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The Federal Constitutional Court Decisions: „The Right to be Forgotten I" and „The Right to be Forgotten II" – The Expectation of Increased Cooperation with the Concurrent Need to Maintain Independence

Introduction

In its decisions of 6 November 2019 ('Right to be forgotten I' and 'Right to be forgotten II')[1], the German Federal Constitutional Court (FCC) went so far as to redefine its relationship of cooperation with the European Court of Justice (ECJ) in the area of fundamental rights. From the German perspective, the significance of the decision cannot be underestimated. Contrary to its previous stance, which was largely determined by the '*Solange II*' decision[2] and confirmed by subsequent case law[3], the FCC recognised the Union's fundamental rights as appealable by constitutional complaint, as laid down in Article 93(1) No. 4a of the Basic Law (*Grundgesetz*)[4]. The Charter of Fundamental Rights

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[1] FCC, decision of 6 XI 2019, 1 BvR 16/13 – Right to be Forgotten I and FCC, decision of 6 XI 2019, 1 BvR 276/17 – Right to be Forgotten II.

[2] FCC, decision of 22 X 1986, 2 BvR 197/83, BVerfGE 73, 339 – *Solange II*.

[3] FCC, decision of 07 VI 2000, 2 BvL 1/97, BVerfGE 102, 147 – *Europäische Bananenmarktordnung*.

[4] According to Art. 93(1)(4a) Basic Law: The Federal Constitutional Court shall rule on constitutional complaints, which may be filed by any person alleging that one of his

of the European Union[5] is now a relevant standard of review for the FCC. This new approach involves risks and opportunities, since both the ECJ and the FCC have always used fundamental rights to determine their jurisdictional powers.[6] Prior to these decisions, the applicability of the Union's fundamental rights meant that the FCC did not exercise its jurisdictional power. The reason was that the application of such rights – in a manner similar to other Union law – takes precedence (*Anwendungsvorrang*)[7] over the Basic Law. The fundamental rights of the Union were thus solely a matter for the ECJ. By including them in its own review standards, the FCC now applies the fundamental rights of the Union and is becoming an actor to be reckoned with in that area. This article explains the current approach and highlights the relevant changes. Our focus is not so much on a historical analysis of the case-law as on the relevant aspects of constitutional law and Union law. Consequently, the first step will be to present the previous system, including the precedence of application of Union law and its exceptions from the FCC perspective (I.), as well as the controversial question of the interpretation of Article 51(1) of the Charter of Fundamental Rights[8], which is decisive for the applicability of the fundamental rights under

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basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority.

[B]asic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p. 404).

[5] Official Journal of the European Union, C 326/391.

[6] ECJ, judgement of 26 II 2013, Cs. C-617/10 – *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21; ECJ, judgement of 30 IV 2014, Cs. C-390/12, ECLI:EU:C:2014:281 – *Pfleger and Others*, para. 34; FCC, decision of 15 I 1958, 1 BvR 400/51, BVerfGE 7, 198 – *Lüth*; FCC, decision of 16 I 1957, 1 BvR 253/56, BVerfGE 6, 32 – *Elfes*; FCC, decision of 25 II 1975, 1 BvF 1-6/74, BVerfGE 39, 1 – *Schwangerschaftsabbruch I*; FCC, decision of 28 V 1993, 2 BvF 2/90, 4/90 and 5/92, BVerfGE 88, 203 – *Schwangerschaftsabbruch II*; FCC, decision of 20 IV 2016, 1 BvR 966/09 and 1140/09, BVerfGE 141, 220 – *BKA*.

[7] In this article we use the notion *precedence of application* instead of *supremacy* or *primacy of application, because the FCC uses it in its decision Right to be Forgotten II*. However, the FCC has also used in previous decisions *primacy of application*, FCC, decision of 30 VI 2009, 2 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09, BVerfGE 123, 267 – *Lissabon*.

[8] According to Article 51, para. 1 of the Charter of Fundamental Rights: The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

the Charter (II.). Based on this, a presentation of the *'Right to be forgotten II'* decision will be made, taking into account the new aspects (III.). The concluding part provides an overview of the consequences, open questions, risks and opportunities of the approach (IV.).

1. The precedence of application and its exceptions under the Basic Law

The precedence of Union law is a key concept in the relationship between Union law and national law.[9] This means that Union law must be applied even where it conflicts with national law. From the German perspective, precedence of application does not nullify German law; the conflicting national provisions remain valid but are not applied. The FCC emphasized in its early case-law the independence of Community law and recognized its precedence of application over national law in principle.[10] The FCC ruled that European Economic Community (EEC) legislation represented the exercise of supranational authority, a notion distinct from national public authority under the Basic Law.[11] However, the precedence of application of supranational law in the area of fundamental rights has repeatedly been the focus of FCC case-law (1.). The consideration initially given to the protection of fundamental rights later led to the recognition of ultra vires review[12] and identity review[13], which constitute a constitutional control mechanism employed by the FCC under narrow conditions for the European integration process (2.).

