Ladies and gentlemen,

I would like to thank the organisers for inviting me to speak on this occasion. It is an honour and pleasure for me to deliver this lecture. There is no need to explain why it is an honour, but let me explain why I’m so pleased.

Apart from the obvious reason that it is pleasing to have the opportunity to discuss with outstanding colleagues and excellent students, I have two more reasons to enjoy being here. The first is an indirect familiarity and sympathy with King’s College due to the fact that my eldest daughter had a very nice and interesting time here a few years ago as an LL.M. student of European Law. The second is that I myself keep fond memories of the conference that was held at King’s College in the summer of 2009 on the occasion of the end of the final sitting period of the House of Lords Appellate Committee. On the 30th of July 2009 we heard the Lawlords pronounce their last judgments as members of that Committee. With all the different opinions that were read and the various references to what "my noble and learned friend Lord X (oder Baroness H)" had said, it wasn’t easy for an unaccustomed spectator like myself to find out what it was that the Court had decided and why. But none of us, I suppose, failed to grasp the paradigmatic nature of the moment we were witnessing. A venerable institution made its final appearance to give way to European principles of separation of powers. Some of the British participants, I learned, saw this as a pointless, unwarranted sacrifice on the altar of abstract doctrine. Others saw it as a necessary sacrifice to the development of judicial independence in countries that one would not like to see staff their highest court with acting parliamentarians or members...
of government and point to the UK as an example. Yet others may have thought that a more stringent separation of powers will benefit not only foreign countries.

At any rate, probably all of those who watched the final ceremony felt that something serious was happening and that, however much was to be gained from the change, it also implied a loss. Something very British was about to disappear. You rarely get to experience it so impressively, but that’s the fate of many national peculiarities in the process of transnationalisation.

This takes me to the subject of my talk: To the problems of conflict between national and transnational courts which can arise in that process.

In Europe, it is for the moment mainly the relationship between national courts on one side and the European Court of Human Rights and the European Court of Justice on the other that raises questions of potential conflict. But the problem of defining and shaping the relationship between national and transnational courts, is a more general one. One need not be a prophet to foresee that it is just a matter of time for the relationship between national courts and, say, WTO panels – or even between European transnational courts and WTO panels - to get similar public attention. We should keep this in mind when discussing our actual European issues.

In the first part of my presentation, I will explain what has prevented the German Federal Constitutional Court from swearing unlimited allegiance to the jurisdiction of the European Courts. In the second part, I will explain why I think potential obstinacy on the part of the highest national courts can be a functional rather than a dysfunctional element in the Union and Convention systems. In the third and final part, I will discuss the contributions required on both sides - national and transnational - to shape a viable system of cooperation between national and transnational Courts, and the reasons why these contributions should be made.

I.

The German Federal Constitutional Court (I will abbreviate this as “FCC” - not to be read as "Federal Communications Commission") has taken a position towards the
European Court of Human Rights (ECtHR) as well as towards the European Court of Justice (ECJ) which has produced certain tensions in past. In a somewhat one-sided manner, one might describe this position as refusal to declare unconditional surrender - if there weren´t an unfitting undertone in this metaphor. It sounds as if the Courts were at war which eachother, which is definitely not the case.

What has prevented my court from swearing unlimited allegiance to whatever the transnational European Courts may decide? In the abstract, the answer to this is very simple: It is our national constitution which sets limits to permissible obedience.

With respect to the European Convention of Human Rights and the jurisprudence of the Strasbourg Court, the situation in Germany is the following:

According to the German Constitution - the Grundgesetz (Basic Law) - there is a difference in rank between the national Constitution and ordinary statutory law, and the Constitution provides for a Federal Constitutional Court (FCC) to safeguard its supremacy. This Court is endowed with extensive powers to that end, in particular with extensive powers to protect the individual rights granted by the German constitution, the so-called fundamental rights. It can strike down any unconstitutional act of state, including federal statutes, and it has ample opportunity to do so: After exhaustion of other remedies, everyone can seize the Court by way of an individual constitutional complaint with the contention that his or her fundamental rights have been violated. You don’t even need a lawyer. The FCC is therefore a very popular, and, due to its popularity, a very powerful institution not only legally, but also factually.

