# Editorial

## BETTER IN THAN OUT: WHEN CONSTITUTIONAL COURTS RELY ON THE CHARTER

'Freedom entails that one's personal beliefs and behaviour are subject to development and change'. It includes 'the chance to move on from errors and mistakes'. When the German *Bundesverfassungsgericht* delivered these lines in late 2019, it was speaking of the right to be forgotten in the age of digital mass communication.[1] It could also have been speaking of itself. For the German Court did feel free radically to review its own fundamental rights jurisprudence in cases involving EU law. In two decisions of cardinal importance, *Right to be forgotten I* and *II*, the First Senate of the German Federal Constitutional Court moved away from its arguably flawed concept of strict separation between the scope of application of European and national fundamental rights, and moved on to acknowledge – and actually manage – their overlap. For the very first time, the *Bundesverfassungsgericht* decided that EU fundamental rights can, under certain conditions, be directly invoked as a standard of review in constitutional complaints brought before it. Hence, the German Court no longer limits itself to reviewing the exercise of public authority in Germany on the basis of German constitutional standards alone, but extends its judicial review – and its judicial responsibility – to the respect for EU fundamental rights by German authorities. In other words, the *Bundesverfassungsgericht* has recentralised fundamental rights review by taking up the European mandate which for decades it had left to the ordinary courts.

The *Bundesverfassungsgericht* is not the first constitutional court to rely on EU fundamental rights as a standard of review – a fact also pointed out by the Court,

[1]BVerfG, order of 6 November 2019, case 1 BvR 16/13 – *Right to be forgotten I*, English summary available at ⟨www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-083.html⟩ and BVerfG, order of 6 November 2019, case 1 BvR 276/17 – *Right to be forgotten II*, English summary available at ⟨www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-084.html⟩, both visited 10 March 2020. Both decisions were published on 27 November 2019. The literal quotations refer to the English summary of *Right to be forgotten I* (referring to para. 105 of the decision).

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which expressly refers to the case law of other constitutional courts. The first case law mentioned is that of its Austrian counterpart, the *Verfassungsgerichtshof*, which came up with an innovative approach, relying on the EU Charter of Fundamental Rights on the basis of the principle of equivalence.[2] In Italy, the *Corte costituzionale* has recently announced that it could also, in appropriate cases, carry out judicial review directly on the basis of EU fundamental rights.[3] Both Courts argue that extending the standard of review to the Charter reflects their constitutional task to provide centralised constitutional review. Furthermore, the Belgian *Cour constitutionnelle* has also included the Charter in its standard of review.[4] And in France, the *Conseil constitutionnel* has at least highlighted the congruence of national and supranational fundamental rights when applying French fundamental rights in an area covered, but not fully determined, by EU law.[5] There are other examples, and there will possibly be more to come. It already looks like an overarching trend: constitutional courts, although in rather diverse ways and to a varying extent, are refraining from leaving the protection of EU fundamental rights entirely to the ordinary courts in cooperation with the Court of Justice. They have decided to re-enter in the game.[6]

The concern of otherwise being marginalised is openly raised by the *Bundesverfassungsgericht*. According to the Court, the more dense EU law becomes, the more incomplete the protection of fundamental rights.[7] This is why the constitutional complaint as a key mechanism of German constitutional law is opened up to the European dimension: 'fundamental rights' in the sense of the Basic Law's procedural provisions on constitutional complaints[8] are now to be read as also covering EU fundamental rights.[9] According to the German Court,

[2]VfGH 14 March 2012, Cases U466/11-18 et al., *Charter of Fundamental Rights*, English translation provided by the VfGH, available at ⟨www.vfgh.gv.at/downloads/VfGH_U_466-11__U_1836-11_Grundrechtecharta_english_2.pdf⟩, visited 10 March 2020.

[3]*Corte costituzionale*, decision of 23 January 2019, case 20/2019 English translation provided by the *Corte* available at ⟨www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2019_EN.pdf⟩, visited 10 March 2020. For the specific context of so-called 'dual preliminary' cases, i.e. situations in which national law potentially violates both Italian fundamental rights and the Charter, *see* G. Martinico and G. Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath', 15(4) *EuConst* (2019) p. 731 ff. with a comment on the preceeding case No. 269/2017.