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[9] Already early in the case law developed by the ECJ: Judgment of the Court of 5 II 1963, Cs. 26/62 – *Van Gend & Loos*, ECLI:EU:C:1963:1; Judgment of the Court of 15 VII 1964, Cs. 6/64 – *Costa/ENEL*, ECLI:EU:C:1964:66; Judgment of the Court of 9 III 1978, Cs. 106/77 – *Simmenthal*, ECLI:EU:C:1978:49.

[10] FCC, decision of 18 X 1967, 1 BvR 248/63 and 216/67, BVerfGE 22, p. 293 (295 et seq.) – *EWG-Verordnungen.*

[11] Ibidem, paras 15–18.

[12] FCC, decision of 12 X 1993, 2 BvR 2134/92 and 2159/92, BVerfGE 89, 155 – *Maastricht*; FCC, decision of 21 VI 2016, 2 BvR 2728/13, 2729/13, 2730/13 and 2731/13, 2 BvE 13/13, BVerfGE 142, 123 – *OMT*; FCC, decision of 05 V 2020, 2 BvR 859/15, 1651/15, 2006/15 and 980/16 – *PSPP*.

[13] FCC, decision of 30 VI 2009, 2 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09, BVerfGE 123, 267 – *Lissabon*; FCC, decision of 15 XII 2015, 2 BvR 2735/14, BVerfGE 140, 317 – *Europäischer Haftbefehl*.

1.1. Precedence of application and its meaning in the area of fundamental rights

In the area of fundamental rights, the precedence of application was the main aspect of the FCC judgements '*Solange I*'[14] and '*Solange II*'.[15] In '*Solange I*' issued in 1974, the FCC reserved the right to check the conformity of European Union (EU) provisions against the fundamental rights set out in the Basic Law "as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law."[16] A possible infringement of fundamental rights under the Basic law led to the inapplicability of the provisions of Community law. The FCC expressly clarified that a decision on the validity of Community law is reserved for the ECJ. This approach is entirely in line with earlier case-law.[17] The main argument in this judgement is the need for the protection of such aspects of the German Basic Law which define the essential features of the constitution.[18] In particular, according to the FCC, effective monitoring of fundamental rights by the ECJ is necessary but non-existent due to a lack of individual legal protection. While this approach forms the basis for the ultra vires review and the identity review established in later judgments[19], it drew strong criticism from within the First Senate[20] already in the '*Solange I*' decision. In a dissenting opinion, judges *Rupp, Hirsch* and *Wand* charged that Community law did provide a sufficient legal mechanism for the protection of fundamental rights. The '*Solange II*' decision issued in 1986 is already laid out in this dissenting opinion. In it, the FCC stated that since the first '*Solange*' decision was issued, "a measure of protection of fundamental

[14] FCC, decision of 29 V 1974, 2 BvL 52/71, BVerfGE 37, 271 – *Solange I*.

[15] FCC, decision of 22 X 1986, 2 BvR 197/83, BVerfGE 73, 339 – *Solange II*.

[16] Ibidem; According to the lack of translation of the judgment into English, the authors have made their own translation for the purposes of this Article.

[17] FCC, decision of 18 X 1967, 1 BvR 248/63 and 216/67, BVerfGE 22, 293 – *EWG-Verordnungen*, paras 1–5.

[18] FCC, decision of 29 V 1974, 2 BvL 52/71, BVerfGE 37, 271, p. 280 – *Solange I*.

[19] FCC, decision of 12 X 1993, 2 BvR 2134/92 and 2159/92, BVerfGE 89, 155 – *Maastricht*; FCC, decision of 30 VI 2009, 2 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09, BVerfGE 123, 267 – *Lissabon*.

[20] The First Senate is basically responsible for constitutional complaints and fundamental rights, whereas the Second Senate is responsible for disputes concerning the organisation of the state.

rights had been established within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Basic Law."[21]

Therefore, the FCC essentially reversed the main argument of the first '*Solange I*' decision issued in 1974. The wording of '*Solange II*' is as follows: "As long as the European Communities […] generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution […], the FCC will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation […] and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law."[22] Today, the written catalogue of fundamental rights in the Charter of Fundamental Rights, which itself is part of primary law, according to Article 6(1) TEU, and the fundamental rights case-law of the ECJ, which is becoming increasingly important[23], ensure the level of protection required by in *Solange II*.

Important key considerations regarding the multilevel protection of fundamental rights in the EU were included in the Court's decision on the regulation of the Community Banana Market in June 2000. The FCC had to decide whether constitutional complaints and submissions by courts which assert that fundamental rights laid down in the Basic Law have been infringed by secondary European Community Law are admissible. It was found inadmissible to file constitutional complaints and requests, with general courts under Article 100 of the Basic Law[24], asking to verify the constitutionality of particular regulations in cases

[21] FCC, decision of 22 X 1986, 2 BvR 197/83, BVerfGE 73, p. 339 (378) – *Solange II*. According to the lack of translation of the judgment into English, the authors has made the translation for the purposes of this Article

[22] FCC, decision of 22 X 1986, 2 BvR 197/83, BVerfGE 73, p. 339 (340) – *Solange II*.