This very strong system of judicial protection of individual rights was established after World War II in response to the unprecedented crimes against humanity committed during the Nazi period. In general, it has worked well not only as a means of implementing national constitutional rights, but also as a means of factually preventing violations of Convention Rights insofar as these are congruent with national constitutional rights and therefore, in effect, automatically co-protected along with these.
However, under the German Constitution, national constitutional rights and Convention rights are not necessarily congruent. There is even the possibility of conflict. This is because the German Constitution assigns international treaties like the Convention the rank of ordinary statutory law. Accordingly, there is a theoretical possibility of conflict between obligations under the Convention (ECHR) as interpreted by the ECtHR, and the national constitution (or even normal statutory law enacted after the Convention became binding for Germany.

Conflicting individual rights are the most sensitive matter in this respect. If of two conflicting rights A and B, both protected by the Convention as well as by the national constitution, right A is given a very extensive reading by the ECtHR, this may – theoretically, from the point of view of the German Constitution - result in a constitutionally unacceptable restriction of right B.

If such a conflict arose, German courts would, from the point of view of national law, have to decide in favour of the constitution. This is what, to the dismay of many commentators, the FCC made explicit in a much debated decision in 2004 (case of Görgülü). In fact, however, the decision strengthened the role of Convention.

Görgülü made clear for the first time that in a case of failure by a court of ordinary jurisdiction to take due account of a decision of the ECtHR, the party concerned may take this to the Constitutional Court as a presumptive violation of the relevant constitutional right. It also reaffirmed what the Court had already stated earlier: that German Courts, including the FCC, must as far as possible, i.e. by all methodologically acceptable means of interpretation, read national law – ordinary and constitutional - in such a way as to avoid a conflict with the Convention as read by the ECtHR. If you knew the ambit of methodological possibilities that can be learned from the jurisprudence of the FCC, you would not expect the FCC to run into difficulties with the ECtHR on that basis.

What the principle of harmonising interpretation is good for can be seen from a decision that was rendered just a few days ago, concerning preventive detention. According to German Criminal law, a perpetrator can under certain narrow conditions be sentenced to be kept in preventive detention after the end of his fixed-term
criminal sentence as long as he is still considered dangerous. Because of certain retrospective elements in the relevant statutory rules, the ECtHR had in several decisions found a violation of Convention rights (Art. 5 and 7) in their application. The FCC, which had in an earlier judgment - in 2004 - confirmed these rules now found them unconstituional.

With the doctrines just explained, and with the power of the FCC to declare void any national statute or decision which it considers contrary to the constitution, the level of judicial protection for Convention rights is definitely higher in the German legal system than it is in many others, including the British one.

The constitutional framework determining the role of EU law in Germany is different. Accordingly, there is a different set of limits to obedience.

The German Constitution explicitly permits integration into the EU and is therefore held to recognise, in principle, the precedence of EU law over national law.

Nevertheless, the FCC sees itself bound by the Basic Law to exercise two types of review even with respect to the applicability of acts of the EU, including judgments of the Court of Justice, in Germany: ‘ultra vires review’ and ‘identity review’.

Ultra vires review, i.e. the constitutional right and duty of the FCC to declare obvious ultra vires acts of the EU inapplicable in Germany, is held to follow from Art. 23 of the Basic Law, which authorises the transfer of sovereign powers, but not of sovereignty as such. In the view of the FCC, as expressed in its judgments on the Treaties of Maastricht and Lisbon, the reserved right to exercise ultra vires review is a necessary corollary of this limited constitutional authorisation, and of the corresponding EU principle of conferral.

For without ultra vires review, there would be no limit to the amplification of conferred powers by way of interpretation. The Union itself, not the Member states, would then be the master of its competences, and that means: the Union would have the sovereignty which Art. 23 of the Basic Law doesn´t allow to be conferred upon it. For
sovereignty lies precisely in being the master of one’s own constitution and, in particular, of one’s own competences.

As for "identity review", there is a terminological correspondence with Art. 4 II 1 TEU, according to which the Union must respect the national identities of its member states. The concept, however, is not based on the EU Treaty, nor on some philosophical idea of national identity, but on the German Constitution. The Basic Law contains a so-called "eternity clause" (Article 79 III) according to which certain fundamental principles of the constitution (democracy, rule of law, respect for human dignity, and a few more) shall not be affected even by way of amendments to the constitution. "Identity review" is there to prevent this prohibition from being circumvented via the European Union. Since, for the time being, there seems to be little danger of German democracy or German respect for human dignity being abolished or seriously damaged by the EU, I will not dwell on identity review. Ultra vires review would seem to be the one with the greater chance of producing a practical conflict. However, a recent FCC judgment - in the so-called Honeywell case - has made it clear that ultra vires review will be exercised ultra-cautiously.

