

# Protection of Human Rights in the European Union. Multilevel Cooperation on Human Rights between the European Constitutional Courts \*

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## Lecture manuscript

### I. Introduction: The Age of Human Rights

On the threshold to the 21st century the Italian philosopher *Norberto Bobbio* declared that we have entered the age of human rights.<sup>1</sup> Yet, the discourse on human rights began much earlier than that.<sup>2</sup> At its centre is a grand idea: the protection of universal rights to which all people are entitled by virtue of belonging to the human race, quite irrespective of their standing in the state, society, family, occupation, religion or culture. This commitment to the natural-law-based existence of inalienable human rights, which is generally accepted in essence worldwide, distinguishes the human rights discourse from all other global philosophical discourse.<sup>3</sup> The same *jusnaturalae* approach also inspired the French “Declaration of the Rights of Man and of the Citizen” as well as the North American Bill of Rights, whose genesis in both cases vividly bears witness to the painful development process of human rights which culminated in the French Revolution and the American War of Independence. Inspired by humanism and enlightenment, they represent political accomplishments which had to be fought for in bitter confrontation with the power of the state and the church.<sup>4</sup>

While the landmark human rights declarations of the 18th century saw the (national) state as the sole guarantor of human rights, following World War II there was a growing realisation that the protection of human rights could not be entrusted to individual states alone. From then on, the international community was also called upon to uphold and ensure universal human rights by the provision of institutional safeguards. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10th December 1948 marked the beginning of the international protection of human rights as we now know it. This Declaration is rightly acclaimed as a milestone in the history of humanity<sup>5</sup>, since it formulated a universal canon of values as rules governing the coexistence of people and nations in the world community.

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<sup>1</sup> *Norberto Bobbio*, *Das Zeitalter der Menschenrechte*, 1998.

<sup>2</sup> For a history of human rights cf. *Andreas Haratsch*, *Die Geschichte der Menschenrechte*, 3rd edition 2006; *Eike Wolgast*, *Geschichte der Menschen- und Bürgerrechte*, 2009.

<sup>3</sup> With regard to the philosophical foundations of human rights see the essay by *Christian Starck*, *Die philosophischen Grundlagen der Menschenrechte*, in: Michael Brenner/Peter M. Huber/Markus Möstl (ed.), *Der Staat des Grundgesetzes – Kontinuität und Wandel*, Festschrift für Peter Badura zum 70. Geburtstag, 2004, p. 553 et seq.

<sup>4</sup> Cf. *Jutta Limbach*, *Der internationale Schutz der Menschenrechte – Anspruch und Wirklichkeit*, in: Susann Bräcklein/Jürgen Meyer/Henning Scherf (ed.), *Politisches Denken ist*, Festschrift für Margot von Renesse, 2005, p. 123 (124 et seq.).

<sup>5</sup> Cf. *Norberto Bobbio*, *Das Zeitalter der Menschenrechte*, 1998, p. 17 et seq.

In the thirty Articles of the Declaration, the General Assembly first proclaims the classical civil rights and liberties – like the right to life, freedom of thought and religion – which are also known as “first-generation human rights”.<sup>6</sup> The Declaration also contains economic and social rights, including the right to work, social security and education, which can be subsumed under the heading “second-generation human rights”. There is no mention of “third-generation human rights”, for instance the right to peace or the right to development, on which today there is still no international agreement. The General Assembly could spare itself the task of formulating specific limits to the rights guaranteed, as consensus reigned that the Declaration should not entail any binding legal consequences. Nevertheless, the international community had succeeded in setting a standard level of expectations for world civilization, a standard which all nation states should orient themselves to and be judged by.<sup>7</sup> Nowadays it is almost inconceivable that a constitution could exist without ensuring at least a core element of civil rights<sup>8</sup> – even though rights that exist in theory and living reality sometimes lie far apart.

## II. The Multiplication of Human Rights in Europe

In Europe, the Universal Declaration of Human Rights has served in manifold ways as a “blueprint” for the codification of human rights in the form of catalogues of fundamental rights. Here we can distinguish between two – partly complementary, partly opposed – developments, whose conflicting relationship may also be read into the title of my talk: on the one hand – despite, or perhaps because of, the universal, naturalist and programmatic character of human rights – there exists the need to formulate them as binding and legally enforceable guarantees.<sup>9</sup> On the other hand, such concretisation and codification can usually only take place in confined – albeit growing – “spaces of human rights”. Hence, the regional, functional, and sector-specific differentiation of human rights protection comes hand in hand with a certain loss of universality. I would like to illustrate the consequences of this from the perspective of the German citizen, who – leaving aside the human rights guarantees contained in the constitutions of the “*Länder*” – lives in three partially overlapping judicial spheres.

