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The Federal Constitutional Court and the Role of its Jurisprudence in the German State Order

Ladies and Gentlemen,

I am very pleased to be with you today and to be given the opportunity to join the members of the Constitutional Court of Morocco and Moroccan constitutional lawyers for an exchange of ideas on questions of constitutional law. In my presentation, I would like to provide an overview on the status of the Federal Constitutional Court and the role of its jurisprudence in the German State Order.

I.

Article 20 section 2 of our Basic Law provides:

"All state authority is derived from the people"

The system of government adopted in the Federal Republic of Germany is that of a *representative democracy.* The political will of the people is manifested by way of an elected assembly that represents the people and is vested with autonomous decision-making powers. Therefore, Parliament is, with good reason, described as the "centre of democracy[1]". This, of course, may lead you to ask: where then is the place of the constitutional court, and what role does it play in a democratic state under the rule of law? This discussion can be traced back to the very origins of constitutional jurisprudence. The President of the Federal Constitutional Court, Andreas Voßkuhle, even refers to certain "natural tensions" which arise between the political sphere and constitutional jurisprudence[2].

II. A robust and efficient constitutional court will, in any case, fail to deliver on the expectations placed upon it unless the following prerequisites are met:

The court must be on equal footing with the other constitutional organs (1.) and vested – unequivocally – with constitutional jurisdiction (2.), including, in particular,

[1] *Paul Kirchhof*, Das Parlament als Mitte der Demokratie, in: Der Staat des Grundgesetzes - Kontinuität und Wandel, Festschrift für Peter Badura (2004), p. 237 et seq..

[2] For an in-depth analysis of this topic, cf. *Andreas Voßkuhle*, in: vMangoldt/Klein/Starck, Kommentar zum Grundgesetz, Art. 93 paras. 35 et seq.

the review of constitutionality in respect of laws adopted by parliament (3.). Last but not least, it must be ensured that decisions of the constitutional court are executed (4.).

1. The Federal Constitutional Court is recognised as a constitutional organ, alongside the *Bundestag*, the *Bundesrat*, the Federal Government and the Federal President.

a) This is rooted in the understanding that, as an institution, a constitutional court must be truly *independent* if it is to exercise its assigned functions; otherwise, the court's decisions will fail to secure the necessary level of acceptance. It is an essential, fundamental and indispensable element of the rule of law that state authority be limited by means of an autonomous court, a court that, by virtue of being a constitutional organ itself, stands on equal footing with the other constitutional organs.

b) Thus, the relations between the national constitutional organs must be informed by mutual respect. The fact that some of the Federal Constitutional Court's decisions may occasionally face criticism, most notably on the part of politicians, does not merit a different assessment. Such criticism is an inevitable (and it would seem almost a necessary) consequence resulting from the Federal Constitutional Court's oversight function, and it reflects the aforementioned tensions that permeate the relation between politics on the one hand and constitutional jurisprudence on the other. As the manifestations of a critical, albeit factual and objective dialogue, this is a reality that an institution such as the Federal Constitutional Court must live with and, when appropriate, confront.

2. The functions of the Federal Constitutional Court at the national level are clearly set out (Art. 93 of the Basic Law) and can be summarised in one sentence as follows: the Court ensures observance of the Basic Law of the Federal Republic of Germany. As an institution that is explicitly mentioned and highlighted in the Basic Law, it oversees the observance of the formal and substantive constitutional requirements.

a) First and foremost, this is the case with regard to enforcing the fundamental rights of individual persons. For this, the key mechanism is the individual constitutional complaint – considered by some as the "Queen of all roads leading to the Constitutional Court"[3] –; a constitutional complaint may be lodged by any person who believes that his or her fundamental rights have been violated by an act of public authority.