In that case, the complainant (Honeywell) had argued that the interpretation of Union law upon which the ECJ had based its decision in the case of Mangold was inapplicable in Germany because that decision was ultra vires. In Mangold, the ECJ had held that a German statutory rule allowing fixed-term employment of people beyond the age of 52 was in breach of a directive and of a primary law prohibition against age-based discrimination. Our complainant objected that the time allowed for implementation of the directive wasn’t over, yet, and that he could not find a specific ban on age-based discrimination in primary Union law - neither in the wording of the treaties nor in the constitutional traditions common to the Member States. Therefore, he alleged, he had been free to deploy what the ECJ had found to be age-discriminatory behavior. The FCC, in this case, took occasion to clarify that it would not assume some sort of general control of whether or not Court of Justice had made a wrong decision and thereby transgressed its competences, and that 'ultra vires review' would only come into play where the alleged 'ultra vires action' led to a structurally significant shift in the system of competences. No such shift was found to have occurred in the specific case.
II.

Obviously, the mere possibility of conflict implied in the reservations I have described implies a tension and a risk. Would it be better to avoid that tension and eliminate that risk?

As far as the law is concerned, this could easily be done.

In the Netherlands, the Constitution gives precedence to international treaties and acts of international organisations over the rest of constitutional law. This is as strictly monistic a rule as a constitution can possibly produce. Taken at face value, it positively eliminates the possibility of conflict between the regimes of national and treaty-based international law. In a transnational order into which all the national legal systems integrated themselves this way, the final say would be clearly allocated to the transnational level. The perspective of conflicts for which the law can offer no solution - or rather: for which the law offers contradictory solutions, depending on whether you look through the glasses of national or international law - this frightening perspective would be eliminated.

The real world, however, cannot so easily be delivered from its real conflicts. And the prospect of transnational systems wherein the states parties have relinquished every legal authority to claim respect for the limits of the powers conferred to the system might be just as frightening, or even more frightening, than the risks resulting from potentially obstinate national constitutions.

Why?

Economic globalisation inevitably goes hand in hand with legal harmonisation. Where there is a market, you need legal frameworks reaching as far as the market does to ensure that it can function properly. You need them to constitute the market, and you need them to control what economists call the external effects of market behaviour – e.g. impacts on natural resources, on social structures, on the stability of the market system itself, etc.
The European Union owes its existence to this inevitable nexus between markets and the need to regulate them. When plans to establish a European political union failed in the 1950s, the European Economic Community was founded instead - not because the founding fathers had given up more ambitious plans but because they knew that a common market would necessitate common regulatory policies and expected that it would entail a political union, in the long run. This expectation has turned out to be realistic. Today, large parts of the law in every member state of the EU are shaped by Union law, to say nothing of additional factual economic pressures to equalise the conditions of competition.

After decades of European harmonisation and decades under the pressure of an increasing global competition, we find ourselves in a dilemma. On the one hand, it is obvious that in many areas, more of a transnational legal framework is needed - in other words: that the process of transnationalisation of law will und must go on. On the other hand, it also becomes more and more obvious that there are costs, heavy costs, attached to this process. These costs include, among other things, losses of familiarity with (and manageability of) institutional and other conditions of living. They necessarily include losses in the democratic character of decisionmaking processes. I will call this "democratic costs". (It would probably be more precise to say "costs in democraticity", but I suppose that in English like in German, that sounds too bad).

When referring to democratic costs, it is not primarily the non-proportional parliamentary representation of citizens in the EU that I would like to draw attention to. Non-proportional representation is a necessary element of democracy in a supranational union of states of very unequal size (in terms of population). It is a means of keeping the democratic costs of supranationalisation at a tolerable level for citizens of the smaller members of the union. What I have in mind as "democratic costs" are mainly the costs of scale (there is a sort of reverse economy of scale with respect to the possible degree of self-determination in collective decisionmaking processes) and the costs arising from the inevitable complexity of decisionmaking processes on a transnational level. One need only ask whether and to what extent the long-term political consequences of the globalisation of markets will resemble the
long-term political consequences of the creation of a *European* market to get a sense of the ambivalence of transnationalisation in terms of democracy.

