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THE PROTECTION OF HUMAN RIGHTS WITHIN THE EUROPEAN COOPERATION OF COURTS

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Paper presented to the Venice Commission

by

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Mr President,
Ladies and Gentlemen!

A. Introduction

It is a great pleasure to have the opportunity to present to you, the Venice Commission, some ideas on the cooperation of the European constitutional courts in the field of human rights protection.

For more than 20 years, the Venice Commission has made an important contribution to involving its Member States in the European multilevel system. It has done so by supporting the Member States in the drafting of their constitutions and by critically accompanying and commenting on specific developments from the perspective of human rights protection. Moreover, by convening regular plenary sessions, such as the one today, the Venice Commission provides an excellent platform for a fruitful and lively dialogue in all questions concerning human rights protection.

The Europeanisation and internationalisation of the law has brought new players into the arena. A German citizen, for example, now lives at the same time in different legal areas: the national one, which also has a federal structure, the one of the European Union, and the legal area of the European Convention on Human Rights.

Since 1958, the European Court of Human Rights in Strasbourg has been watching over the observance of the European Convention on Human Rights.

Since the beginning of the 1970s, the Court of Justice of the European Union has been consistently expanding fundamental rights protection. With the entry into force of the Charter of Fundamental Rights of the European Union, the protection of fundamental rights at the European level has reached a new dimension.

Apart from this, the national constitutions with their human rights catalogues continue to exist. The national constitutional courts, such as the Federal Constitutional Court in Karlsruhe, watch over them; in doing so, the Federal Constitutional Court is supported by the constitutional courts of the *Länder* (federal states).

But how does the interplay of these fundamental rights documents, and of the European and national constitutional courts, work? Where do we need some more fine-tuning? Where might corrections be necessary?

Today, I would like to present to you, in the shape of five theses, some strategies for successful European human rights protection.

B. Five theses on human rights protection in Europe

1. What counts is not quantity alone

My first thesis is: what counts is not quantity alone. A large number of fundamental rights catalogues and enforcement mechanisms does not automatically result in a high quality of human rights protection.

a) The advantages of a multisided human rights protection are obvious. This applies both to the plurality of legal frameworks, and to the diversity of jurisdictions. The proclamation of a human rights catalogue has great symbolic power: it is a new confirmation of the human rights[1]. Different legal documents can mutually reinforce each other. Beyond these practical implications, the European fundamental rights catalogues, which join the national ones, promote the European idea: they consolidate a common European human rights standard. As a "European common law of human rights"[2], this standard is part of a developing European legal system.

Because many institutions work towards enforcing human rights, this minimises the risk of fundamental rights violations slipping through the cracks of the review mechanisms without being detected[3]. An effective international protagonist makes a particular difference where the enforcement of human rights is weaker at the national level. Where national courts have a strong position, the international authority for legal protection acts where the courts have their "blind spots", which are due to tradition or to the respective system. Here, impulses from outside contribute to creating awareness.

b) It is true that a multisided human rights protection makes human rights more visible. However, the visibility of human rights should not result in a lack of clarity. Decisions in the different "legal areas" which deviate from each other and correct each other hold the risk of losing persuasiveness as a whole. Just adding the activities of the different courts in order to achieve a maximum of human rights protection as a sum – this is a calculation which does not work out. What is important instead is that the different contributions interlock efficiently.

2. Not a "keystone", but a pillar: the multilevel cooperation of European constitutional courts

This leads me to my second thesis: what is required is not a mere accumulation of the activities of the constitutional courts in Europe but their coordination. The European constitutional courts are part of a system that provides room for coordination: they form a *Verbund*, as it is called in German, or network, of European constitutional courts. There is no such thing as a single supreme guardian of the fundamental rights in Europe, a keystone of the European vault of human rights. What exists instead are European constitutional courts, all of which, so to speak, have the function of pillars in the European human rights architecture.

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[1] *Dieter Blumenwitz*, Die Universalität der Menschenrechte, in: Kirche und Gesellschaft no. 307 (2004), p. 14.