[23] ECJ, judgement of 21 XII 2016, Cs. C-203/15 – *Tele2 Sverige*, ECLI:EU:C:2016:970.

[24] Article 100 of the Basic Law for the Federal Republic of Germany:

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.

(2) If, in the course of litigation, doubt exists as to whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties

where the applicant does not claim that the development of European law, including the ECJ jurisprudence, has reduced the standard of protection of his fundamental rights to a level below the minimum specified in the *'Solange II'* decision. Therefore, a request for examining the conformity of the secondary Community legislation against fundamental rights under the Basic Law, as well as constitutional complaints against such provisions, may be based only on the claim that a legal effect has been produced by the insufficient protection of guarantees of fundamental rights.

Moreover, the FCC mentioned the 1992 change in its legal position, introduced by a new clause implemented into the EU law following German reunification. The court stated that Article 23(1) No. 1 of the Basic Law[25] widened the constitutional court's jurisdiction regarding European integration. According to the FCC, there was no need either for the identical protection of individual fundamental rights under the Basic Law or for the ECJ to produce identical case law. In order to meet the constitutional requirements, it is sufficient that ECJ jurisprudence guarantees fundamental rights protection within Community law, which corresponds to fundamental rights protection under the Basic Law.[26] The judgements clearly show the approach of the FCC. The court accepts the precedence of application of Union law when Union fundamental rights are applicable. However, this only applies as long as the fundamental rights of the Union provide a level of protection of fundamental rights comparable to that provided by the Basic Law. The protection

for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3) If the constitutional court of a Land, in interpreting this Basic Law, proposes to derogate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court.

[25] Article 23(1) of the Basic Law for the Federal Republic of Germany: With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

[26] J.A. Frowein, *Die Europäisierung des Verfassungsrechts*, in: Festschrift für 50. Jahre Bundesverfassungsgericht, ed. by P. Badura, H. Dreier, Tübingen 2001, p. 217.

of fundamental rights does not have to be identical with the fundamental rights under the Basic Law in detail, but must correspond in its effectiveness to the German standard. As already stated, this reservation is only theoretical in nature because of the level of protection that is now available at the Union level.

1.2. The ultra vires review and the identity review

The ultra-vires review and identity review constitute a general prerogative of the Basic Law within the integration process of the European Union and in principle mean that Union law does not take precedence in its application. The two control mechanisms relate less to the area of fundamental rights than to the question of which integration steps are covered by the Basic Law. The relationship between ultra vires review and identity review is still controversial in German jurisprudence.[27] According to German constitutional law, ultra vires legislative acts are those which are adopted by the European Union without any empowerment needed under the principle of conferral laid down in Article 5(1) TEU, but which are possible in principle under the Basic Law, provided the corresponding competence is transferred.[28]

In contrast, the identity review should be defined as a mechanism of national constitutional law aimed at restricting the number of critical breaches of the constitution through an integration process serving a safeguarding and stabilising function against parliamentary liability.[29]

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[27] S. Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, Tübingen 2006, p. 233 et seq.; The main difference is arguably the procedural approach and the legal consequence of classifying a Union act as ultra vires. The determination of an ultra vires act first requires referral to the ECJ. If, on this basis, the Federal Constitutional Court classifies Union action as ultra vires, the German institutions are obliged to work towards ensuring that the Union acts in accordance with its competences. In principle, this can also be done by transferring further competences, compare to this the FCC decision of 05 V 2020, 2 BvR 859/15, 1651/15, 2006/15 and 980/16 – *PSPP*.

[28] FCC, decision of 12 X 1993, 2 BvR 2134/92 and 2159/92, BVerfGE 89, 155 – *Maastricht*; FCC, decision of 21 VI 2016, 2 BvR 2728/13, 2729/13, 2730/13 and 2731/13, 2 BvE 13/13, BVerfGE 142, 123 – *OMT*; FCC, decision of 05 V 2020, 2 BvR 859/15, 1651/15, 2006/15 and 980/16 – *PSPP*; FCC, decision of 30 VII 2019, 2 BvR 1685/14 and 2631/14, BVerfGE 151, 202 – *Europäische Bankenunion*; FCC, decision of 13 II 2020, 2 BvR 739/17 – *Europäisches Patentgericht*.

[29] K. Schneider, Der Ultra-vires Maßstab im Außenverfassungsrecht, AöR 2014, vol. 139, p. 255 et seq.

When analysing the legal basis for the identity review, one must refer to the FCC decision on the Lisbon Treaty.[30] In that judgment, the FCC specified the terms of such control, pointing out that it should apply when legal protection cannot be obtained at the EU level and the abuse of authority is evident. In such cases, the FCC verifies whether actions of the EU institutions were performed in accordance with the principle of subsidiarity within the limits of authoritative rights granted to them. The FCC verifies further whether these acts infringe the constitutional identity of the Basic Law, pursuant to Article 23(1), sentence 3, in connection with the entrenchment clause in Article 79(3) of the Basic Law. The control should be in line with the constitutional principle of favourability towards European integration, and therefore it does not constitute a breach of the loyal cooperation specified in Article 4(3) TEU.

