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Forgetting Fundamental Rights Identity Claims

The New Constitutional Paradigm in Multilevel Fundamental Rights Standards

A man's conscience and his judgment is the same thing; and as the judgment, so also the conscience, may be erroneous.

(Thomas Hobbes)

1 Introduction

This chapter explores convergences and divergences in the field of multilevel fundamental rights protection across the EU and Member States.[1] In an attempt to navigate an ever closer European harmonization and the protection of national constitutional diversity, the accommodation of various fundamental rights standards puts forward the pivotal challenge of the European multilevel system.[2] On the one hand, unifying European legislation increasingly requires some form of common and shared fundamental rights standards under the EU Charter, going beyond mere minimal protection. On the other hand, the protection of national constitutional idiosyncrasies is often accompanied by the highly volatile concept of national identity,[3] which is to be understood here as unique interpretations of fundamental rights, potentially challenging the primacy of EU law and its unified and effective application.

The chapter firstly explicates and contextualizes the landscape of national and supranational fundamental rights standards relating to national constitutional identity claims. It analyzes the disputed scope of fundamental rights application and critically demonstrates how minimum protection may become the final norm (Section 2).

Moreover, the chapter engages with the specific type of national constitutional identity claims concerning fundamental rights standards and idiosyncratic interpretations (Section 3). The following section then highlights an alternative approach adopted by the German Federal Constitutional Court (FCC). In the *Right to be Forgotten I*, the FCC held that in the constitutional complaint which falls within the scope of application of EU law, but where the subject matter is not fully harmonized, it will

1 Andreas Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175.

2 Dieter Grimm, 'The Various Faces of Fundamental Rights' in David Dyzenhaus, Jacco Bomhoff and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press 2020) 426.

3 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457; Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.

directly apply the fundamental rights under the Basic Law. The section critically scrutinizes the said case law, especially in the light of claims of national constitutional identity (Section 4). Furthermore, in the *Right to be Forgotten II*, the FCC presented a true change, arguing that it will directly apply the EU Charter should the matter fall within the scope of EU law, which is fully harmonized. The section highlights the challenges as well as the opportunities of the new constitutional paradigm for the further constitutionalization of the EU (Section 5).[4]

Finally, the chapter concludes with an assessment of how the new shift of paradigm in the *Right to be Forgotten* opens possibilities for the national apex courts to leave behind highly volatile identity claims in the field of fundamental rights protection, while at the same time maintaining their idiosyncratic fundamental rights interpretations within the scope of application of EU law, which is not entirely harmonized. Hence, the new paradigm could indicate the end of identity – forgetting fundamental rights identity claims (Section 6). The chapter wraps up with short concluding remarks (Section 7).

4 Johannes Masing, 'Das Bundesverfassungsgericht' in Matthias Herdegen et al. (eds), *Handbuch des Verfassungsrechts* (1st edn, C.H. Beck 2021) 1043.

2 National and Supranational Fundamental Rights Standards

This section contextualizes the challenges and open questions of the multilevel fundamental rights protection in the Union and its Member States.[5] It first explores the European constitutional design of fundamental rights protection together with identity claims (2.1). Moreover, it explicates the disputed scope of fundamental rights application (2.2). Finally, it demonstrates how minimum protection can become the final norm (2.3).

2.1 Multilevel Constitutional Design of Fundamental Rights Protection

The European Union is commonly regarded as a Community of values[6] in light of its commitment to democracy, the rule of law, human dignity, equality and respect for human rights. The CJEU recently stated that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member State'.[7]

However, the national constitutional identity argument and the resisting national apex courts,[8] most notably the German FCC with its *Solange I* jurisprudence,[9] prompted the resourceful ECJ to introduce the protection

5 Due to the specific focus of the research questions, the ECHR is not directly taken into account here.

6 Matteo Bonelli, 'From a Community of Law to a Union of Values' (2017) 13 European Constitutional Law Review 793; Jan Wouters, 'From an Economic Community to a Union of Values: The Emergence of the EU's Commitment to Human Rights' in Manfred Nowak et al. (eds), *The European Union and Human Rights Law and Policy* (2020).

7 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

8 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini' [2020] TRiSS Working Paper Series.