It is this ambivalence which is reflected in potentially obstinate national constitutions, constitutions which do not allow *unconditional submission* to transnational regimes. Potential obstinacy can act as an element of check and balance and as an ear-opener in such a regime. Ideally in a purely preventive manner, it will keep the transnational courts aware of what incorrigible actors easily lose sight of: the limits to their competences and authority.

III.

But what about the risk of destructive clashes that is implied in potential obstinacy? What is necessary to avoid them?

Both sides - the national and the transnational one - must contribute.

On the part of the transnational courts (and not the courts only, so I should rather say: on the transnational level), the most important change that we need is a more acute sense of subsidiarity.

Subsidiarity is a principle designed to protect the self-determination of the lower and smaller decisionmaking-units against that of the higher and larger ones. The importance of this principle grows along with the needs for transnational harmonisation of policies and legislation.

Growing needs to harmonise inevitably *raise* the value of local, regional and national peculiarities and the value of remaining possibilities of collective self-determination at a local, regional or national level. The pan-european tendency to decentralisation, autonomisation, devolution that we have witnessed along with "Europeanisation" during the last decades expresses this change in preferences. Simultaneously, however, the ubiquity or almost-ubiquity of needs to coordinate or even harmonise makes it ever more difficult to entirely withhold larger areas of competence form the more central decisionmaking units. Hence the growing importance of a principle that
will restrain the exercise of competences which have in principle been conferred to the more central levels. That is precisely what the principle of subsidiarity is up to.

If we look at the origins of the principle - the catholic theory that the state should not deal with matters that can sufficiently be dealt with by individuals and societal units like the family or the church -, it becomes obvious that human rights themselves are an expression of the principle of subsidiarity insofar as they protect the individual’s self-determination, traditionally called "freedom", against intrusions by collective decision-making units. (It took some time for the Catholic Church to become aware of that).

At first sight, it may seem strange to consider the principle of subsidiarity in connection with the interpretation of international human rights, because human rights are considered to be universal. Isn’t therefore the concept of subsidiarity inadequate when we talk about interpreting international human rights?

I do not think it is. Human rights may claim universal validity. But that is not true for each and every specific content which someone - or some court - may derive from them. In this, I agree with Lord Hoffman’s famous speech on the matter. The central content of many human rights is but a requirement that restrictions have a legal basis and respect the principle of proportionality, i.e. that the relevant concern be properly balanced against other concerns which may also claim importance. Views on how to do that may differ for many reasons, including respectable ones. For instance, views on how far parental rights go when it comes to determining whether a child will go to school or not may vary from one country to the next. In Germany we feel that there is no violation of the right to respect for private and family life in requiring parents to send their children to school. In the USA, Germans required to do that have been granted asylum. In some countries, the traditional view is that freedom of religion requires strict laicism on the part of the state and its organs. Others, even undoubtedly democratic ones, see no harm in their head of state being ex-officio also the head of a certain faith and/or Church. There certainly are "kernel contents" of human rights which ought to be recognised all over the world. But that does not mean that there are no human rights questions with respect to which different answers given in different countries due to different collective preferences could be
tolerated. It does not mean, in other words, that there is no room for subsidiarity in matters of human rights.

It is not by accident but due to the idea of subsidiarity that international systems of protection of human rights are typically not designed as unitising systems but as subsidiary systems to guarantee minimum standards (Art. 53 ECHR) which have to respect national margins of appreciation not only with respect to factfinding but also with respect to normative assessments, concerning e.g. the weight of issues which have to be balanced against each other. There is no other way transnational protection of human rights can work, in the long run.

It seems to me that in recent years, there has been increasing impatience with decisions of the ECtHR in many Countries. In the UK, this culminated in the recent decision of the House of Commons not to change the statutory rules denying prisoners the right to vote although the ECtHR has found them to violate the Convention. In Germany, the Court’s decision against retroactive prolongation of preventive detention (M. v. Germany) has been extremely unpopular because it was interpreted as forcing us to release uncontroversially dangerous criminals. In Italy, the first Lautsi judgment, finding the display of crucifixes in public school classrooms in violation of Convention rights, has created popular outrage. In Russia, I have sensed a spirit of rebellion about the Court’s decision in the Markin case, concerning unequal treatment of male and female military staff with respect to parental leave. This account could be prolonged.