[4]*Cour constitutionnelle*, decision of 15 March 2018, Case 29/2018.

[5]*Conseil constitutionnel*, decision of 26 August 2018, case 2018-768 DC.

[6]Perhaps with the exception of the Belgian *Cour constitutionnelle*, which never left the game in the first place.

[7]BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 60.

[8]*See* Art. 93(1) No 4a of the Basic Law.

[9]In the BVerfG's previous EU-related case law, constitutional complaints were always based on a potential violation of German fundamental rights and Art. 38 (right to vote) in particular.

the protection of fundamental rights by means of constitutional complaints is a cornerstone of the system of constitutional review as established by the Basic Law: individuals should be able to benefit from dedicated fundamental rights review by a specialised institution.[10] This specific mandate of the *Bundesverfassungsgericht* to carry out a dedicated fundamental rights review[11] is now extended to EU fundamental rights. The Court conceives this move as a way of assuming its own responsibility for integration, a responsibility deriving from the Basic Law's EU clause, Article 23. Interestingly, the Court emphasises the fact that the constitutional complaint aims at reviewing the *application* of EU fundamental rights by national authorities and courts in individual cases. It is not the *Bundesverfassungsgericht*'s frequently emphasised role of concretising (and also setting) abstract constitutional standards that is highlighted here, but its function of reviewing whether authorities and courts have actually observed the requirements deriving from EU fundamental rights *in concreto*. To the *Bundesverfassungsgericht* this is all the more important because individuals cannot lodge such a complaint before the European Court of Justice.[12]

It is well known that constitutional review is organised in different ways and embedded in diverse contexts all around the world, including Europe. Hence, judicial developments like the *Right to be forgotten* case law have to be seen in the specific context of the relevant constitutional system and should not be universalised. At the same time, such developments may give rise to broader questions that go far beyond the constitutional order directly concerned. This is not the place to analyse the *Right to be forgotten* case law in detail, nor to anticipate its reception. However we can seize this significant development as an opportunity to raise some overarching questions – questions that will keep courts and scholars busy over the coming years.

In what way should constitutional courts embed the Charter as a standard of review? A whole range of options is available in this respect. The three most prominent solutions consist in, *first*, taking the Charter into consideration as a guideline when interpreting national fundamental rights; *second*, relying on selected Charter rights, guided by the principle of equivalence on a case-by-case basis; and *third*, generally acknowledging EU fundamental rights as a direct standard of review. A combination of these models is also possible, as demonstrated by the *Right to be forgotten* case law, which combines mode one and mode three.

[10]BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 62 ff.

[11]So-called '*grundrechtsspezifische Kontrollfunktion*'.

[12]BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 61. However, it would be at odds with the entire judicial system if individuals were to have a cause of action before the Court of Justice against national acts.

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To what extent and in what situations will constitutional courts apply the Charter as a standard of review? As of now, the Charter is only taken into consideration by national constitutional courts insofar as the respective member state implements EU law in the sense of Article 51(1) of the Charter. However, this finding does not answer the question fully, because under Article 53 of the Charter national courts remain free to apply national fundamental rights, on condition that neither the level of protection provided by EU fundamental rights nor the primacy, unity and effectiveness of EU law are thereby compromised.[13] The latter would, for instance, be the case if a constitutional court on the basis of national fundamental rights called into question a mandatory provision of secondary EU law that complies with EU fundamental rights. Against this background, the *Bundesverfassungsgericht* has opted to apply EU fundamental rights directly and exclusively, in situations which are fully determined by EU law (*Right to be forgotten II*), while relying on national fundamental rights as the primary standard of review in situations which do fall within the scope of application of EU law but are not fully determined by it, because of a margin of discretion left to national authorities (*Right to be forgotten I*). Following this approach, the distinction between mandatory and non-mandatory EU law becomes crucial, i.e. between EU law fully determining the case and EU law leaving a margin of discretion at the national level.[14]