### 1. The system of European human rights protection

The geographically smallest space of human rights for the German citizen is contoured by the Basic Law of the Federal Republic of Germany, which was the very first national constitution to integrate the human rights standards contained in the Universal Declaration of Human Rights. The fathers and mothers of the Basic Law created an exemplary catalogue of constitutional rights that bind all state authorities as directly applicable and enforceable law. Evolved and finely nuanced over many decades, the case law of the German Federal Constitutional Court constantly fills these rights with new life. Parallel to this, the Federal Constitutional Court has from the very beginning done everything to promote international cooperation and supranational integration. In doing so it has always paid special attention to guaranteeing an adequate protection of fundamental rights.

The second legal space in which the German citizen moves lies at the international level of the Council of Europe – a body whose declared *raison d'être* is the protection of human rights. With explicit reference to the Universal Declaration of Human Rights, in 1950 its members adopted the European Convention on the Protection of Human Rights and Fundamental Freedoms (in the following abbreviated to ECHR). The ECHR is the first instrument of its type to contain binding guarantees. A “constitutional court” with a speciality in human rights, the European Court of Human Rights in Strasbourg monitors compliance with the Convention.<sup>10</sup> The heart of the Convention

<sup>6</sup> For the different “generations” or “dimensions” of human rights cf. *Eibe Riedel*, Menschenrechte der dritten Dimension, EuGRZ 1989, p. 9 et seq.

<sup>7</sup> Cf. *Bardo Fassbender*, Idee und Anspruch der Menschenrechte im Völkerrecht, APuZ 46/2008, p. 3 et seq.

<sup>8</sup> Cf. *Daniel Thürer*, Kosmopolitisches Staatsrecht, Band 1, 2005, p. 6.

<sup>9</sup> Cf. *Dieter Grimm*, Menschenrechte II – Grundrechte und Grundpflichten, in: Marion Gräfin Dönhoff (Hrsg.), Menschenrecht und Bürgersinn, Band 2, 1999, p. 53 et seq.

<sup>10</sup> On the designation as „constitutional court“ cf. *Andreas Voßkuhle*, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, p. 1 (1) m.w.N. An English version is soon to appear: *Andreas Voßkuhle*, Multilevel Cooperation of the European Constitutional Courts, European Constitutional Law

comprises classical civil rights and liberties such as the right to life and freedom, the right to respect for private and family life, freedom of speech, assembly and association, as well as freedom of conscience and religion.

Marking a major achievement of civilisation, the ECHR not only exerted an impact on international law. Above all it contributed to a process of European integration dedicated to the protection of human rights. And this brings us to the third legal space that conditions the lives of citizens – namely, the European Union. Ultimately based on mutual economic interests, from the outset the European Union was also concerned with implementing political and social integration.<sup>11</sup> Accordingly, since the early 1970s the Court of Justice of the European Union in Luxemburg (in the following: European Court of Justice) has systematically continued to strengthen the protection of human rights.<sup>12</sup> By contouring human rights as fundamental principles of Community law, this “constitutional court of the European Union” is orientated especially to the ECHR and to the constitutional traditions common to the member states.

With the entry into force of the Treaty of Lisbon, the protection of human rights in Europe acquired a new dimension:<sup>13</sup> Pursuant to Art. 6 para. 1 of the Treaty on European Union (TEU), the now binding Charter of Fundamental Rights of the European Union (in the following: Charter of Fundamental Rights) enters into force along with – pursuant to Art. 6 para. 3 TEU – those fundamental rights developed by the European Court of Justice in the course of judge-made law based on the ECHR and the constitutional traditions common to the member states. As a modern codification that also contains “second-generation human rights”, the Charter of Fundamental Rights is likely to have an effect on the interpretation the ECHR.<sup>14</sup> Moreover, pursuant to Art. 6 para. 2 TEU, the European Union shall accede to the ECHR, which means there will be an ongoing need for coordination between the Strasbourg and the Luxemburg jurisdictions.

This multifaceted regime of European human rights protection – usually convergent but sometimes divergent at its intersections – also has its critics: “the more the merrier” assert the advocates of human rights “cornucopias”<sup>15</sup>, whereas the sceptics quote the adage “too many cooks spoil the broth”. One can find good arguments in support of both positions.

