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Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts

Mr President, Dear colleagues, Ladies and Gentlemen,

It is a true honour for me to join you today for the opening of the judicial year, and I thank you very much for the invitation to take part in this important occasion.

A. INTRODUCTION

The title of my speech is "Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts". Contrary to what the words "pyramid or mobile" might suggest, I am not going to talk about telecommunications in Egypt. By "mobile" I mean – taking my inspiration from the former judge Renate Jaeger – a kinetic sculpture which consists of an ensemble of balanced parts that can move but are connected by strings or wire.[1] I use the word "pyramid" to refer to a fixed geometric structure that has a base and a top.

In the following paragraphs I will try to establish which of these two images more accurately captures the characteristics of the European constitutional courts in their protection of human rights. In order to do this we need to examine some features of the interaction of these courts and of their respective catalogues of rights. The system of human rights protection in Europe is a topic which I have already highlighted in past speeches. However, we will see that the *Verbund* is a living and changing organism whose constant evolution deserves to be observed, accompanied and rebalanced. In my speech, I will approach this very complex topic by making just a few brief observations.

B. STRASBOURG AND KARLSRUHE: DIALOGUE – NOT ONE-WAY TRAFFIC

Ladies and Gentlemen,

If you look at the parts of a mobile for some time, you will realise that they are not revolving around their own axes, but are constantly engaged in an imaginary dialogue triggered by the movements of the other parts. The ECtHR and the German Federal Constitutional Court (FCC) – like all national constitutional courts – also depend on a permanent dialogue in order to coordinate the protection of fundamental rights in a multi-level system.

How does the interplay between the European Convention on Human Rights and the German Constitution work? What concessions do the ECtHR and the FCC have to make in order to coordinate their work? Where might adjustments be necessary?

Let me ease the suspense: a strictly hierarchical – in other words, a pyramidal – approach would not fit the characteristics of a *Verbund* of European constitutional courts.

1 Interview in *The Economist*, 26 March 2009, p. 34.

I. THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT

First of all, let us examine the "mobile of institutions" from the point of view of the FCC. The Basic Law is not only open towards European and international law, it is also explicitly open towards human rights. Under the Basic Law the FCC, as well as all other constitutional bodies, must serve the cause of international human rights. Our recent case-law shows that these words are not mere constitutional rhetoric. In May 2011, subsequent to your decision in *M. v. Germany* of December 2009[2], the FCC delivered a judgment concerning preventive detention in Germany.[3] Two aspects of this judgment prove the FCC's openness towards human rights. First, the FCC chose to apply the national procedural rules flexibly in order to avoid further breaches of the Convention. Notwithstanding a previous decision declaring the provisions on preventive detention constitutional – a situation which, under German law, generally acts as a procedural bar against the admissibility of new proceedings – the FCC found the new constitutional complaints admissible in the light of the decision in *M. v. Germany*.[4] And secondly, the FCC stressed that the Convention has to be thoroughly considered at an early stage in the context of the constitutional system incorporating it. Although, in Germany, the European Convention on Human Rights does not have the same rank as the Constitution, it does have significance under our constitutional law. For the FCC, it is an important guide to interpretation when it comes to determining the content and scope of the fundamental rights and constitutional guarantees of the Basic Law.

As you can see, the FCC accepts guidance from Strasbourg and is able to remedy breaches of the Convention at national level – thereby helping to ease the caseload of the ECtHR. We are pleased that in the *Kronfeldner*[5] case the ECtHR recently welcomed our approach consisting in interpreting the Basic Law in the light of the Convention, as this demonstrates the intensive dialogue between the two courts.

However, acceptance of the Convention should not be mistaken for strict obedience. The Basic Law has certain limits when it comes to its interpretation in the light of international law. The comparative interpretation has to be justifiable in terms of methods and compatible with the Basic Law's core values (Article 79 § 3 of the Basic Law (GG)).[6] In addition, the interpretation must not – in accordance with Article 53 of the Convention – compromise the standard of protection of fundamental rights provided by the Basic Law.[7] Occasionally, the Basic Law guarantees a higher level of protection. This is illustrated by two recent judgments, one by the ECtHR and the other by the FCC, which were delivered on the same day. The ECtHR's judgment in *X and Others v. Austria* of 19 February 2013 concerned the right of unmarried same-sex couples to second-parent adoption,[8] while the FCC's judgment concerned the bar on successive adoption by registered civil (same-sex) partners.[9] Whereas the ECtHR held that there had been no violation of Article 14 in conjunction with Article 8 of the Convention when the applicants' situation was compared with that of a married couple,[10] the FCC found that the bar on successive adoption by registered civil partners violated the general principle of equality before the law (Article 3 § 1 GG).[11]

II. THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

And what about the basis for cooperation on the part of the European Court of Human Rights? To my mind, the European Court of Human Rights is not a lone combatant either, but a strong team player. It does not render national constitutional courts unnecessary but takes their existence as a

2 *M. v. Germany*, no. 19359/04, ECHR 2009.