9 BVerfGE 37, 271 *Solange I* 29 May 1974.

of fundamental rights at the Community level. In the cases of *Stauder*,[10] *Internationale Handelsgesellschaft*[11] and *Nold*,[12] the ECJ established the protection of fundamental rights as a part of general principles of EU law[13] while openly acknowledging that its derivative source is dependent on Member States' legal cultures and common constitutional traditions.[14]

After a gradual but continuous development of fundamental rights protection in the Union,[15] the current EU Charter of Fundamental Rights finally[16] and formally became part of EU primary law.[17] Yet, the multilevel protection of fundamental rights remains designed and interpreted ambiguously. While Article 53 of the EU Charter promises not to affect any standard or level of protection elsewhere,[18] the Court's interpretation in *Melloni* prohibits the application of higher national standards when the subject matter is fully harmonized by EU law – thus possibly affecting higher national standards.[19] Moreover, the EU Charter concurrently protects in two distinctive ways: first, as the only fully adequate protection in fully harmonized areas; second, as the minimum level of protection in non-fully harmonized areas. That in itself already bears a risk of contradict-

10 Case 29-69 *Erich Stauder v City of Ulm* (*Stauder*) [1969] ECLI:EU:C:1969:57.

11 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Internationale Handelsgesellschaft*) [1970] ECLI:EU:C:1970:114.

12 Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (*Nold*) [1974] ECLI:EU:C:1974:51.

13 The argument was first made by Walter Hallstein in parliamentary discussions. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 365.

14 Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (4th edn, Cambridge University Press 2019) 237.

15 Case C-173/99 *The Queen v Secretary of State for Trade and Industry (BECTU)* [2001] ECLI:EU:C:2001:81, Opinion of AG Tizzano, para 27; Case C-540/03 *European Parliament v Council of the European Union* [2006] ECLI:EU:C:2006:429, para 58.

16 Although in 1953 the European Community wanted to include the Convention for the Protection of Human Rights and Fundamental Freedoms into the Statute, that was rejected by France, the Community nevertheless rejected Francoist Spain's EU membership due to different ideological commitments.

17 Daniel C Thomas, *The Limits of Europe: Membership Norms and the Contestation of Regional Integration* (Oxford University Press 2021).

18 Article 53 of the EU Charter fully corresponds to the wording of Article 53 ECHR, but the former has a different role–at times it has to provide the only fundamental rights protection, not just minimum standards.

19 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (*Melloni*) [2013] ECLI:EU:C:2013:107, paras 63, 65.

ing standards.[20] The constitutional tensions relating to fundamental rights standards thus continue to exist. And once again, and in the absence of a more predictable and concretized mechanism for accommodating different (national and supranational) standards of protection, identity claims continue to undertake that functional role.

2.2 The Scope of Fundamental Rights Application – A Disputed Matter

An additional challenge is the disputed scope of the application of fundamental rights. In a nutshell, there are two distinct cases where the EU Charter ought to apply: first, when the Member States are *implementing* Union law; second, when national legislation *falls within the field* or *scope* of Union law.[21]

Before the EU Charter formally came into force, the CJEU had extensively defined its jurisdiction concerning fundamental rights protection.[22] For example, in *Grogan*,[23] the Court stated that it had jurisdiction 'to assess the compatibility of that legislation with the fundamental rights [...] where national legislation *falls within the field of application* of Community law'.[24] Moreover, in the *ERT*[25] case, it similarly decided that 'where such rules do *fall within the scope of* Community law',[26] European fundamental rights apply. Henceforth, the ECJ firmly established its jurisdiction to scrutinize

20 Eleanor Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 29.

21 Marjan Kos, 'Constitutional Diversity and Differentiation in the EU: What Role for National Constitutional Demands under EU Law?' in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming). See also Christopher Bilz, *Margin of Appreciation Der EU-Mitgliedstaaten*, vol 164 (1st edn, Mohr Siebeck 2020) 55ff.

22 Xavier Groussot, Laurent Pech and Gunnar T Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (2011) 1 The Eric Stein Working Papers.

23 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (*Grogan*) [1991] ECLI:EU:C:1991:378.

24 Ibid. para 31 (emphasis added).

25 Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (*ERT*) [1991] ECLI:EU:C:1991:254.

26 Ibid. para 42 (emphasis added).

the subject matter through the lens of EU fundamental rights every time the relevant national legislation 'falls within the field or scope of application of the EU laws'.