I am not implying that the decisions which I have mentioned all go too far. Nor am I implying that a transnational Court should make it a priority to avoid opposition. Yet, the mere incidence of so much strong discontent in different countries may indicate that generally, it would be in the interest of long-term operability of the Convention system for the Court to give the idea of subsidiarity more weight and develop a specific culture judicial restraint.

Its culture of judicial restraint must be specific because more judicial restraint is needed in a transnational system of protection of human rights than at the national level. At the national level, the necessary degree of judicial restraint is determined by
the principle of separation of powers. Courts must refrain from improper intrusions into the domains of the legislative and executive powers. A transnational court must, in addition, take account of the principle of subsidiarity as a principle that requires judicial restraint in interfering with the national legal orders. It must also consider that the (primary) transnational law under which it operates will usually be much more difficult to change than national law; this requires additional caution in handling the existing transnational legislation. And it must consider that the national systems it interferes with differ in their cultures of judicial restraint, in their understandings of what is proper and what is improper interference with political and administrative decisionmaking. Accordingly, they differ in the extent to which they will be ready to tolerate such interference. It would be unwise for an International Human Rights Court to neglect that.

In the case of the EU Court of Justice, matters are a bit more complicated. For the Court of Justice, making the Treaty principle of subsidiarity effective in the EU would mean giving up some of the judicial restraint which it has practised so far in applying this legal principle when checking the conformity of EU legislation with the Treaties. To go into that would require a lecture of its own. I suppose I had better try to finish this one in time.

If on the part of the transnational Courts, it is a lack of allegiance to (and, as it seems, sometimes a lack of understanding of) the principle of subsidiarity that poses the greatest risks to the viability of the respective transnational system as a whole - what about the national Courts? What are the mistakes they should avoid?

In the first place, we should not get caught up in problems of status and facekeeping. A constitutional court judge from another EU Member State with whom I once discussed why neither his court nor mine had ever referred a question to the Court of Justice told me about a colleague of his who opposed referrals because asking the Court of Justice would mean to acknowledge that court as a superior. This is ridiculous. It is obviously nice to serve as a highest judge, nice to have the final say, nice never to be subject to any momentous criticism. Where self-assurance in national Justices is based on such niceties, it may suffer from the existence of transnational courts, and suffer even more when these find a decision made by the
national Justices not to be in conformity with transnational law. The professional standard, however, should be to bear that with composure, avoid defiant or evasive reactions, and be — in principle, within the limits that may be set by our respective constitutions — ready to revise one’s own jurisprudence in response to judgements of the European Courts.

We should also be aware that an exclusively national perspective on the work of a transnational Court is inadequate. The jurisdiction of a Court working for a legal community of 27, or even 47, states cannot be expected never to get on the wrong side of any of the national legal cultures with all their differences in legal doctrines, prevailing value judgments and even methodological standards. Even a perfect Court couldn’t avoid that. And of course, transnational courts are just as imperfect as national ones. They make mistakes in individual cases (if only we knew for sure in which ones!). They may even seem to be on the wrong track for some time in a more general way, overstressing either the hard or the soft element in justice, overestimating either the market or the state, showing either too little or too much judicial restraint, lacking either a sense of subsidiarity or a sense of where uniform standards are necessary, and so on.

That is why transnational courts, just like the national ones, need open discussion and criticism of what they do. That is why dialogue is important, why it is useful and not just crypto-tourism for delegations and individual judges to meet at conferences and exchange views.

Criticism can also be voiced in decisions of national courts. The Suisse Federal Court has, in a recent decision, sharply criticised the judgment of the European Court of Human Rights in the case of Schlumpf v. Switzerland. This was a case concerning the right of a transgender person to get her sex change operation paid by her mandatory health insurance. According to Swiss legislation, the insurance has to pay for medical treatment insofar as the medical measures are effective, appropriate and cost-efficient. The Swiss Insurance Court had - on the basis of broad medical expertise - constantly, and also in the case of Ms Schlumpf, interpreted this as requiring a two-year period of testing, including hormone therapy, and medical observation preceding the operation in order to make sure that the community of the
insured would not be burdened with the high costs of such a serious measure without good cause and proper scrutiny. The ECtHR held that the routine application of this rule to the case of Ms. Schlumpf had violated her right to private and family life under Art. 8 of the convention. The Suisse Federal Court, when called upon to decide whether to reverse the decision of the Suisse Insurance Court on the basis of that transnational judgment, explained in detail why, in its view, the Strasburg Court was wrong and even misread the files - and then went on to state that it (the Suisse Federal Court) was bound to rectify the violation stated by the ECtHR irrespective of whether it was convinced by the ECtHR’s argument. This type of criticism, which remains without consequences in the decision in which it occurs, may seem contrary to the judicial virtue of abstaining from obiter dicta. But it makes sense as an element of the necessary communication between national and transnational courts, and it is certainly better than a national decision voicing criticism of the ECtHR as a ratio decidendi, i.e. as a reason for refusal to comply.