## 2. Benefits of a plurality of human rights protection

The benefits of a plural system of human rights protection result both from the variety of regulatory frameworks as well as from the different jurisdictions. First of all, the codification of fundamental rights developed in case law holds symbolic power for the citizens, who no longer have to laboriously cherry pick among hundreds of past court rulings.<sup>16</sup> The authors of the Charter of Rights perceived it a major task to strengthen the fundamental rights in the European Union by making them transparent.<sup>17</sup> Furthermore, new catalogues of human rights can prevent gaps occurring in legal protection that may arise from the increasing complexity of societal life. Accordingly, the Charter of Rights stresses the need to take societal and social progress into

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Review 2010, p. 175 et seq.; cf. also *Matthias Knauff*, Das Verhältnis zwischen Bundesverfassungsgericht, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte, DVBl. 2010, p. 533 (533).

<sup>11</sup> Cf. *H. J. Küsters*, Die Gründung der Europäischen Wirtschaftsgemeinschaft, 1982, p. 55 et seq., 79 et seq.

<sup>12</sup> Seminal: European Court of Justice, Rs. 29/69, *Stauder/Ulm*, Slg. 1969, 419 (Rn. 7); EuGH, Rs. 11/70, *Internationale Handelsgesellschaft/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Slg. 1970, 1125 (Rn. 4); EuGH, Rs. 4/73, *Nold/Kommission*, Slg. 1974, 491 (Rn. 13).

<sup>13</sup> Cf. recent publications by *Juliane Kokott/Christoph Sobotta*, Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon, EuGRZ 2010, p. 265 et seq.; *Manfred Dausen*, Der Schutz der Grundrechte in der Rechtsordnung der Europäischen Union, 2010; *Thorsten Kingreen*, Grundrechtsverbund oder Grundrechtsunion? – Zur Entwicklung der subjektiv-öffentlichen Rechte im europäischen Unionsrecht –, EuR 2010, p. 338 (352 et seq.).

<sup>14</sup> Cf. *Michael Gerhardt*, Europa als Rechtsgemeinschaft: Der Beitrag des Bundesverfassungsgerichts, ZRP 2010, p. 161 (162).

<sup>15</sup> Terminology taken from *Thorsten Kingreen*, in: Christian Calliess/Matthias Ruffert (ed.), *Verfassung der Europäischen Union*, 2006, Art. I-9 Rn. 1.

<sup>16</sup> Illuminated by *Jutta Limbach*, Grundrechtsschutz in der Europäischen Union, Savigny-Vorlesung 2000, p. 13 (16).

<sup>17</sup> Preamble to the Charter, Recital 4.

account, as well as scientific and technological developments, by means of providing accordant guarantees beyond the ECHR.<sup>18</sup>

Secondly, the plurality of jurisdictions brings with it many advantages. Additional courts can give innovation impetus to a deadlocked jurisprudence and break new ground. After exhausting all domestic remedies, citizens have the option of invoking the Strasbourg jurisdiction. Moreover, this procedure serves to contour and reinforce common European standards of human rights, an aspect that cannot be emphasised enough. The European constitutional tradition thus becomes the motor of learning processes, dynamic adaptability, and progressive developments within the framework of an emergent European legal order.<sup>19</sup>

### 3. The challenges of competing human rights protection

There is also a downside to the existence of different regulatory frameworks and jurisdictions which partially overlap functionally and geographically, complementing as well as competing with each other. The quantity of codifications and the enacted law they contain does not necessarily represent a stamp of quality; rather, it can also be seen as an expression of actionism and incertitude. Hence, the goals of transparency, acceptance, and identification ultimately associated with the new legal instruments could therefore become relativized, or even turned into their opposite. Moreover, we already find ourselves confronted with the problem of limited resources, which makes it difficult to rule on matters of human rights protection within reasonable timeframes. It is understandably frustrating for the citizens when they are expected to pass through several different “constitutional court” procedures involving long durations and potentially high costs.

The growing number and scope of interfaces between the different jurisdictions poses specific challenges concerning the uniformity of human rights protection in Europe. Considering the common roots of fundamental rights and their openness to development, though, it seems hardly likely that there will be any lasting unbridgeable differences. From time to time – although it is seldom admitted<sup>20</sup> – different levels of jurisdiction do arrive at divergent rulings on specific points. Understandably, there is a risk that divergent or corrective rulings cause loss of confidence and acceptance. We must therefore be very careful to ensure that any ensuing legal uncertainty does not place the force of the human rights approach in jeopardy. We must at all costs avoid that the beauty and simplicity of human rights and the shared consensus on their fundamental message become blurred as a consequence of overcomplicated subsumtion!