3 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 128, 326 <386>.

4 See BVerfGE 128, 326 <364> et seq.

5 *Kronfeldner v. Germany*, no. 21906/09, § 59, ECHR, 19 January 2012; see also *B v. Germany*, no. 61272/09, §§ 44 et seq. and § 98, 19 April 2012.

6 See BVerfGE, loc. cit., p. 371.

7 See BVerfGE, loc. cit.

8 *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

9 BVerfGE, judgment of the First Division (*Senat*) of 19 February 2013, 1 BvL 1/11, NJW (*Neue Juristische Wochenschrift*) 2013, p. 847.

10 *X and Others v. Austria* [GC], ECHR, cited above, §§ 105 et seq.

11 BVerfGE, judgment of the First Division (*Senat*) of 19 February 2013, 1 BvL 1/11, NJW 2013, p. 847 (855).

precondition. To continue my image of the mobile of institutions: each element is necessary in order to maintain the balance. Otherwise, a single hanging object would orbit around itself.

In order to perform this balancing act the ECtHR, as an international court, is faced with the task of defining the minimum standard of fundamental rights protection. This minimum standard can be accepted by the national authorities and courts of all the member States without the plurality of national fundamental rights provisions being sacrificed. At the same time, when it comes to the effective enforcement and the dynamic evolution of the Convention, the ECtHR increases the level of acceptance by demonstrating respect for the national "heritage" – traditions that have evolved over a long time. The Grand Chamber judgment in *Lautsi and Others v. Italy* of 18 March 2011 is a fine example of judicial self-restraint. In the judgment, the Grand Chamber stated that the decision whether crucifixes should be present in classrooms was a matter falling within the margin of appreciation of the State Party concerned. Thus, it took into account the submissions of the Italian Government, which had argued that the presence of crucifixes in classrooms did not just have cultural significance but also contributed to the shaping of identity.[12] Furthermore, the ECtHR, fortunately, respects the margin of appreciation where a case raises sensitive moral or ethical issues on which no consensus has been reached between the member States. One example in that regard is the case of *Stübing*, in which the ECtHR held that the applicant's conviction by the German courts for an incestuous relationship did not violate Article 8 of the Convention. Nor should we forget the *Countryside Alliance* case, in which the ECtHR decided that the various bans on fox hunting and the hunting of other wild mammals with dogs in the United Kingdom did not amount to a violation of the Convention.[13] Even *Lord Bingham*'s very, well, British argument to justify the ban, namely the suggestion, I quote, "that the British mind more about their animals than their children[14]", was apparently regarded as falling within the margin of appreciation.[15]

As you know, the Council of Europe has, in the meantime, presented Protocol No. 15 to the Convention, which incorporates into the preamble a reference to the principle of subsidiarity and the doctrine of the margin of appreciation.[16] This is a major contribution to the rebalancing of our mobile of institutions. The more the implementation of the Convention is devolved to the national authorities and courts, the better the ECtHR – in view of its limited resources – can focus on its role as the guardian of a common core standard of human rights. At the same time, as my Belgian colleague Bossuyt recently pointed out, some questions – especially those concerning positive obligations – are best left to the domestic courts, which are familiar with the national community's economic, social and cultural environment.[17] Extending the Court's jurisdiction to economic and social rights beyond a core standard could deprive human rights of their universality, since the above-mentioned rights are unattainable by many countries.[18]

C. STRASBOURG AND LUXEMBOURG: THINGS GET MOVING

Strasbourg is not only intimately connected with the national courts. It is also closely linked with the *other* European court, the European Court of Justice (ECJ) in Luxembourg – linked in a way we could describe as a "relationship in motion". In this relationship, the representative of a national constitutional court is, of course, not a direct protagonist. Nonetheless, pursuing the logic of the mobile image, any movement by other elements of the mobile necessarily has repercussions on the system as a whole. Thus, the national courts are more than just casual bystanders. So, from the viewpoint of an interested observer, I will briefly identify three ties between the two courts that already exist or are about to emerge.

12 *Lautsi and Others v. Italy* [GC], no. 30814/06, §§ 67 et seq., ECHR 2011 (extracts).

13 *Friend and Countryside Alliance and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, ECHR, 24 November 2009.

14 *R (Countryside Alliance) v. Attorney General* [2008] 1 AC 719, para 37.

15 See Hale, "*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?", H.R.L.R. 12 (2012), p. 65 (72).

16 Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms.

17 Bossuyt, "Judicial activism in Strasbourg", to appear in print, manuscript p. 17.

18 *Ibid.*, manuscript p. 17.

