unwritten constitution consisting of traditional rules and principles handed down from the past without formal enactment is perfectly conceivable as being nevertheless a constitution in a narrow, technical sense. The decisive point is, in my opinion, that due to the basic doctrine of *parliamentary supremacy* no meaningful distinction between constitutional laws and ordinary laws (laws not being part of the constitution) exists in Britain. If the former can be amended or repealed by the latter at any time and without material limitations or formal impediments, if, therefore, Parliament is not under the

1. In *Marbury v. Madison* (1803) [1 Cranch, 137]

constitution but the constitution is subject to each and every decision of Parliament, the word "constitution" designates something rather different from what it means in other countries. Or in other words: From a Continental European or North American point of view the British constitution consists of one rule only, the very rule proclaiming *parliamentary supremacy*.

But then, British textbooks on *Constitutional Law* are no less numerous and no less voluminous than German ones on *Verfassungsrecht* and certainly do not restrict themselves to the one rule mentioned. The same is true of political science textbooks on the working of the constitution. And in the general political discussion the constitutionality of controversial measures is a frequent topic in both countries: There is not a day in the British media without statements or polemics on the constitutionality or otherwise on e.g. introducing the Euro or remaining a member state of the European Union. For the rest of this paper I shall, therefore, ignore the differing concepts of what a proper constitution precisely is and conclude these introductory remarks with the simple observation that the general public in both countries appears to agree on this: There is a constitution in the respective country, the constitution is highly valued, and it should be adhered to. Highly valued things need to be protected. Who then protects the German constitution, who protects the British constitution?

1. Guarding the Constitution in Germany . . .

"Who are the guardians of the constitution?" is a familiar question in Germany. Even before World War I and during the *Weimar Republic* period hardly a book on the constitution could be found without a chapter or at least a few paragraphs dedicated to it, frequently expressed in exactly those words: 'Guardians of the Constitution' (*'Verfassungshüter')*. The academic discussion included references to institutions as far back in the past as the Spartan ephors or at least the Royal Coronation Oath or the Estates' rights to prefer charges for violation of the constitution in the early 19th century's Bavarian or Saxon constitutions. As to institutions of the time, the discussion in the 1920s and early 1930s centred on the roles of the *Reichsgericht*[2], the

2. 'Imperial Court', i.e. the Supreme Court of Germany during the *Weimar Republic* period.

Staatsgerichtshof[3] or the *Reichspräsident*[4]. (See, for example, Schmitt 1931, with many further references.)

Who, then, are the guardians of the *Grundgesetz*, the constitution of the Federal Republic of Germany since 1949? Are there specific legal obligations to protect the constitution, allocations of concrete tasks and duties? And if so, who are the addressees of such tasks and duties?

The *Grundgesetz* itself contains some pertinent articles:

Art. 1 I GG begins with the central tenet of the constitution: "Human dignity is inviolable"; and then continues: "To respect and protect it is the *duty of all state authority*."[5]

Art. 1 III GG: "The following basic rights are *binding on legislature, executive, and judiciary* as directly enforceable laws."[6]

Art 20 III GG: "*Legislation* is subject to the constitutional order; *the executive and the judiciary* are *bound* by law and justice."[7]

To sum up: *All state bodies* must guard the constitution, *all state authority* is bound by it and is to be exercised in accordance with it.

In a more specific sense[8], however, it is the courts and in particular the constitutional courts who

3. 'State Court' for, among others, disputes between the constituent states of Germany or disputes between a state and the central government during part of the *Weimar Republic* period.

4. 'Imperial President', i.e. the President of Germany during the *Weimar Republic* period.

5. "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist die *Verpflichtung aller staatlichen Gewalt*."

6. "Die nachfolgenden Grundrechte *binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung* als unmittelbar geltendes Recht."

7. "*Die Gesetzgebung* ist an die verfassungsmäßige Ordnung, *die vollziehende Gewalt und Rechtsprechung* sind an Gesetz und Recht *gebunden*."

8. In a different sense, it is the task of the Federal Bureau for the Protection of the Constitution (one of the German intelligence services), cf. art. 87 I 2 GG.

are entrusted with the task to guard the constitution:

Art. 92 GG: "Judicial power is vested in the judges; it is exercised by the Federal Constitutional Court, by the federal courts provided for in this Constitution, and by the courts of the States."[9]

In Art. 93 GG it says: "The Federal Constitutional Court decides on:", followed by an enumeration of seven different kinds of constitutional disputes, such as between highest state bodies, between the federal and state governments or in the case of doubts about the constitutionality of Acts of Parliament. The article ends with a general reference to further types of cases provided for in other parts of the constitution[10] and with an enabling clause for Parliament to introduce even more such types of cases by simple Acts of Parliament.