## III. Multilevel Cooperation on Human Rights between the European Constitutional Courts

### 1. Shared responsibilities through recognition of margins for interpretation

What can we learn from these deliberations? We need a coherent system of human rights protection that encompasses both fundamental truths – the universality of human rights, on the one hand, and the sectoriality of their codification and enforceability on the other. The focus should be on establishing a European constitutional jurisdiction dedicated to developing a culture of cooperation and substantive coherence. As I have illustrated elsewhere, all of the constitutional courts are called upon to play their part and assume “responsibility for integration”<sup>21</sup> in a “multilevel cooperation between European constitutional courts”<sup>22</sup>. The simplistic hierarchical system of legal

<sup>18</sup> Preamble to the Charter, Recital 4.

<sup>19</sup> Cf. *Thomas Buergenthal/Daniel Thürer*, *Menschenrechte – Ideale, Instrumente, Institutionen*, 2010, p. 294 et seq.; *Jörg Paul Müller*, *Koordination des Grundrechtsschutzes in Europa – Einleitungsreferat*, ZSR 2005, p. 9 et seq.; *Daniel Thürer*, *Grundrechtsschutz in Europa – Globale Perspektive*, ZSR 2005, p. 51 (69 et seq.); for the whole context *Peter Häberle*, *Verfassung als öffentlicher Prozess*, 2nd edition, 1996.

<sup>20</sup> For examples see *Andreas Voßkuhle*, *Der europäische Verfassungsgerichtsverbund*, NVwZ 2010, p. 1 (4).

<sup>21</sup> Cf. *Andreas Voßkuhle*, *Die Integrationsverantwortung des Bundesverfassungsgerichts*, pending.

<sup>22</sup> *Andreas Voßkuhle*, *Der europäische Verfassungsgerichtsverbund*, NVwZ 2010, p. 1 et seq.; see for this topic already *Udo Di Fabio*, *Der Verfassungsstaat in der Weltgesellschaft*, 2001, p. 78; see also the

protection characterised by strict super-/subordination designed to implement an almost uniform structure of norms has shown itself to be unworkable.<sup>23</sup> Rather, we need to equip the complex and uniquely intertwined multilevel system of protection of human rights with an adequate sharing and assigning of responsibilities. The most suitable “systematic concept” [*Ordnungsidee*]<sup>24</sup> would appear to be that of multilevel cooperation [*Verbundkonzept*], since this incorporates all the factors of autonomy, diversity, responsiveness and the ability to act jointly.

In concrete terms, this means that we have to develop prudent multilevel strategies [*Verbundstrategien*] which will enable both a better coordination of substantive guarantees as well as judicial competences and procedures.<sup>25</sup> In doing so, endeavours should not be aimed at the maximum extension of competences, but rather at achieving functional, efficient and rapid legal protection for our citizens – after all, only by concentrating on specific individual competences will it be possible to reduce the caseload.<sup>26</sup> All this calls for reciprocal considerateness and self-restraint on the part of the courts, manifested above all in the recognition of margins of appreciation and discretion for respective constitutional traditions. From the perspective of European law, such a commitment is embodied in the principle of sincere cooperation laid down in Art. 4 para. 3 TEU and in Art. 4 para. 2 TEU, which contain the duty to respect the constitutional identity of the member states.<sup>27</sup> These principles go hand in hand with the constitutional principles of openness towards international and European law contained in the German Basic Law.<sup>28</sup>

## 2. The role of the German constitutional court

The *Solange* [German: ‘as long as’] decision – recently upheld in the Lisbon judgement<sup>29</sup> – serves as an example of the coordination instruments<sup>30</sup> in the area of human rights already developed by the Federal Constitutional Court. In view of the judicial practice of the European Court of Justice in matters of fundamental rights, in its *Solange II* decision the Federal Constitutional Court regarded its former requirement from the *Solange I* decision to have a written catalogue of fundamental rights as factually having been met. Since then it no longer exercises its judicial authority in respect of the conformity of Union law with fundamental rights, provided – and for ‘as long as’ – within the jurisdiction of the European Union a degree of fundamental rights protection is guaranteed that is essentially comparable to the standards of German Basic Law.<sup>31</sup> This is achieved by procedural

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concept of a European constitutional jurisdiction by *Franz C. Mayer*, *Verfassungsgerichtsbarkeit*, in: Armin von Bogdandy/Jürgen Bast (ed.), *Europäisches Verfassungsrecht*, 2nd edition 2009, p. 559 et seq.