[3] *Peter Häberle*, Jahrbuch des Öffentlichen Rechts, new edition/Volume 45 (1997), 89, 112.

b) In addition, the Federal Constitutional Court is tasked with resolving disputes between constitutional organs as regards their constitutional rights and duties (in so-called *Organstreit* proceedings) or federalism disputes between the Federation and the *Laender*. Other types of proceedings include the abstract judicial review of statutes (upon application of the Federal Government, a *Land* government, or one fourth of the Members of the *Bundestag*) as well as the specific review of statutes (upon referral by a regular court).

c) In this context, the status of law in general and the status of constitutional law in particular merit special emphasis. In a modern and democratic state under the rule of law, the acts of all state authority must always be acts *governed by law*. This concept of *the rule of law* is pronounced quite distinctively in the Basic Law, and the philosopher Immanuel Kant has famously described the relation between law and politics in a perfectly apt manner[4]:

"The law must never be adapted to politics but politics to the law"

In other words: society must deal with the existence of diverse – often conflicting – interests and the political influences resulting therefrom. It is the primary function of a constitution, and by extension that of a constitutional court in its capacity as guardian of the constitution, to make sure that no political group has the power to bend the law – not least constitutional law – at its own discretion and for its benefit.

As a consequence, the Basic Law contains *irreversible decisions on constitutional values* that are laid down in Art. 79 section 3 of the Basic Law and that subject acts of state authority in any form to absolute limits. Enshrined in the so-called "eternity clause", the foundations of our nation – specifically, the rule of law, democracy, human dignity and the principle of federalism – cannot be abolished, not even by way of constitutional amendment.

d) Last but not least, the effect and influence of constitutional jurisprudence are inextricably linked to the status of the respective constitutional court justices and their understanding of the office they hold. In Germany, Constitutional Court Justices are elected in a democratically legitimised process (half of the justices are elected by the *Bundestag,* half by the *Bundesrat*; the right to propose eligible candidates rests with the political parties); re-election is not permissible, ensuring that during their term of office Justices render their decisions in a free and independent manner. The Justices of the Court are even known to invoke a "duty to remain ungrateful" towards the political faction upon whose proposal they were elected into office. In this respect, it is imperative to make a clear distinction: there is no doubt that the jurisprudence of the Federal Constitutional Court has a political dimension, and necessarily so, as it is called upon to decide matters that originate from the political sphere – a prime

[4] Cf. „Immanuel Kant's Sämmtliche Werke", v. G. Hartenstein (ed.), 7th Volume, p. 311.

example are legislative acts of Parliament which is dominated by the respective political majority – and also because the resulting implications and consequences of the Court's decisions reach well into the political sphere – just consider the nullification of laws, the delineation of competences between the different constitutional organs, the protection of parliamentary minority rights, or the clarification and shaping of constitutional principles such as the social state principle. Constitutional law is by necessity "political law". Yet, by no means do constitutional court justices render their decisions in a "political" manner in the sense that they might favour one political faction over the other.

3. In addition to the review of acts of the executive and the judicial branch, the Federal Constitutional Court is tasked with the oversight of Parliament, most notably with regard to the constitutionality of laws it adopts.

a) In principle, such review is contingent upon an *application*; the Federal Constitutional Court does not have the power to act on its own initiative for the purpose of volunteering its view on certain constitutional matters. It follows that the Court never renders an opinion "in the abstract", i.e. outside specific proceedings; rather, the Court invariably decides only the specific matters brought before it by way of those types of proceedings set out under the applicable constitutional law of procedure (and subject to compliance with the applicable formal requirements); most notably, this concerns cases submitted by way of constitutional complaint, the specific judicial review of statutes or *Organstreit* proceedings. This mechanism proves to be rather effective in preventing the Constitutional Court from exceeding its mandate. Within the system of the separation of powers, the Constitutional Court may thus assert its role as guardian of the Constitution and ensures observance of constitutional standards; it is, however, barred from exceeding the powers that the Constitution directly confers upon it and from "transgressions" by way of instigating proceedings *ex officio*.

b) As regards the relevant laws and acts of public authority brought before the Court, the applicable standard of review is the Constitution – one almost wishes to add "the Constitution alone". This, too, serves as an important safeguard for ensuring that the Constitutional Court is able to discharge its actual functions, namely to act as the guardian of the Basic Law and to secure its primacy. It is this very notion that informs the commonly cited phrase: "The Federal Constitutional Court does not serve as an ultimate court of appeal (*Superrevisionsinstanz*)"[5]. This means the following: the Federal Constitutional Court generally refrains from interfering with the way ordinary court proceedings are conducted, with the application and interpretation of ordinary law, and with findings of fact or the assessment of evidence; this is left to the regular courts. The Federal Constitutional Court will not intervene unless there is a violation of "specific constitutional law"; this is the case when the legislative basis of