The constructed jurisdiction is, however, exceedingly general and far-reaching. A lot of frustration from the Member States, as well as critique from legal scholars, relate precisely to a too widely construed European jurisdiction.[27] Accordingly, the EU Charter introduced a more limited scope of fundamental rights application.[28] Article 51(1) EU Charter states that EU fundamental rights apply only when the Member States are 'implementing Union law'. Henceforth, the *scope of the application* was replaced by the *implementation.*

Yet, the CJEU has not given up its previously defined broader jurisdiction. Due to the Explanations,[29] soft law which provides guidance relative to the interpretation of the EU Charter,[30] 'the requirement to respect fundamental rights [...] is only binding on the Member States when they act *in the scope of* Union law' (emphasis added).[31] Moreover, the Explanations directly refer to cases such as *Wachau*,[32] *ERT*[33] and *Annibaldi*[34], which all specifically established the broader application of fundamental rights.[35] The scope of application of fundamental rights remains a disputed matter among scholars, subject to dissent and controversy,[36] while the CJEU continues to apply the same jurisdiction as construed at the beginning.

27 Mark R Freedland and Jeremias Adams-Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2015).

28 Michael Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 Common Market Law Review 1201, 1205.

29 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

30 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 52(7).

31 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

32 Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (*Wachauf*) [1989] ECLI:EU:C:1989:321.

33 Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254.

34 Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* (*Annibaldi*) [1997] ECLI:EU:C:1997:631.

35 Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

36 Eleanor Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' (2018) 55 Common Market Law Review 997.

2.3 Three Levels of Fundamental Rights Protection – Turning Minimum Protection into a Final Norm

The last challenge concerns the concurrent coexistence of minimum and fully adequate levels of protection of fundamental rights in multilevel constitutional systems. One may observe the levels of protection from three perspectives.

First, from the perspective of the Member States, national constitutional systems usually consider themselves adequate and self-sufficient. However, the systems of protection and the adjudicative outcomes in the 27 Member States are considerably diverse.

Second, when national laws are fully harmonized by EU law, usually in the form of a Regulation, the CJEU interprets the EU Charter as the only standard of protection; nevertheless, not as the minimum standard, but as the adequate standard of protection. Yet, these standards cannot fully overlap with *all* the national standards.[37] That logically derives from the fact that the national fundamental rights adjudications differ considerably. A typical example is the well-known landmark *Melloni* decision, where the CJEU firmly rejected the Spanish Constitutional Tribunal's suggestion that the Member States should be able to apply their higher national standards, if they provide higher protection than the one awarded by the CJEU under the EU Charter.[38]

Finally, in the areas of law which have not yet been fully harmonized, only minimum protection of fundamental rights is provided. Concurrently the Member States are allowed to apply their own (higher) national standards of fundamental rights protection, as stated in the *Åkerberg Fransson* decision. Where the matter falls 'within the scope of European Union law', but 'in a situation where the action of the Member States is not entirely determined by European Union law', Member States 'remain free to apply national standards of protection of fundamental rights', provided that the level of protection due to the EU Charter and the primacy, unity and effectiveness of the EU law are not thereby compromised.[39]

37 Francesco de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 Common Market Law Review 9.

38 Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

39 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (*Åkerberg Fransson*) [2013] ECLI:EU:C:2013:105, paras 21, 29.

The described system is generally known among legal scholars.[40] What is largely overlooked, however, are the *consequences* of these double standards of protection. This sub-section demonstrates only one of the most problematic outcomes: namely, how even the minimum protection in non-fully harmonized legislation might turn into an ultimate (final) standard.[41]

When thinking about the problem of combining the European minimum protection of fundamental rights with higher national standards, one should consider the following. A particular standard for a fundamental right often results from a balancing exercise between two or more colliding or conflicting rights. For example, the scope of privacy is often counter-balanced by the question of security standing. Labour and social protection stand in conflict with the freedom to conduct business, and freedom of speech with personality rights. Hence the question of whether minimum protection of a particular fundamental right is possible without determining the scope and limits of its opposing right. The case *AGET Iraklis*[42] might help us to understand the above-raised query better.

According to the Collective Redundancies Directive,[43] workers enjoy minimum protection against collective lay-offs. However, the Directive specifically states that the Member States may afford additional higher protection to workers.[44] Accordingly, the Greek legislator provided more extensive regulation in favour of the workers. Specifically, before authorizing (some of the) collective redundancies, the Ministry of Labour would have to consider factors such as the market conditions, the situation of the company and the interests of the national economy.[45]

In the case at hand, the Greek Ministry of Labour refused to authorize the projected redundancies of *AGET Iraklis* because 'there was no plan for relocating the workers concerned to other plants belonging to *AGET*

40 Spaventa (n 20).
41 Spaventa (n 36).
42 Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis* (*AGET Iraklis*) *v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (*AGET Iraklis*) [2016] ECLI:EU:C:2016:972.
43 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16; Corrigendum to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998) [2007] OJ L59/84.
44 Ibid. art 4(3) and art 5.
45 Law (N.) 1387/1983 *Control of Group Dismissals and Other Provisions* (FEK A' 110/18-19.8.1983), 19 August 1983, art 5(3).