In turn, the FCC 2010[31] answered in its '*Honeywell*' ruling, issued in 2010[32], the question whether the European Court of Justice exceeded its authority by elaborating on the rules of Union law, i.e. whether it acted ultra vires. In the above judgment, the FCC did not consent to the full authority of the ECJ in assessing whether a given instrument of EU law was issued based on the superior rights granted to the EU, because according to the FCC, this would be equivalent to "fully transferring the burden of administration of the Treaty bases to the EU institutions." Such a structurally significant shift in the ECJ hierarchy of authority to make decisions in individual cases should not be warranted.

In the judgment discussed above, the FCC held that, in addition to ultra vires control applied in a way favourable to EU law, the control in question is applied by the FCC by way of exception and should be used in a narrower way. Due to the fact that in the case of a complaint related to exceeding of the authority the scope of the control also covers the legal view expressed by the ECJ, according to the FCC, it is vital to protect both the authority, and the position of the independent transnational judicial bodies. "This means, on the one hand, respect for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them […]. Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter

[30] FCC, decision of 30 VI 2009, 2 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09, BVerfGE 123, p. 267 (353 et seq.) – *Lissabon*.

[31] FCC, decision of 06 VII 2010, 2 BvR 2661/06, BVerfGE 126, 286 – *Honeywell*.

[32] FCC, decision of 06 VII 2010, 2 BvR 2661/06, BVerfGE 126, 286 – *Honeywell*.

for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens."[33]

Another significant decision was the ECJ judgment of 2015 on OMT[34] concerning the legality of the bond purchase made by the European Central Bank (ECB). It should be noted that in this matter a kind of dialogue occurred between the ECJ and the FCC. The application for issuing of a prejudicial decision included a direct proposition that the action of an EU institution is ultra vires in nature and contradicts the primary law. The ECJ did not uphold this proposition. However, it should be pointed out that in the judgment of 21 June 2016 on the OMT decision[35], the FCC developed the criteria for the control of both ultra vires acts, as well as acts standing in opposition to constitutional identity.[36]

Unlike the ultra vires review, the identity review is also applied in the area of fundamental rights, albeit under very strict conditions. This is because human dignity protected by Article 1(1) of the Basic Law is part of the constitutional identity laid down in Article 79.3 of the Basic Law. The decision on the European arrest warrant, issued in 2015[37], stated that "the Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG."[38]

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[33] FCC, decision of 06 VII 2010, 2 BvR 2661/06, BVerfGE 126, 286 – *Honeywell*, para. 66.

[34] ECJ, judgement of 16 VI 2015, Cs. C-62/14 – *Gauweiler and Others*, ECLI:EU:C:2015:400.

[35] FCC, decision of 21 VI 2016, 2 BvR 2728/13, 2729/13, 2730/13 and 2731/13, 2 BvE 13/13, BVerfGE 142, 123 – *OMT*.

[36] M. Bainczyk, *Problemy hybrydowej oceny aktów unijnego prawa pochodnego w świetle wyroku niemieckiego Federalnego Trybunału Konstytucyjnego z 21.06.2016 r. w sprawie decyzji OMT* [Challenges of the hybrid assessment of the EU secondary legislation in the light of the German Federal Constitutional Court judgment of 21 June 2016 on the OMT decision], EPS 2017 No. 11, p. 29 et seq.

[37] FCC, decision of 15 VII 2015, 2 BvR 2735/14, BVerfGE 140, 317 – *Europäischer Haftbefehl*.

[38] Ibidem, para. 49.

In this specific case, the German authorities were not allowed to comply with Italy's extradition request, because it could not be ensured that the court procedure carried out in Italy complied with the requirements of Article 1(1) of the Basic Law. However, the court emphasized that the ascertainment of a violation of constitutional identity in the context of fundamental rights is the absolute exception and can only be approved under restrictive conditions.[39] At this point, it can be stated that the precedence of application of Union law in the area of fundamental rights holds true in principle, despite the prerogative of identity review. However, as described above, the precedence of application only refers to cases where the Union's fundamental rights are applicable. The answer to this key question is largely determined by the interpretation of Article 51.1 of the Charter of Fundamental Rights, which is disputed between the ECJ and the FCC and which will be examined in detail below.

2. The interpretation of implementing Union law in the sense of Article 51.1 of the EU Charter

The key issue in the interpretation of Article 51.1 of the EU Charter of Fundamental Rights is the question of the meaning of the implementation of Union law. The ECJ and the FCC follow different approaches in this respect. This can be explained by the fact that the applicability of the respective catalogues of fundamental rights also determines the scope of jurisdiction. The ECJ tends to have a broad interpretation.[40] In the "*Åkerberg Fransson*" judgement regarding the application of fundamental

[39] Ibidem, paras 34, 50.