This express, concrete and comprehensive allocation of tasks has shown effects. In modern commentaries on the *Grundgesetz* (e.g.: Sachs (ed.) 1999: Art. 93, Rn 1) and textbooks on constitutional law (e.g.: Maunz / Zippelius 1998: 424) as well as the present day general discourse in the media, the word *Verfassungshüter* usually appears as a synonym, as if it were a technical term, for the constitutional court and its judges only[11]. The Federal Constitutional Court has adopted the term and has used it in several of its judgements to designate itself.[12]

So far there was no mentioning of the citizens or of the individual citizen.

The recent German discussion on existence, lack of or necessity of *Verfassungspatriotismus*[13] (Sternberger 1982) (patriotism centred on the constitution and its values) indicates that a constitution depends on its acceptance by the citizens, that their active hostility destroys it immediately, their indifference in the long run (Hammer 2000: 63). A sufficiently positive

9. "Die rechtsprechende Gewalt ist den Richtern anvertraut; sie wird durch das Bundesverfasungsgericht, durch die in diesem Grundgesetz vorgesehenen Bundesgerichte und durch die Gerichte der Länder ausgeübt."

10. Artt. 18, 21, 41, 61, 98, 99, 100, 126

11. Sometimes slightly modified as *oberste Verfassungshüter* (uppermost guardians of the constitution).

12. E.g.: BVerfGE 2, 124,130; 40, 88, 93 (Decisions of the Federal Constitutional Court vol. 2, p. 124, 130; vol. 40, p. 88, 93.)

13. In recent years it has become a key term in the political discourse in Germany.

attitude of a sufficiently large number of citizens towards their constitution appears therefore to be indispensable, even though generally felt as a sentiment or a vague emotion only which does not directly translate into specific acts of guarding the constitution.

What, then, is a citizen's concrete *legal* position towards the constitution in respect of *acts* of the citizen, be they hostile or protective?

Going through the statute book one can find *prohibitions* and *empowerments.* According to §§ 80 to 108 e Criminal Code certain acts directed against the constitution itself or against its working are criminal offences and punishable; in some cases, like certain types of treason, the acts may lead to a life sentence. For extreme cases of abuse of certain basic rights art. 18 of the constitution provides for a declaration of forfeiture of these rights by the Federal Constitutional Court.[14] Art. 20 IV GG, on the other hand, gives each citizen an individual constitutional right of resistance as a means of last resort against those who undertake to abolish the constitutional order.[15]

There are no positive legal *commands,* though. The constitution of the Free City of Danzig (1920), for example, contained such a command. Its art. 87 read: "It is the duty of each citizen to protect the constitution against unlawful attacks."[16] Under present German law we can find such duties imposed on civil servants. According to § 52 II Federal Civil Service Act, a civil servant must speak up for the constitution and actively support it in his whole conduct.[17] A general citizens' duty to actively support or protect the constitution, comparable to the general duty

14. "Wer die Freiheit der Meinungsäußerung, insbesondere die Pressefreiheit (Artikel 5 Abs. 1), die Lehrfreiheit (Artikel 5 Abs. 3), die Versammlungsfreiheit (Artikel 8), die Vereinigungsfreiheit (Artikel 9), das Brief-, Post- und Fernmeldegeheimnis (Artikel 10), das Eigentum (Artikel 14) oder das Asylrecht (Artikel 16a) zum Kampfe gegen die freiheitliche demokratische Grundordnung mißbraucht, verwirkt diese Grundrechte. Die Verwirkung und ihr Ausmaß werden durch das Bundesverfassungsgericht ausgesprochen."

15. "Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist."

16. "Es ist Pflicht jedes Staatsbürgers, die Verfassung gegen gesetzwidrige Angriffe zu schützen." (Schmitt 1931: 21)

17. "Der Beamte muß sich durch sein gesamtes Verhalten zu der freiheitlichen demokratischen Grundordnung im Sinne des Grundgesetzes bekennen und für deren Erhaltung eintreten." (§ 52 II BBG)

imposed by § 323 c of the Criminal Code[18] to help another person in cases of accidents and common danger, does not, however, exist under present German federal law.[19]

Verfassungspatriotismus can only be hoped for among the citizens as their political attitude, it is not *legally* obligatory for them, as was the case for example in the Greek constitution of 1927 which decreed in its art. 127 that the protection of the constitution was entrusted to the patriotism of the Hellenics.[20] For Germany the protection of the constitution in a legal sense remains the task of the courts in general and the constitutional court in particular.