[5] For instance, cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 53, 30 <53>: the Federal Constitutional Court shall not evolve into a "supreme instance".

the challenged act is unconstitutional; the application of ordinary law seems arbitrary; the horizontal effects of fundamental rights between non-state actors (*Drittwirkung*) would otherwise not come to bear; or, when fundamental procedural rights – such as the right to one's lawful judge or the right to be heard – are affected, or courts have crossed the line of judicial law-making.

aa) As far as the judicial review of statutes is concerned, the Constitutional Court has the exclusive power to set aside laws, and thus holds a monopoly in declaring legal provisions unconstitutional. It is true that – when applying the law – every court must examine whether it considers the legal provisions upon whose validity its decision depends in a specific case to be compatible with the Constitution. If the regular court reaches an affirmative conclusion, it may apply the legal provision in question. If, however, the regular court is convinced that the legal provision in question is unconstitutional, it is required to refer the respective provision to the Federal Constitutional Court. The ultimate decision on the constitutionality of laws and the final authority on the interpretation of the Constitution are reserved for the Federal Constitutional Court alone. This is due to the deference that is accorded to the legislature, which initially gave shape and effect to the relevant legal provision by way of a democratically legitimised process. It is not up to the regular courts, but solely incumbent upon the Constitutional Court (a constitutional organ in its own right), to void such a legal provision – as it were, in the manner of an "act of reversal" (*actus contrarius*).

bb) The Federal Constitutional Court grants the legislature broad latitude and discretion with regard to determining which legal provisions, if any, are necessary, politically sensible as well as reasonable and expedient in society, and furthermore which regulatory approach from among the available options appears to be the most equitable. In principle, it is thus up to the legislature and only the legislature to decide how to best exercise its functions. The significant latitude on the part of the legislature corresponds to restraint on the part of the Constitutional Court when exercising its judicial review.

Consequently, the Federal Constitutional Court does not substitute the legislature's expertise on a given regulatory matter with its own expertise, nor does it replace a reasonable decision adopted by the legislature with its own decision – no matter how reasonable. In particular, the Court grants the legislature a margin of appreciation and prognosis. Accordingly, constitutional review is exercised with the appropriate restraint, although its scope cannot be determined in the abstract. For instance, the Federal Constitutional Court will only intervene with regard to the state's duty to protect in the event that the legislature *manifestly* violates the relevant duty. This is due to the fact that the Constitution merely calls upon the legislature to assure the aim of *protection*, yet it does not determine exactly how such protection ought to be put in place; the latter is only for the legislature to decide. The Federal Constitutional Court may only find a violation of the duty to protect if there is a

complete lack of protective measures; or, if the regulations and measures that were adopted prove to be manifestly unsuitable or inherently insufficient for the purpose of achieving the required aim of the protection; or, if the measures fall significantly short of the aim of the protection.

In contrast, a different standard of review applies with regard to the general right to equality under Art. 3 section 1 of the Basic Law, which requires the legislature to accord equal treatment to matters that are essentially alike, and unequal treatment to matters that are essentially different. The standard of constitutional review that applies here is based on the principle of proportionality and the level of scrutiny applied varies depending on the subject matter regulated and on the differentiation criteria, ranging from a mere prohibition of arbitrariness to the strict adherence to proportionality requirements. The varying intensity of the different standards of review ensures that while the Constitutional Court is always able to intervene to the extent necessary vis-à-vis the legislature, it does so as sparingly as possible.

4. Finally, in its capacity as national constitutional court, the Federal Constitutional Court shall not remain a “toothless tiger”; its decisions must be fully adhered to and implemented to the extent necessary.