Is the distinction between mandatory and non-mandatory EU law, between areas fully harmonised by EU law and areas leaving discretion to the member states – a distinction also drawn in the case law of the Court of Justice – conceptually convincing? How should the 'test of discretion' be carried out? The *Bundesverfassungsgericht*'s standard of review depends basically on the distinction between mandatory and non-mandatory EU law. However, EU law cannot be divided into two categories so sharply. EU law's density varies: the extent to which it leaves a margin of discretion to national authorities in implementing EU law differs from one case to the next. Seen from this perspective, the distinction between mandatory and non-mandatory EU law is a specific federal problem that needs to be developed further by scholarship, just as the test of discretion needs to be concretised by future case law – in particular by the Court of Justice.

What role does the Charter play for constitutional courts in the field of non-mandatory EU law? If a situation falls within the scope of application of the Charter, but is not fully determined by substantive EU law, both national and supranational fundamental rights apply. This suggests, prima facie, a combined application of both regimes by a constitutional court. The *Bundesverfassungsgericht*

[13]ECJ 26 February 2013, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60.
[14]*See* BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 77 ff.

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has, however, opted for an approach based on the idea of 'federal diversity' (*föderative Vielfalt*). While the German Court accepts that in the areas that are covered by mandatory EU law unity of fundamental rights protection is required, this is not the case in areas in which the EU legislature leaves national authorities a margin of discretion. The concept of diversity in European fundamental rights protection, which the *Bundesverfassungsgericht* qualifies as a structural principle of the Union (*Vielgestaltigkeit des europäischen Grundrechtsschutzes als Strukturprinzip der Union*), leads the Court to the questionable conclusion that German fundamental rights in principle provide the *sole* standard of review in the field of non-mandatory EU law.[15] This approach is based on the presumption that the application of German fundamental rights generally ensures that the level of protection required under the Charter is achieved.[16] In order to justify this presumption, the *Bundesverfassungsgericht* highlights the common roots of fundamental rights protection in Europe, and states for the first time that German fundamental rights have to be interpreted not only in light of the European Convention on Human Rights, but also in light of the Charter.[17] This presumption of adequacy in protection can be rebutted, however, if the required level of protection under the Charter is higher than that of the Basic Law or if the application of German fundamental rights runs counter to very specific fundamental rights requirements in EU secondary law.[18] One might wonder, however, whether the approach whereby review in areas not fully harmonised by EU law is carried out in principle only on the basis of national standards might, in the end, lead to a marginalisation of the Charter. It might prevent the national courts from noticing the European dimension of cases, and from participating in a European fundamental rights discourse.

How do constitutional courts see their new role as guardians of EU fundamental rights vis-à-vis the Court of Justice? The *Right to be forgotten* case law provides insights into the *Bundesverfassungsgericht*'s perception of its role. According to the German Court, its role as a guardian of EU fundamental rights in Germany is limited to reviewing the concrete application of EU fundamental rights by German authorities, while it is for the Court of Justice to spell out the relevant fundamental rights standards.[19] In this context the German Court also acknowledges the European Court of Justice's monopoly in interpretation and announces that it seeks close cooperation with the Court of Justice, inter alia via preliminary references.[20] Yet, whether a self-confident constitutional court like the

[15]BVerfG, *Right to be forgotten I*, *supra* n. 1, para. 50 ff.
[16]Ibid., para. 55 ff.
[17]Ibid., para. 60 ff.
[18]Ibid., para. 63 ff.
[19]BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 69.
[20]Ibid., para. 69 ff.

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*Bundesverfassungsgericht* will really stick to merely reviewing the concrete German application EU fundamental rights and leave the interpretation of the Charter to the Court of Justice remains to be seen. The *Bundesverfassungsgericht* is well aware of the fact that by deciding cases with reference to the Charter, it will influence not only the Court of Justice, but also other highest courts in Europe. In other words, it is likely that while it respects the European Court of Justice's monopoly, its references to the Charter will allow it to shape EU fundamental rights beyond the German borders.