In matters of human rights, there is a special danger that countries which tend to see themselves as top performers in that area take a too narrowly national perspective, because they may feel they do not need to take lessons from Strasburg.

In Germany, this was palpable after the Strasburg judgment in re von Hannover v. Germany, according to which the German Constitutional Court had failed to strike the right balance between a publisher’s freedom of expression and a princess’s right to privacy. This has been dealt with successfully in the end; the First Panel of my Court has adjusted its jurisprudence to the Strasburg requirements. But some of the initial comments in the German legal community had been very sharp. For instance, the Strasburg judges were seriously advised to stop tampering with the decisions of the venerable Constitutional Court of a long-established democracy and mind their business elsewhere. This may sound particularly weird because democracy isn’t all that long-established in Germany, nor are human rights. They are firmly established, though, today, that much can be said.

Of the states parties to the European Convention, it is the United Kingdom, the “mother, or grandmother, of human rights”, to quote Louis Henkin, that could most convincingly claim a historical record testifying that its culture of respect for human rights does not depend on its being a party to the European Convention of Human
Rights. This is probably what Lord Hoffmann had in mind when he scolded the ECtHR for “teaching grandmothers to suck eggs”. I hate to disagree with Lord Hoffmann. His opinion in A and others v. Secretary of State for the Home Department is one of the most memorable pieces of legal writing I have read in my life. But, however well-founded his criticism of certain decisions of the ECtHR may be, I don’t think it is helpful to exhort that Court not to teach grandmothers how to suck eggs. Even a grandmother may happen to squash an egg from time to time. With new types of eggs, or with new sucking techniques developing, she may even, from time to time, turn out to be less proficient than some of the youngsters.

An international judicial system for the protection of human rights cannot work on the basis of different standards of scrutiny, with some states claiming some sort of ancestorial immunity or aristocratic privilege, and others being treated as the ones to be taught decent behavior. The bars must be the same for all states parties. Grandmothers and other high performers will be identified by their knocking them off less frequently than others. The European states with a good human rights record may be right when they feel that it is not for their sake in the first place that the European Convention of Human Rights is necessary. But if, out of discontent with the jurisdiction of the ECtHR, a state like the UK were to break away from the Convention, that would seriously endanger the viability of the Convention system as a whole. The credibility of the system rests on its having members like Great Britain, and being respected by them. How can the states which are most often found in violation of convention rights, be expected to seek fault with themselves, or at least respect the Strasburg judgments, if countries like the UK didn’t? Countries where human rights are real, countries like yours and mine, therefore have a special responsibility concerning the functioning of the Convention system. I’m using the term “responsibility” deliberately, because there is more than a moral obligation involved. In the long run, it is in our own interest to keep that system effective, because in a globalised world, the general lawlessness and moral corruption that necessarily go along with contempt for human rights cross borders like contagious diseases.

If we find one or another individual judgment of the ECtHR hard to swallow, we should let “Strasburg” know, but we should also remember the importance of the
system of which the judgment is a part, and be ready to make sacrifices, to a certain 
extent, to keep it working. I do not think the amount of sacrifice needed will become 
unbearable. As far as the European Court of Human Rights is concerned, I am quite 
confident that it is and will be responsive to the criticism that has been voiced in 
recent years. The recent Great Chamber decision in the case of Lautsi and others v. 
Italy, which reversed the above-mentioned decision outlawing crucifixes in public 
classrooms, can be taken as an example of such responsiveness. The unanimous 
Chamber decision of November 2009 has been reversed by a 15:2 majority in 2011. 
This is remarkable, it would not have happened if there had not been a process of 
learning form reactions, in the meantime.

To sum up: We should leave it at the existing divergences of national and 
transnational answers to the question question of who has the the last word. The 
resulting potential obstinacy is fine. But actual obstinacy, be it on the part of national 
Courts or on the part of national parliaments, is probably unnecessary and ought to 
be thought about more than twice.