<sup>23</sup> A view shared by *Dieter Grimm*, *Zur Bedeutung nationaler Verfassungen in einem vereinten Europa*, in: Detlef Merten/Hans-Jürgen Papier (ed.), *Handbuch der Grundrechte in Deutschland und Europa*, Band VI/2, 2009, § 168 Rn. 70; *Thomas Buergenthal/Daniel Thürer*, *Menschenrechte – Ideale, Instrumente, Institutionen*, 2010, p. 294 et seq.

<sup>24</sup> Cf. *Eberhard Schmidt-Aßmann*, in: *Eberhard Schmidt-Aßmann/Bettina Schöndorf-Haubold* (ed.), *Der Europäische Verwaltungsverbund*, 2005, p. 1 (7); *Eberhard Schmidt-Aßmann*, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd edition 2004, p. 1 et seq.; with a critical perspective *Ulrich Fastenrath*, *Souveräne Grundgesetzinterpretation – zum Staatsbild des Bundesverfassungsgerichts (Zweiter Senat)*, in: *Thomas Giegerich* (ed.), *Der „offene Verfassungsstaat“ des Grundgesetzes nach 60 Jahren*, 2010, p. 295 (304, footnote 44)

<sup>25</sup> For the relation between Union law and national legal space cf. *Vassilios Skouris*, *Vorrang des Europarechts: Verfassungsrechtliche und verfassungsgerichtliche Aspekte*, in: *Winfried Kluth* (ed.), *Europäische Integration und nationales Verfassungsrecht*, 2007, p. 31 (39 et seq.). *Gertrude Lübke-Wolff* pleads for a “corridor solution” in relation to the ECHR. Cf. *Der Grundrechtsschutz nach der Europäischen Menschenrechtskonvention bei kollidierenden Individualrechten*, in: *Martin Hochhuth* (ed.), *Nachdenken über Staat und Recht, Kolloquium zum 60. Geburtstag von Dietrich Murswiek*, 2010, p. 193 et seq.

<sup>26</sup> The need to reduce the burdens on the courts is also stressed by *Renate Jaeger*, *Menschenrechtsschutz im Herzen Europas – Zur Kooperation des Bundesverfassungsgerichts mit dem Europäischen Gerichtshof für Menschenrechte und dem Gerichtshof der Europäischen Gemeinschaften*, *EuGRZ* 2005, p. 193 (194).

<sup>27</sup> Cf. *Franz C. Mayer*, *Verfassungsgerichtsbarkeit*, in: *Armin von Bogdandy/Jürgen Bast* (ed.), *Europäisches Verfassungsrecht*, 2nd edition 2009, p. 559 (589).

<sup>28</sup> Cf. BVerfGE 123, 267 <347> – Lisbon.

<sup>29</sup> BVerfGE 123, 267 <339> – Lisbon.

<sup>30</sup> Cf. *Andreas Voßkuhle*, *Der europäische Verfassungsgerichtsverbund*, *NVwZ* 2010, p. 1 (3 et seq.).

<sup>31</sup> BVerfGE 73, 339 <376, 387> – *Solange II*.

means, whereby constitutional complaints and submissions by courts shall be *a priori* inadmissible from the outset if their grounds do not state that the evolution of Union law generally has declined below the unconditionally required standard of German fundamental rights.<sup>32</sup> Hence, the reserve competence that theoretically is still due to the Federal Constitutional Court hardly stands in need of being updated; rather, it underscores the recognition of all public authority being bound by fundamental rights.<sup>33</sup>

### 3. The role of the European Court of Justice

For its part, the European Court of Justice contributes to constructive mutual cooperation in the sphere of the protection of fundamental rights by according the member states reasonable scope for the development of their respective constitutional traditions and structure principles. By way of example<sup>34</sup> I would like to mention the recognition of member states' decisions restricting certain fundamental freedoms by giving priority to the protection of freedom of speech and assembly<sup>35</sup>, national culture<sup>36</sup> and human dignity<sup>37</sup>. With reference to the protection of human dignity, for instance, the European Court of Justice held the German authority's ban on laserdromes to be justified. The ban was approved on grounds of public policy. The Court stressed that interpretation of the concept "public policy" may vary from one country to another and from one era to another. This applies particularly to the protection of human dignity, a fundamental right which is anchored in the most prominent position of German Basic Law. With this ruling the European Court of Justice simultaneously adopted it as a general principle of Community law. The route followed by the European Court of Justice, i.e. avoiding potential conflict by respecting the requirements of national constitutional law, could and should develop into a European role model for future cases of use.