[40] ECJ, judgement of 14 VI 2017, Cs. C-685/15 – *Online Games and Others*, ECLI:EU:C:2017:452, para. 55; ECJ, judgement of 7 IX 2017, Cs. C-177/17 – *Demarchi Gino*, ECLI:EU:C:2017:656, para. 18; ECJ, judgement of 8 XI 2016, Cs. C-243/15 – *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2016:838, para. 51; ECJ, judgement of 5 II 2015, Cs. C-117/14 – *Nisttahuz Poclava*, ECLI:EU:C:2015:60, para. 29; ECJ, judgement of 22 V 2014, Cs. C-56/13 – *Érsekcsanádi Mezőgazdasági*, ECLI:EU:C:2014:352, para. 54; ECJ, judgement of 8 V 2014, Cs. C-483/12 – *Pelckmans Turnhout*, ECLI:EU:C:2014:304, paras 18 et seq.; ECJ, judgement of 30 IV 2014, Cs. C-390/12 – *Pfleger and Others*, ECLI:EU:C:2014:281, para. 34; ECJ, judgement of 27 III 2014, Cs. C-265/13 – *Torralbo Marcos*, ECLI:EU:C:2014:187, para. 29; ECJ, judgement of 28 XI 2013, Cs. C-258/13 – *Sociedade Agrícola e Imobiliária da Quinta de S. Paio*, ECLI:EU:C:2013:810, para. 19; ECJ, judgement of 26 IX 2013, Cs. C-418/11 – *Texdata Software*, ECLI:EU:C:2013:588, para. 72; ECJ, judgement of 26 II 2013, Cs. C-617/10 – *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 18 et seq.

rights, the CJEU extended the application of the Charter of Fundamental Rights. As set out in this judgement, Member states are required to observe EU fundamental rights 'in all situations governed by European Union law.' It is sufficient "if such legislation falls within the scope of European Union law", meaning that it must reference EU provisions. The Court decided that "where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised"[41] […]. It "has jurisdiction to answer the referred questions and to provide all guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the new principle laid down in Article 50 of the Charter".[42]

In contrast, the FCC pursues a narrower approach, according to which it is decisive whether Union law imposes mandatory requirements on the member states or leaves room for discretion.[43] The FCC stated repeatedly in its decision that it will refrain from verifying the compatibility of German provisions with the Basic Law in cases when they are required in order to meet the requirements of EU law.[44] However, the applicants may still rely on an infringement of fundamental rights provided for by the Basic Law insofar as the German legislator had discretion to determine their scope, i.e. in all matters not regulated by EU law. This means that the fundamental rights under the Basic Law, with all their consequences, are applied when there is discretion in implementation. As a result, in this area, German public authority is bound,

[41] Ibidem, para. 29.

[42] Ibidem, para. 31.

[43] With regard to regulations FCC, decision of 14 X 2008, 1 BvF 4/05, BVerfGE 122, p. 1 (20 et seq.) paras 79 et seq.; with regard to directives for example FCC, decision of 15 XII 2011, 1 BvR 1248/11, BVerfGK 19, 278 paras 27 et seq.; FCC, decision of 19 VII 2011, 1 BvR 1916/09, BVerfGE 129, 78, paras 88 et seq.; FCC, decision of 02 III 2010, 1 BvR 256/08, 263/08 and 586/08, BVerfGE 125, 260 – *Vorratsdatenspeicherung*, paras 185 et seq.; FCC, decision of 11 III 2008, 1 BvR 256/08, BVerfGE 121, 1, para. 135.

[44] For example: A Decision of the Federal Constitutional Court on greenhouse gases emission certificates of 13 III 2007, 1 BvF 1/05, BVerfGE 118, p. 79 (95).

according to Article 1(3) of the Basic Law[45], by fundamental rights under the Basic Law and must respect them. In the event of a possible violation, a constitutional complaint pursuant to Article 93(1) No. 4a of the Basic Law is admissible and the FCC thus has jurisdiction. On the other hand, the FCC does not exercise its jurisdiction in the area where Union law does not leave any room for discretion in implementation. In this case, German specialised courts must respect the fundamental rights of the Union when applying Union law and seek a preliminary ruling from the ECJ, as stipulated in Article 267 TFEU, on questions of interpretation. However, the FCC supplements the protection of fundamental rights at Union level through its case law. Due to the lack of individual legal protection outside the narrow limits of an action for annulment under Article 263 TFEU, the FCC classifies the ECJ as a lawful judge within the meaning of Article 101(1) of the Basic Law[46].[47] Although Article 101(1) of the Basic Law itself does not constitute a fundamental right, a violation can be invoked by way of a constitutional complaint. So far, this approach has meant that a violation of the specialised courts' duty of request under 267 TFEU could be asserted before the FCC and the request to the ECJ could be enforced. Here, once again the scepticism of the FCC formulated in the '*Solange I*' decision with regard to the protection of fundamental rights at Union level is evident.

Nonetheless, it must be noted that the ECJ did not limit the legal scope of the Charter of Fundamental Rights only to cases where a Member State implements EU law, which would match the wording of Article 51.1 of the Charter of Fundamental Rights. The ECJ's approach is based on the aim of ensuring the unity and precedence of Union law against any adverse effects of differing national protection of fundamental rights, an objective which is legitimate from the point of view of Union law.