[2] *Paul Mahoney*, Reconciling Universality of Human Rights and Local Democracy, in: Christine Hohmann-Dennhardt et al. (eds.), Grundrechte und Solidarität, Festschrift für Renate Jäger, 2010, p. 147 (156-157).

[3] With regard to "multiple vetoes" cf. *William N. Eskridge, Jr./John Ferejohn*, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 68 S. Cal. L. Rev. 1545, 1549 (1995).

As regards their functions, the European Court of Human Rights and the Court of Justice of the European Union can, in my view, by now be regarded as "European constitutional courts"[4]. In the field of fundamental rights, they are facing similar questions as the national constitutional courts, they perform their review on the basis of comparable fundamental rights catalogues and in comparable procedures.

The system of different levels of these constitutional courts can be understood as a *Verbund* of constitutional courts – a system of multilevel cooperation[5]. The concept of a *Verbund* describes multilevel systems, while avoiding overly simplistic spatial images such as juxtaposition, superiority, and subordination. Instead, the *Verbund* as a systematic concept ("*Ordnungsidee"*, *Schmidt-Aßmann*) leaves room for describing the complex operation of a multilevel system "on the basis of different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement". The idea of *Verbund* equally contains autonomy, consideration and ability to act jointly[6]. In this system, the participants need to develop special "*Verbund* techniques" in order to guarantee the consistent protection of fundamental rights. In the following, I will use the example of the relationship between the European Court of Human Rights and the Federal Constitutional Court to show what I mean by such "human rights-related *Verbund* techniques"[7].

3. The Basic Law's openness towards human rights

The national basis of such "*Verbund* techniques" is the subject-matter of my third thesis. From the German perspective, my third thesis says: the Basic Law is not only open towards European and international law, it is also specifically open towards human rights. The Basic Law places the Federal Constitutional Court, as well as all other constitutional bodies, at the service of international human rights.

Article 1 sec. 2 of the Basic Law reads: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world". This is not merely a non-committal programmatic statement. The provision indicates that the national fundamental rights are to be seen in the light of international human rights.

The Federal Constitutional Court, as part of the "multilevel cooperation of European constitutional courts" does justice to this openness towards human rights by a number of "*Verbund* techniques". In Germany, the European Convention on Human Rights does not have the same rank as the Constitution. Nevertheless, it has significance under constitutional law. For the Federal Constitutional Court, it is an important guide to interpretation in determining the content and scope of fundamental rights and constitutional guarantees of the Basic Law[8]. In this context, the case-law of the European Court of Human Rights has an "orientation effect"[9] as an expression of the current state of development of the convention. Most recently, this

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[4] Cf. *Andreas Voßkuhle*, Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsverbund, JöR n. F. 59 (2011), p. 215 (217); *id.*, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, p. 1 (1); *id*., Multilevel Cooperation of the European Constitutional Courts – Der europäische Gerichtsverbund, European Constitutional Law Review 6 (2010), p. 175.

[5] *Andreas Voßkuhle*, Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsverbund, JöR n. F. 59 (2011), p. 215 (219); *id.*, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, S. 1 (2), *id*., Multilevel Cooperation of the European Constitutional Courts – Der europäische Gerichtsverbund, European Constitutional Law Review 6 (2010), p. 175 (183-184).

[6] *Andreas Voßkuhle*, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, p. 1 (3).

[7] With regard to the role of the *Land* constitutional courts in the multilevel cooperation of European courts, cf. only: *Andreas Voßkuhle*, Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsverbund, JöR n. F. 59 (2011), p. 215 (217 und 237)

[8] Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 111, 307 <317>.

[9] BVerfGE 128, 326 <368>

process of reception has become particularly clear in the proceedings concerning preventive detention in Germany. In the leading case, it says:

"The human rights content of the agreement under international law under consideration must be "reconceived" in an active process (of reception) in the context of the receiving constitutional system."[10]

4. The European Court of Human Rights as a team player

And what does the basis of a cooperation on the part of the European Court of Human Rights look like? My fourth thesis says: The European Court of Human Rights, too, is not a lonesome fighter but a strong player in a team. It does not render national constitutional courts unnecessary but takes their existence as a precondition.