Generally, the judgments and orders rendered by a constitutional court have considerable importance and bearing for the affected areas of the national legal order. This is especially true if the court concludes that the legal provision submitted for review is *void* or at least *incompatible* with the constitution.

a) Let me briefly explain these fundamental concepts which form the basis of German constitutional jurisprudence: according to our understanding of constitutional legal doctrine, if a legal provision conflicts with higher-ranking law (as is most notably the case where an ordinary law violates the Basic Law) such a provision is void *ex tunc* – that is, from the outset. Therefore, a decision by the Federal Constitutional Court concluding that a law is void and without legal effects, does not change the legal order in a constitutive manner. Rather, the decision contains only a declaratory finding which, at most, abolishes any semblance of validity emanating from the law in question.

Such rigorous legal consequences may prove challenging to implement, especially in respect of laws that were adopted a long time ago and have since provided the legal basis for acts of state authority in innumerable cases, a basis that would from then on be invalid with retroactive effects. In light of this, the Federal Constitutional Court, early on, developed another, less far-reaching category of legal consequences[6]: it may limit its decision to the finding that a law is *merely*

[6] Cf. §§ 31(2), 79(1) BVerfGG.

incompatible with the Basic Law. The crucial advantage of this lies in the fact that the decision will take effect only for the future (*ex nunc*) – meaning that the relevant legal provision can no longer be applied *in future cases* (so-called prohibition of application). Furthermore, it allows the Federal Constitutional Court to combine the declaration of incompatibility with appropriate transitional orders.

b) The *Federal Constitutional Court Act* (*Bundesverfassungsgerichtsgesetz* – BVerfGG), as an ordinary law, provides the necessary instruments for ensuring that instead of being reduced to mere statements of invalidity or incompatibility, the decisions of the Federal Constitutional Court are duly recognised in legal practice.[7]

- In accordance with the relevant provisions, any findings on the merits issued by the Federal Constitutional Court, including the operational part of the decision and its key considerations, shall be binding upon the other constitutional organs of the Federation and the *Laender*, as well as upon all courts and public authorities of the Federal Republic of Germany. This implies that all public authority must not only comply with these decisions when applying and implementing the law, but also create the overall conditions necessary to satisfy the requirements set out by the Federal Constitutional Court. In decisions on the merits that are rendered in certain types of proceedings (most notably, abstract and specific judicial review proceedings, § 95 section 3 of the Federal Constitutional Court Act), and where such proceedings pertain to the validity of a law, the operative part of the decision is even deemed to have the force of law. The operative part of the decision shall be published in the Federal Law Gazette (*Bundesgesetzblatt*), for reasons of legal certainty and legal clarity.

- Another provision on the enforcement of constitutional court decisions provides that in its respective decision, the Federal Constitutional Court may – *ex officio* – specify (although it is not under any obligation to do so) who is to execute it – for example, it may task a suitable public authority with the execution; moreover, the Court may determine the "method of execution". The Federal Constitutional Court has traditionally interpreted this provision in a broad manner, reading it as conferring upon the Court "any competence necessary for the execution of its decisions". Thus, as "master of execution", the Court asserts the power to make any orders necessary in order to give effect to its decisions rendered on the merits of a case. This must be seen in light of the fact that the function of the Court is not limited to reviewing the constitutionality of laws referred and, if appropriate, voiding them. Rather, in the spirit of its status as a constitutional organ, it is the specific responsibility of the Federal Constitutional Court to ensure that the legislature remains bound by the Constitution

[7] Essentially, this concerns to three interrelated and interdependent provisions. The provisions in questions are sometimes described a comprehensive regulatory framework; specifically, this refers to §§ 31, 35 and 79 BVerfGG.

and that the Court's decisions are effectively implemented with regard to how the law is applied in practice.

III. Ladies and Gentlemen, these were but a few remarks on the understanding of the role of constitutional jurisprudence. Nevertheless, allow me to draw a brief conclusion: not only does the Federal Constitutional Court expressly recognise Parliament as the "centre of democracy", but it also aims to strengthen democratic processes within and outside Parliament. Even though constitutional jurisprudence cannot (nor would it want to!) claim for itself the "centre stage of decision-making", it nonetheless serves as an indispensable guardian of the unobstructed and seamless functioning of the democratic state under the rule of law. Ultimately, this is in line with the ambition inherent in every modern constitution: to establish a stable legal order, and – by means of constitutional jurisprudence – to preserve it in the long term.