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[45] Article 1.3 Basic Law: The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

[46] Article 101.1 Basic Law: Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

[47] FCC, decision of 22 X 1986, 2 BvR 197/83, BVerfGE 73, p. 339 (366 et seq.) – *Solange II*; FCC, decision of 31 V 1990, 2 BvL 12/88 and 13/88, 2 BvR 1436/87, BVerfGE 82, p. 159 (192) – *Absatzfonds*; FCC, decision of 06. VII 2010, 2 BvR 2661/06, BVerfGE 126, p. 286 (315) – *Honeywell*; FCC, decision of 25 I 2011 – 1 BvR 1741/09, BVerfGE 128, p. 157 (186 et seq.); FCC, decision of 19 VII 2011, 1 BvR 1916/09, BVerfGE 129, p. 78 (105); FCC, decision of 28 I 2014, 2 BvR 1561/12, 1562/12, 1563/12 and 1564/12, BVerfGE 135, 155, para. 177; established case-law.

It should be pointed out here that the FCC has criticised this ECJ judgment. In the judgment of 24 April 2013 (*Antiterrordateigesetz*), it stated, among other things, that: "[…]this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art. 23 sec. 1 sentence 1 of the Basic Law) in a way that questioned the identity of the Basic Law's constitutional order […]. The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR […]".[48]

At this point it can be noted that up till now the fundamental rights of the Charter from the FCC perspective were applicable when Union law left no discretion for implementation. In a mirror image, the fundamental rights of the Basic Law were then applied when there was room for discretion in implementation. Against this background, the decisions on the right to be forgotten develop their historical significance.

3. 'Right to be forgotten I' and 'Right to be forgotten II' decisions

On 27 November 2019, the German FCC published two decisions: '*Right to be forgotten I*'[49] and '*Right to be forgotten II*'.[50] Both decisions concerned the issue of one's name being found in public reporting of past events. The cases provided an opportunity for the FCC to specify the standard of constitutional court review regarding the Basic Law's fundamental rights in the context of EU law.[51]

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[48] FCC, decision of 24 IV 2013 – 1 BvR 1215/07, BVerfGE 133, 277 – *Antiterrordateigesetz*, para. 91.

[49] FCC, decision of 6 XI 2019, 1 BvR 16/13 – *Right to be Forgotten I*; According to the lack of translation of the judgment into English, the authors use the Press Release No. 83/2019 of 27 XI 2019: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-083.html (accessed: 25 V 2020).

[50] FCC, decision of 6 XI 2019, 1 BvR 276/17 – *Right to be Forgotten II;* According to the lack of translation of the judgment into English, the authors use the Press Release No. 84/2019 of 27 XI 2019: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-084.html (accessed: 25 V 2020).

[51] Point 1 in the Press Release in part key considerations of the Senate.

It should be emphasized that the right to information, especially to data protection, is a legal matter that has been extensively developed in the context of Union law. Nevertheless, some freedom is left to the national legislator on certain issues. These decisions are not only interesting with regard to the protection of fundamental rights in the multi-level system, but also reveal complex tensions between German and European fundamental rights. It should also be noted that both cases address the relationship between the right to privacy and freedom of the press.

3.1. Facts of the cases

3.1.1. *'Right to be forgotten I'* – background

The *'Right to be forgotten I'* decision was based on a claim by the complainant, who had been sentenced to life imprisonment for a crime committed in 1981, after which he was released from prison in 2002. Various press articles about the crime and the trial had been published in the magazine 'DER SPIEGEL', available online since 1999. In 2009, after learning that the articles were still online, the complainant sent a cease-and-desist letter to the defendant without success. Afterwards, he lodged an action seeking to enjoin the defendant from propagating any information on the crime, containing the complainant's last name. The action was dismissed by the Federal Court of Justice (BGH). The complainant filed a constitutional complaint for violation of his general personality rights.

3.1.2. 'Right to be forgotten II' – background

In January 2010, a segment of the TV show "Panorama" was aired titled "Dismissal: the dirty practices of employers", featuring an interview with the complainant in her capacity as CEO of a company. In the broadcast, the case of a dismissed employee was presented, and the complainant was accused of unfair treatment vis-à-vis that employee. In this case, the complainant objected to the display and linking of any segment of the TV documentary "Panorama" with the above-mentioned title by the search engine Google. The search engine operator refused the complainant's request to remove the TV show from search results. After that, the complainant lodged an action that was later dismissed by the

Higher Regional Court (*Oberlandesgericht*). Subsequently, the complainant filed a constitutional complaint asserting a violation of her general personality rights and her right to informational self-determination.