Will the *Bundesverfassungsgericht* and constitutional courts sufficiently fulfil their obligation under Article 267(3) TFEU to make preliminary references to the Court of Justice? So far, all constitutional courts mentioned above have referred preliminary questions to Luxembourg at least once. Referring preliminary questions to the Court of Justice must not in any way be confused with an act of subjugation. Rather, it provides the referring constitutional court with the opportunity to contribute actively to the interpretation of the relevant standards at EU level, and hence to fulfil a performative role. While the First Senate of the *Bundesverfassunsgericht* announces its willingness to refer preliminary questions to the Court of Justice in order to receive the authentic interpretation of the relevant EU fundamental rights, its actual conduct in *Right to be forgotten* suggests otherwise. The German Court sees no reason to make a preliminary reference to the Court of Justice with regard to the relevant (and admittedly to a significant extent clarified) Articles 7 and 8 of the Charter, nor with regard to the question whether or not the relevant provisions of EU law actually leave discretion at the national level. If the *Bundesverfassungsgericht* continues to conduct the test of discretion all by itself, it runs the risk of overstretching its constitutional mandate. The question whether or not the underlying rules of EU law are mandatory depends on the interpretation of EU secondary law – and that certainly is not within the competence of the *Bundesverfassungsgericht*. Furthermore, the German Court suggests that the interpretation of the EU fundamental rights applicable *in casu* was already sufficiently clear on the basis of existing ECHR case law from Strasbourg – an assumption which is not in conformity with the strict exceptions to Article 267(3) TFEU formulated by the Court of Justice in *CILFIT*.[21]

How does the recognition of EU fundamental rights as a standard of review relate to constitutional reservations, such as the *Solange* jurisprudence, and *ultra vires* and constitutional identity review? As far as the *Bundesverfassungsgericht* is concerned, the *Right to be forgotten* case law demonstrates that accepting EU fundamental rights as a standard of review does not necessarily affect national constitutional reservations, at least not formally: the jurisprudence on constitutional

[21]ECJ 6 October 1982, Case 283/81, *CILFIT*, para. 21.

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reservations only concerns the reach of national constitutional law in EU related cases, but does not address the question of the extent to which the constitutional court can rely on EU law.[22] In other words, the *Right to be forgotten* case law does not alter the *Solange* jurisprudence, but complements it – like the flipside of the coin – by extending constitutional review to encompass EU fundamental rights precisely in those areas in which *Solange* had limited the reach of national fundamental rights because of the primacy of EU law. In integrating the Charter in its standard of review and in changing direction from the defensive to the cooperative, the First Senate of the *Bundesverfassunsgericht*, however, sends a significantly different signal from that of the Second Senate, which has focused in its case law on the 'defence' of the national constitution, based on national standards. Well aware of their shared responsibility in upholding common values, the judges at the *Bundesverfassungsgericht*, and particularly those of its First Senate, will have realised that the real challenge of our times is not the EU and its Court of Justice, but the subversion of fundamental rights and of the rule of law in several member states.

Although it cannot be universalised and only offers one of many possible approaches to embracing the Charter, the *Right to be forgotten* case law in a more general manner shows how complicated, but also how promising and valuable it might be if constitutional courts accept the Charter as an additional standard of review. That acceptance strengthens the enforcement of the Charter at the national level and at the same time gives the necessary substantive impulses to the further development of fundamental rights jurisprudence at the EU level, in cooperation with the Court of Justice. Several constitutional courts have followed the German Court, in one way or another, on *Solange*, *ultra vires* and identity review. Now let them open up to the European dimension of fundamental rights protection too. As the *Bundesverfassungsgericht* has stressed, the 'possibility for matters to be forgotten forms part of the temporal dimension of freedom'. Let's hope that its future case law will make us forget the overly defensive focus of some of its previous jurisprudence.

MW/JHR/MC

[22] *See* BVerfG, *Right to be forgotten II*, *supra* n. 1, para. 87 ff.

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