### 4. The role of the European Court of Human Rights

Finally, in important areas the European Court of Human Rights also recognises a margin of appreciation for member states with regard to interpretation of the ECHR. This even pertains to such fundamental guarantees as the right to life pursuant to Art. 2 ECHR and the protection of human dignity. In the absence of European consensus as to when human life begins, the Strasbourg court has left the decision to the member states of the Convention, at the same time, though, stressing the need for protection of the embryo in the context of human dignity.<sup>38</sup> This protection can and indeed must be provided by the individual signatory states and thus in keeping with the differentiated systematic of their constitutional orders. This prudent restraint, which enables member states to maintain a high level of protection, also places obligations on the national constitutional courts: they can and must deliver a significant contribution to contouring the guarantees contained in the ECHR by helping to shape and implementing international law in their own judicial practice.<sup>39</sup> In the course of this interaction, the amount of human rights guarantees and possibilities for legal protection in the European constitutional sphere will end up being a real and substantial fundamental rights benefit for the citizens.<sup>40</sup>

<sup>32</sup> BVerfGE 73, 339 <376, 387> – Solange II.

<sup>33</sup> Poignantly illustrated by *Jutta Limbach*, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ 2000, p. 417 (420).

<sup>34</sup> For a more detailed analysis see *Rudolf Streinz*, Die Rolle des EuGH im Prozess der Europäischen Integration – Anmerkungen zu gegenläufigen Tendenzen in der neueren Rechtsprechung, EuR 2010, p. 1 (19 et seq.) m.w.N.

<sup>35</sup> EuGH, Rs. C-112/00, Schmidberger, Slg. 2003, I-5659 – Brennerblockade.

<sup>36</sup> EuGH, Rs. C-260/89, ERT, Slg. 1991, I-2925 – Fernsehmonopol.

<sup>37</sup> EuGH, Rs. C-36/02, Omega, Slg. 2004, I-9609 – Laserdrome.

<sup>38</sup> Cf. EGMR, judgement of 8th July 2004 – Vo/France –, EuGRZ 2005, p. 568 et seq.

<sup>39</sup> Cf. *Michael Gerhardt*, Europa als Rechtsgemeinschaft: Der Beitrag des Bundesverfassungsgerichts, ZRP 2010, p. 161 (162).

<sup>40</sup> For the relationship between the European Court of Human Rights and the German Federal Constitutional Court see also *Hans-Jürgen Papier*, Umsetzung und Wirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, EuGRZ 2010, p. 1 (3).

#### IV. Outlook: The universal human rights discourse

Obviously, it is not possible to arrive at a balanced and effective dogmatic of universal human rights protection overnight. Rather, it calls for a step-by-step approach. The “lived” multilevel cooperation of constitutional courts is able to play a major role in this “policy of small steps”. It is now up to us to breathe life into the common European tradition of human rights protection and at the same time draw benefit from the mutual reception of our case law. The case law of the different constitutional courts working together towards a common standard of fundamental rights protection will therefore become a shared process of learning from one another – a discursive quest for the best solution in a “multilevel instance for learning” [*Lernverbund*].<sup>41</sup> Step by step, this “human rights comparison” may even look beyond the European horizon and evolve to encompass a global discourse on human rights.

Human rights protection in such a system of multilevel constitutional courts lives not least from the persons responsible for it participating in an ongoing exchange of views and sharing of ideas. We are all grateful to the Volkswagen Foundation for bringing us together here with this intention in mind. The conflicting relationship implicit in the title of my talk, i.e. between the universality of human rights protection and its implementation in multilevel European constitutional courts, could very well prove to be a veritable catalyst for advancing European constitutional culture<sup>42</sup>!

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<sup>41</sup> Cf. *Franz Merli*, VVDStRL 66 (2007), p. 418 et seq.; *Wolfgang Hoffmann-Riem*, Die Caroline II-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten, NJW 2009, p. 20 (26).

<sup>42</sup> For more detail *Peter Häberle*, Europäische Verfassungslehre, 6th edition 2009, p. 6 et seq., 460 et seq.