3.1.3. Key considerations of the Senate

In the case "Right to be forgotten I," the First Senate of the FCC applied the fundamental rights enshrined in the Basic Law as its standard of review. The FCC held that claims for protection against the distribution of old press articles by means of an online archive must be reviewed by balancing the conflicting interests in fundamental rights. It should be noted that the legal dispute falls within the field of application of EU law.[52] But so-called media privilege also covered the challenged propagation of press articles, for which EU law grants Member States leeway to design. Therefore, the matter could not be decided by EU law alone. Although the FCC opted for the application of fundamental rights in this case, the reasoning has since changed. The court now recognizes the precedence of application of the fundamental rights under the Charter even when the German legislature has some discretion in the matter. However, there is a presumption that the protection afforded by the Charter is already guaranteed by the fundamental rights under the Basic Law, since the catalogues of fundamental rights of the Member States and the Charter of Fundamental Rights share a common tradition of fundamental rights.[53] The common tradition has its foundation in the European Convention on Human Rights, which in turn is referred to in Article 6.3 TEU, the preamble of the Charter and Articles 52(3) and 53 EU Charter of Fundamental Rights.[54] For the Member States, the ECHR provides 'a common foundation for the protection of fundamental rights', which provides 'a relevant guideline for the interpretation of the Charter, drawing on the case-law of the ECtHR'.[55] Several consequences follow from this. On the one hand, the fundamental rights under the Charter become even more important for the interpretation of the fundamental rights under the Basic Law. The Charter has 'to be taken into account as an interpretation guideline for

[52] Namely the former Data Protection Directive 95/46/EC, now replaced by the General Data Protection Regulation, 2016/679.

[53] FCC, decision of 6 XI 2019, 1 BvR 16/13 – *Right to be Forgotten I*, paras 55 et seq.

[54] Ibidem, para. 57.

[55] Ibidem.

the understanding of the guarantees of the Basic Law […]'.[56] On the other hand, the fundamental rights under the Charter are now also applied when there is room for discretion in implementation and the Charter sets out additional fundamental rights guarantees which have no equivalent in the Basic Law.[57] This follows from the general acceptance of the precedence of the Charter's fundamental rights as described above. At the same time, this means that in these contexts, a violation of the fundamental rights under the Charter is reviewed by the FCC. The main argument put forward in the decision is the responsibility with regard to European integration (*Integrationsverantwortung*)[58] laid down in Article 23(1) Basic Law. The responsibility for integration demands active participation of the German constitutional organs in the process of European integration.[59] This means that under the openness to EU law under Art. 23 (1) Basic Law, the German state is not relieved of its responsibility in matters for which competences have been transferred to the EU. The Federal Constitutional Court must therefore, in particular, participate in the development of effective protection of fundamental rights in the multi-level system. Against this background, the FCC highlights that individuals have no direct access to the ECJ to assert a violation of EU fundamental rights in cases in which the ordinary courts apply EU Law.[60] In order to close this gap, the FCC elevates the EU Charter of Fundamental Rights to a standard of review in the constitutional complaint procedure. Following this decision, the term 'basic rights' within the meaning of the constitutional complaint under Article 93(1) No. 4a of the German Constitution now also includes the fundamental rights under the Charter, so that the constitutional complaint can be justified on the basis of a possible violation of the fundamental rights under the Charter.

The 'Right to be forgotten II' case, which concerns a legal dispute governed by legislation that is fully harmonized with EU law, refines this approach. In this case, the relevant standard of review does not derive from German basic rights, but solely from European fundamental rights. EU law takes precedence of application over the fundamental rights of

[56] Ibidem, para. 59.

[57] Ibidem, paras 69 et seq.

[58] FCC, decision of 30 VI 2009, 2 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09, BVerfGE 123, p. 267 (351 et seq.) – *Lissabon.*

[59] FCC, decision of 6 XI 2019, 1 BvR 276/17 – *Right to be Forgotten II*, paras 42 et seq. and paras 53 et seq.

[60] Ibidem, paras 60 et seq.

the Basic Law.[61] In this case, the First Senate of FCC decided to directly apply EU fundamental rights as the standard of review in constitutional complaint proceedings.

Another question that arose when dealing with fully harmonized EU law is whether German courts and authorities observed the requirements deriving from EU fundamental rights in that individual case. The FCC cannot entirely refrain from exercising a fundamental rights review and rather is called upon to ensure fundamental rights protection on the basis of EU fundamental rights. It should be emphasized that in European Union Law there is no constitutional complaint procedure (unlike in German Law). This means that if the EU fundamental rights are now reviewed by the FCC, they can thus themselves be the subject of a constitutional complaint under the Basic Law. The FCC explicitly condemns the previous approach, in which specialized courts were reviewed solely for a violation of their duty to submit a case under Article 101(1) of the Basic Law.[62] The constitutional complaint rather requires 'a comprehensive review of fundamental rights […], which also includes the correct application of fundamental rights in individual cases'.[63] The reasoning behind the ruling explicitly emphasizes the need for cooperation between the ECJ and the FCC in the field of fundamental rights.[64] The application by the FCC of the fundamental rights under the Charter could therefore only be considered 'if the ECJ has already clarified its interpretation or […] is evident'.[65] If this is not the case, the FCC considers itself to be a court of last instance within the meaning of Article 267 TFEU and therefore is obliged to make a submission to the ECJ.[66] In the case in question, following the approach described above, the Court resolved the case on the basis of the Charter. Having established that the relevant issues had already been decided by the ECJ[67] and a procedure under Article 267 TFEU was therefore unnecessary, the Court weighed the right to respect for private and family life under Article 7 of the Charter and the fundamental right to the protection of personal data under Article 8 of the Charter against the freedom

[61] Ibidem, Point 2 Key of considerations of the Senate.
[62] Ibidem, paras 64 et seq.
[63] Ibidem.
[64] Ibidem, paras 68 et seq.
[65] Ibidem, para. 70.
[66] Ibidem, para. 69.
[67] In particular, ECJ, judgement of 13 V 2014, Cs. C-131/12 – *Google Spain and Google*, EU:C:2014:317.

of conducting business under Article 16 of the Charter and the right to freedom of expression under Article 11 of the Charter. The Federal Constitutional Court could not find any violation of fundamental rights, as the TV documentary "Panorama" and its availability on the Internet was a permissible use of fundamental rights.