3. . . . and in the United Kingdom?

There is no constitutional court in Britain, nor any other institution with the specific task of guarding the constitution. There is not even a word for *Verfassungshüter*. The German term[21] can, of course, be translated or paraphrased, but 'guardians of the constitution' or the like has a faintly quaint ring.[22] Not only such a term, however, but even the notion it designates will not normally be found in a modern British textbook on constitutional law as a separate issue dealt with at any length.

This has not always been so. In the works and various constitutional drafts and proposels, for example, of the 17th-century English political philosopher James Harrington and his circle, *Conservators of Liberty* and *Conservators of the Charter* to "guard whatever constitution was

18. § 323c StGB: Unterlassene Hilfeleistung: Wer bei Unglücksfällen oder gemeiner Gefahr oder Not nicht Hilfe leistet, obwohl dies erforderlich und ihm den Umständen nach zuzumuten, insbesondere ohne erhebliche eigene Gefahr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.

19. I am grateful to Dr. Otmar Jung, Berlin, for drawing my attention to the pre-1949 constitutions of Germany's federal states. In some cases (e.g. art. 146 of the Hesse constitution) such general duty is indeed enacted as to the respective state constitution.

20. Dareste, François-Rodolphe / Delpeche, Joseph 1928: Les constitutions modernes, 4th ed., Paris, 656 (Delpeche): "La garde de la constitution est confié au patriotisme des Hellènes."

21. It sometimes even appears as quasi-technical term in the alphabetical index in German books on constitutional law, see e.g. Maunz / Zippelius 1998: 474.

22. In the current general political discussion, for example in the context of further House of Lords reform, the term

decided on" played a not insignificant role (Smith 1914: 96, 175, 208). These writings did not remain unnoticed; the lines of influence ran west to Pennsylvania and into the formation of the American constitution and east to the French revolutionary constitutions (Dwight 1889, Schmitt 1931: 1). In England, later in Great Britain and in the United Kingdom, however, such ideas did not gain much acceptance.

Thus, there is no constitutional court and even if one should exist, it would have little to do. As long and in so far as the general principle of *parliamentary supremacy* determines British constitutional law, any statute, having attained a majority in Parliament, repeals, at least implicitly, any earlier provision to the contrary, even if the earlier provision was one of constitutional significance. Therefore, *violation* of the content of the constitution by way of legislation is impossible. If there was a British Constitutional Court it could do little more than check whether the new statute had really received a majority in Parliament.

At times, the King or the House of Lords (as a chamber of Parliament) were named as being the true guardians of the constitution. It is conceivable that in an extreme crisis this might be so. The role of the Spanish King during the Tejero putsch in 1981, for example, comes to mind. In cases of possible violations of the constitution of a less theatrical kind, however, one should not count on the Queen or the House of Lords as having effective means of protection:

While Royal assent is required for Acts of Parliament to be valid, the Queen, by constitutional convention, is bound to give her assent (on ministerial advice). To refuse her assent to an Act of Parliament on the grounds of unconstitutionality of the Act would itself be a violation of the constitution and lead to a serious constitutional crisis. Thus, unlike German Federal Presidents who on several occasions since 1949 have refrained from undersigning a new federal statute (for details see e.g. Epping1991: 1102), no British monarch since Queen Anne in 1708 has refused the Royal assent to an Act of Parliament.

Similarly, following the Parliament Acts 1911 and 1949, the House of Lords can no longer *permanently* resist the legislative will of the majority of the House of Commons[23], be this will be

'constitutional watchdog' can sometimes be found (e.g. The Times, October 31, 1999).
23. With the one exception of acts prolonging the life of Parliament.

directed towards enacting an uncontroversial statute or one of doubtful constitutionality like the retrospective War Crimes Act 1991. And even the remaining limited suspensive veto right of the House of Lords is not certain to survive the next stage of the House of Lords reform.

So what remains? Apart from everybody's goodwill to act constitutionally, it is in the last resort the notion that the citizens at large, i.e. the public opinion, would not tolerate violations of the constitution, not severe and obvious violations, at any rate. The guardianship, thus, would be the individual citizen's, supported, as to gathering of information, formation of opinion, focusing of opinion and articulation of opinion, by the media.