It is for the European Court of Human Rights to decide, in a responsible manner, how much uniformity the European Convention on Human Rights demands in fundamental rights protection and how much plurality it tolerates[11]. This requires a prudent balance between the effective enforcement and the dynamic development of the European Convention on Human Rights on the one hand and respect for the national margin of appreciation on the other hand[12]. With regard to the interaction with the national courts, functional aspects need to be taken into consideration as well. In this context, I would like to draw your attention to just two aspects:

- Firstly: the limited resources of the European Court of Human Rights. They show clearly that the precondition of effective human rights protection is "coexistence" with the national constitutional courts in the long term. A single court cannot on its own constitutionalise a legal area with approximately 800 million inhabitants.

- Secondly: the considerate handling of the national "inheritance" in the shape of traditions that have evolved over a long time. This increases general acceptance, which is a capital a court can draw upon especially when rendering decisions which are somewhat uncomfortable. The Grand Chamber judgment of Lautsi and Others v. Italy of 18 March 2011 is a fine example of judicial self-restraint. In the judgment, the Chamber stated that the decision whether crucifixes should be present in classrooms was a matter falling within the margin of appreciation of the respective State party. Thus, it took into account the statements of the Italian government, which had put forward that the presence of crucifixes in classrooms did not only have cultural significance but also an identity-creating effect[13].

5. The dialogue between the European constitutional courts

My last thesis is actually a synthesis from the previous theses: a "dialogue of courts"[14] of the European constitutional courts is the precondition of a conclusive system of human rights guarantees. We are facing the challenge of jointly securing high-quality legal protection by means of our institutions. It takes two hands to tie a knot – and tying a network such as the multilevel cooperation of European constitutional courts all the more requires the cooperation of all parties involved. A culture of dialogue will not be achieved by separation or polemics. What is needed instead is a culture of considerateness and exchange.

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[10] Cf. BVerfGE 128, 326 <370>
[11] Cf. *Thürer*, in: Merten/Papier (eds.), Handbuch der Grundrechte, vol. VII/2, 2007, § 203, para. 57: Delimitation between "required uniformity and legitimate plurality".
[12] *Krisch*, The Open Architecture of European Human Rights Law, 2007, http://eprints.lse.ac.uk/24621/1/WPS11-2007Krisch.pdf, p. 25.
[13] Cf. European Court of Human Rights, Judgment of 18 March 2011, Application no. 30814/06 (Lautsi and Others v. Italy), paras. 67 et seq.
[14] Cf. BVerfGE 128, 326 <369>

C. Conclusion

Ladies and Gentlemen,

This brings me to the end of my presentation.

We have seen that the protection of human rights is no longer the task of the national constitutional courts alone, but that it takes place in cooperation with the European Court of Human Rights and the Court of Justice of the European Union in the shape of a *Verbund*. Such a *Verbund* thrives, among other things, on the personal interaction of the justices of the European constitutional courts and the mutual reception of their case-law. In this context, the Venice Commission makes an important contribution to the development of human rights protection through its statements, which are often incorporated into the rulings of the European Court of Human Rights[15]. Such dialogues are often difficult; they require stamina, a great deal of pragmatism and much visionary power. The common goal, however, certainly justifies the effort!

Thank you very much for your attention.

[15] Cf. for instance: Judgment of the ECtHR of 22 April 2010, Application no. 7/08 (Tänase v. Moldova); Judgment of the ECtHR of 22 December 2009, Applications nos. 27996/06 and 34836/06 (Sejdić and Finci v. Bosnia and Herzegovina); Judgment of the ECtHR of 8 July 2008, Application no. 10226/03 (Yumak and Sadak v. Turkey), all retrieved under http://hudoc.echr.coe.int on 13 February 2013. Concerning the influence of the Venice Commission on the national (constitutional) legal systems cf. the differentiated account by *Hoffmann-Riem*, „Soft Law“ und „Soft Instruments“ in der Arbeit der Venedig-Kommission des Europarats, in: Festschrift Bryde, 2012, pp. 595 et seq.