These two judgments also answer the question of whether to apply the fundamental rights under the Basic Law or the rights under the Charter of Fundamental Rights of the European Union as the standard of review. The matter essentially hinges on the distinction between fully harmonized EU law and EU law that leaves room for discretion.

Conclusions

The two judgments – 'Right to be forgotten I' and 'Right to be forgotten II' – have a significant impact on doctrinal and procedural matters. With regard to doctrinal consequences, it should be noted that there is a new justification for the distinction between the applicability of European Union fundamental rights and fundamental rights under the German Constitution, although the previous distinction is still valid (scope for implementation decisive). The European fundamental rights and the German fundamental rights are not strictly separate from each other. Indeed, they are intertwined even when public authority in individual cases can only be measured against one of the catalogues of fundamental rights. The Court is clearly seeking to bring the catalogue of fundamental rights under the Basic Law closer to that enshrined in the Charter. In procedural matters, the recognition of the fundamental rights of the Charter as 'basic rights' within the meaning of Article 93(1) (4a) of the Basic Law is probably the most significant innovation. By making the institution of constitutional complaint available in matters related to fundamental rights under the Charter, the FCC ensures that the fundamental rights under the Charter will remain the subject of future decisions. This is also likely to have a lasting effect on case law in the area of fundamental rights.

It has to be emphasized that the 'Right to be forgotten II' judgment in particular has implications for the position of the Federal Constitutional Court. With the interpretation set out in the judgment, the German Constitutional Court empowers itself to shape the Union's fundamental rights and to apply them according to German doctrine. It should also

be stressed that through the preliminary ruling procedure, the Federal Constitutional Court enters into a dialogue with the ECJ. But there is no list of cases in which the FCC had to submit questions to the ECJ. It might happen that many marginal cases will provoke debate as to whether the German Constitutional Court has decided a question in the area of EU fundamental rights, which has not been finally decided by the ECJ, meaning that the Federal Constitutional Court should have submitted such a question to the ECJ. The question which remains unanswered is: to what extent will the FCC make use of the preliminary ruling procedure to clarify questions of interpretation of the Charter by the ECJ?

But on the other hand, the preliminary ruling procedure allows the ECJ and the FCC to enter into a fruitful dialogue that can strengthen fundamental rights. The ECJ and national constitutional courts could use the dialogue to buttress the position of the fundamental rights against the aforementioned threats to freedom. The path taken in the 'Right to be forgotten I and II' decisions has great potential for effective common protection of fundamental rights in a multi-level system. It is to be hoped that the ECJ and the national constitutional courts will make constructive use of this potential.

THE FEDERAL CONSTITUTIONAL COURT DECISIONS: „THE RIGHT TO BE FORGOTTEN I" AND „THE RIGHT TO BE FORGOTTEN II" – THE EXPECTATION OF INCREASED COOPERATION WITH THE CONCURRENT NEED TO MAINTAIN INDEPENDENCE

Summary

The article discusses the decisions "Right to be forgotten I" and "Right to be forgotten II" of 6 November 2019 by the Federal Constitutional Court, which redefine the relationship of cooperation between the Federal Constitutional Court and the European Court of Justice in the area of fundamental rights. The Court has decided for the first time that where EU fundamental rights take precedence over German fundamental rights, the Court itself can directly review, on the basis of EU fundamental rights, the application of EU law by German authorities.

In the first part, the article presents the previous system, including the precedence of application of EU law and its exceptions (ultra-vires review; identity review), as well as the controversial question of the interpretation of Article 51 (1) of the Charter of Fundamental Rights, which is decisive for the applicability of the fundamental rights under the Charter. The focus is on the constitutional background of the German Basic Law for the protection of fundamental rights in the European multi-level system.

Against this background, the second part of the article presents the facts and reasons for the decisions "Right to be forgotten I" and "Right to be forgotten II". This is followed by an analysis of the consequences of these decisions for the protection of fundamental rights and cooperation between the European Court of Justice and the Federal Constitutional Court. In particular, the way in which fundamental EU rights can now be enforced before the Federal Constitutional Court is described in greater detail.

The concluding part provides an overview of the open questions, risks and opportunities of this approach. Here the article illustrates the significant impact of the two decisions on dogmatic and procedural matters.

Keywords: Right to be Forgotten I – Right to be Forgotten II – precedence of application – fundamental rights – cooperation between European Court of Justice and the Federal Constitutional Court

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