And indeed, the *Letter to the Times*, for example, as an institution sui generis, has become proverbial (see e.g. Levin, in: Gregory 1976: 13), and the number of *Letters to my MP* are still astonishingly high[24]. And yet, the notion of a reliably controlling power of the public opinion is probably a romantic rather than a realistic one. It disregards at least two aspects of the problem:

On the one hand, the media are not only *mediating*, they are not just honest disinterested brokers. The commercial interest is obvious, and many a newspaper or TV-channel owner's ambition to be himself a player on the political stage - resulting, at the same time, in becoming the object of political influence, e.g. by patronage - is an additional factor. In the United Kingdom, the modern high circulation press began first during the Boer wars, then, and even more importantly, during World War I, to conduct their own political campaigns, while, under Lloyd George's premiership alone, no less than ten media owners were elevated to the House of Lords, and another eleven became Baronets. Gerhard Ritter, who in his 1961 Berlin inauguration lecture drew attention to this development, thought he could conclude his observations on an optimistic note, assuming the political power of the print media to be contained by the matter-of-fact and pluralistic approach of the BBC (Ritter 1962: 22). Forty years on and with press owners entering the realm of broadcasting as well, Ritter's optimism appears to have been somewhat premature.

The second problem with placing trust in *public opinion* is that it will not be helpful in the same

24. Ben Bradshaw, MP for Exeter, mentioned a figure of 50 to 100 letters from his constituency *per day* (Conference "Parliamentary Culture in a Time of Change", The British Council and Humboldt University Centre for British Studies, Berlin, February 29, 2000).

way in all cases. If the issue in question is a popular one or at least one where constitutional doubts are obvious or are easy to convey, a public outcry may well come fast and be effective. Should it, for example, occur to Tony Blair to try to preserve his very comfortable majority in the House of Commons for the next decade by prolonging the life of the present Parliament and postponing the next general election to the year 2010, this could easily be done with a simple Act of Parliament, provided the House of Lords agrees. Twice in the 20th century the life of Parliament was, indeed, thus prolonged, during both World Wars, based on broad national consensus. To do something similar in peace times would be, although technically possible, politically inconceivable.

Less reliance, however, can be put in *public opinion* where the public at large is not concerned about the issue in question or, even more so, where the position to be defended is an unpopular one. Politics *for the many, not the few*, as Tony Blair phrased it in his speech at the 1999 annual conference of the Labour Party, is of course democratically impeccable, but the statement leaves open the question as to the rights of the few. Many a detail of Northern Ireland legislation and pertinent anti-terrorist measures during the past decades might have been struck out at once by British Courts, rather than only later on by the Strasbourg human rights court or even remaining unjusticiable at all, had British courts had a general power of scrutiny of public measures in respect of their observance or otherwise of basic rights (see e.g. Dickson 1997: 143 ff; Dickson (ed.) 1993).

With this, we have arrived after all with the courts, not with a constitutional court, which does not exist, but with the ordinary courts of the country. And here we can observe remarkable developments. While a century ago the then probably most important British author on constitutional law, Albert Venn Dicey, could say "We in England know nothing of administrative law; and we wish to know nothing" (quoted in Leylands / Woods 1997: 1), administrative law is a thriving branch of the law in Britain today. On the basis of a few general legal principles such as the *ultra vires* doctrine, the maxim *audi alteram partem* and others, the courts have managed to build up a fairly extensive control of administrative measures under the general heading of *Judicial Review*. The present stage of legal protection against administrative measures is still fragmentary and unsystematic, but remarkable nevertheless - and it was reached without the existence of specific administrative courts.

In my opinion, we may be about to observe the repetition of such a process, the beginnings of constitutional jurisdiction without the existence of specific constitutional courts. An example is the courts' attitude towards the relationship of European Union legislation to British national law in the areas of powers transferred to the European Union. According to the doctrine of parliamentary supremacy in its traditional understanding, all later British Acts of Parliament should prevail over contrary earlier EU legislation. In a series of decisions, proceeding from case to case and continually developing the argument, the British courts, sometimes going boldly beyond conventional British methods of interpretation, have managed to establish the factual predominance of such EU legislation[25], as provided for in the EU treaties.

The advocates of incorporation of the European Human Rights Convention into British national law or of the enactment of a separate Bill of Rights in the sense of a catalogue of basic human and civil rights in the United Kingdom expect the British courts to find similar ways of reasoning to establish the predominance of such legislation over contrary other Acts of Parliament, even later ones, in spite of their equal rank - there being no formally superior constitutional acts - as 'simple' Acts of Parliament.

Should this happen, the initial question would have found an answer: the ordinary courts of the country would be the guardians of the British constitution - and this would not be a bad solution at all.

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25. See, for example, the series of Factortame decisions, in particular Factortame Ltd. v. Secretary of State for Transport [1990] 2 A.C. 85. On these and other decisions see e.g. de Smith / Brazier 1998: 67 ff, 101 ff; Loveland 1996: 475 ff.

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