I. THE DOSE MAKES THE POISON: MUTUAL REFERENCES IN THE JUDGMENTS OF THE ECJ AND THE ECTHR

The first thing that seems remarkable to me is the way in which the Luxembourg and Strasbourg courts make use of each other's frame of reference. To draw upon other human rights texts and case-law sources is, of course, an excellent way to achieve the necessary consistency between overlapping human rights catalogues. But, as always, the dose can make what is normally a remedy into a poison. In mutual references to the relevant texts there are certain pitfalls to be avoided. It would be inappropriate for the Strasbourg Court to aim to be the first in shaping the interpretation of a Charter provision. The same would apply if the Luxembourg Court were to rely on the Convention in order to override the restricted scope of application of the Charter. Luckily, these pitfalls appear largely theoretical. Recently, some scholars criticised what they saw as a significant decrease in the ECJ's citation of the Convention text and case-law, and cautioned against an isolated interpretation of the Charter.[19] My personal guess would be that with the accession of the EU to the Convention, the convergence between the human rights instruments will increase again.

II. *ÅKERBERG FRANSSON*: THE COURTS AS NEIGHBOURS, NOT TWINS

Secondly and even more remarkably, a certain *rapprochement* can be observed between the roles of the two Courts.

To put it in a nutshell using the words of a Law professor, the Luxembourg Court has "evolved from being a tribunal concerned primarily with economic matters, to one with a much wider range of jurisdiction which is now explicitly tasked with enforcing human rights".[20] This shift in its nature, of course, raises new questions as to the respective functions of the Strasbourg and Luxembourg Courts. As I see it, the mandates of the two Courts should not blur, but be kept quite distinct. Whereas Strasbourg, in accordance with Article 53 of the Convention, sets the minimum level of human rights protection throughout Europe, the ECJ must ensure that the law is observed in the interpretation and application of the EU Treaties (Article 19 § 1 of the Treaty on European Union). Recently, the *Åkerberg Fransson* decision[21] swept like a blast – or even a storm – through the mobile I have described. In the aftermath of *Åkerberg*, it is perhaps important to stress the following: as much as a uniformly high human rights standard in Europe is desirable, it is not the task of the Luxembourg Court, but that of Strasbourg and the ECtHR, to safeguard it internationally.

III. SAVE THE LAST DANCE FOR STRASBOURG?

Thirdly and finally, the most striking of the ongoing transformations is the emerging formalisation of the relationship between the two Courts.

The accession of the EU to the Convention will reshape the institutional architecture. European laws and judgments will be subject to the jurisdiction of the Strasbourg Court – an operation which our host, the President of the ECtHR Dean Spielmann, rightly praises as a high point of modern Europe's commitment to human rights.[22] For accession to operate smoothly, it might once more be helpful to set the pyramid model aside and to focus on the mobile instead. Becoming part of the Convention should not be thought of in terms of hierarchy, but in terms of specialisation. Strasbourg will not acquire the authority to assess the validity or the correct interpretation of EU law in a binding

19 De Búrca (2013), "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law* 20, p. 168 (173-176); Polakiewicz, "EU law and the ECHR: Will the European Union's Accession Square the Circle?", E.H.R.L.R, p. 592 (594 -597).

20 De Búrca (2013), "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law* 20, p. 168 (171).

21 ECJ (Grand Chamber), judgment of 26 February 2013, C-617/13 – *Åkerberg Fransson*.

22 D. Spielmann, *"Krönung des Engagements des modernen Europas für die Menschenrechte"*, *Menschenrechte in Europa, Speech to the Bundesverfassungsgericht on 9 April 2013*.

manner.[23] Instead, accession means no more – and no less – than the external involvement of a specialised international human rights court. An involvement that will enhance the legitimacy and credibility of the system of human rights protection as a whole.

D. CONCLUSION

Ladies and Gentlemen, we have seen that European human rights protection can be better understood if we imagine it not as a pyramid, but as a mobile. We have also established that a mobile, in order to work, quite literally comes with strings attached. The parts of the system (we, the European Constitutional Courts) have to go about their task with sensitivity in order to preserve the balance. After all, we do not want the mobile and its strings to turn into a spider's web in which those who seek protection get entangled.

There is a citation by Alexander Calder, the father of the mobile as an art medium. He noted that "when everything goes right, a mobile is a piece of poetry that dances with the joy of life and surprises." I think even the visionary drafters of our respective human rights catalogues would be surprised by how dynamic the multi-level human rights protection in Europe has proved to be. As far as dancing is concerned, this might not be compatible with the character of a solemn hearing. But I am very much looking forward to interesting, animated and fruitful exchanges with you tonight and in the future.

Thank you very much for your attention.

23 See A. *Torres Pérez (2013)*, "Too many voices? The prior involvement of the Court of Justice of the European Union", *European Journal of Human Rights* 4, p. 565 (583).