Iraklis',[46] combined with the existence of a high unemployment rate in the state. Moreover, 'the projected redundancies had not been substantiated by concrete and detailed evidence, and [that] the arguments relied on by *AGET Iraklis* appeared too vague'.[47]

The decision was challenged before the CJEU, which found the measures in question to be 'liable to impede the exercise of freedom of establishment or render it less attractive'.[48] Furthermore, under the EU Charter, 'the establishment of a regime imposing a framework for collective redundancies, such as the regime at issue [...], entails a limitation on the exercise of the freedom to conduct a business enshrined in Article 16 of the Charter'.[49] Accordingly, the CJEU decided that the required authorization was contrary to EU law, due to the vagueness of the established conditions for exercising the discretionary power in question.

To sum up, although the Directive only established the minimum level of protection, the fact that it conflicted with the freedom to conduct business enabled the CJEU to determine the relationship between two conflicting fundamental rights. Effectively, the minimum European labour standard of protection became the ultimate standard.

46 Case C-201/15 *AGET Iraklis* [2016] ECLI:EU:C:2016:972, para 17.
47 Ibid. para 18.
48 Ibid. para 48.
49 Ibid. para 69.

3 Identity as Protection of National Fundamental Rights Standards

The above-described challenges of multilevel fundamental rights protection stand in correlation with (certain types of) claims of national constitutional identity. To protect national interpretations of fundamental rights, Member States occasionally claim they are part of their constitutional identity. This section first examines whether the requirement of the Union pursuant to Article 4(2) TEU to respect national identities intends to encapsulate the issue of fundamental rights *interpretation* (3.1). Moreover, it analyzes the national judicial practice as to how national identity claims relate to fundamental rights in particular. Identity claims refer to the general commitments to fundamental rights,[50] their idiosyncratic national interpretations,[51] or even specific and unique constitutional rights[52] (3.2). Finally, national constitutional identity is a much broader phenomenon than its specific relation to fundamental rights. Accordingly, one should treat and evaluate identity claims concerning fundamental rights as a separate and normatively specific issue (3.3).

3.1 European Identity Clause and Fundamental Rights – Going Beyond

If a claim of national constitutional identity is to be 'successful' in challenging EU law, the CJEU must accept it. Hence, national constitutional identity requires participation on both levels, national and supranational. Only national authorities are to determine and/or interpret the meaning of respective national identities. In the same way, the CJEU alone is competent to interpret the Treaties, whereby Article 4(2) TEU articulates the meaning and scope of national identity. Accordingly, does the cited European iden-

50 Italian Corte Costituzionale, Case 1146/1988, 15 December 1988, para 2.1; Takis Tridimas and Giulia Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 German Law Journal 794, 800.
The Italian Constitutional Court pointed to supreme constitutional principles as implicit constraints on the exercise of the power to amend the constitution.

51 Case C-42/17 *Criminal proceedings against M.A.S. and M.B.* (*Taricco II*) [2017] ECLI:EU:C:2017:936.

52 Case C-159/90 *Grogan* [1991] ECLI:EU:C:1991:378.

tity clause encapsulate (national) fundamental rights *standards* as part of national identity?

A meticulous reading of the European identity clause suggests no recourse to specificities of national *interpretations* of fundamental rights.[53] De Witte supports that view. He argues that 'Article 4(2) TEU does not refer to fundamental rights as a component of constitutional identity, and the Court of Justice tends to steer from dealing with fundamental rights questions in the language of national constitutional identity.'[54]

Moreover, when the FCC yielded to review EU law in *Solange II* due to sufficient protection of fundamental rights on the level of the Union – previously carried out in the name of constitutional identity – it never demanded that fundamental rights standards both at a national and at a European level be *the same* to recognize the primacy of EU law over national, even constitutional law. On the contrary, the FCC has explicitly recognized that the standards of protection will naturally differ. However, the decisive point is that the essence of fundamental rights is not hollowed out.[55] Fundamental rights protection at the Union level is regarded as *essentially equivalent* to national fundamental rights protection. The FCC has explicitly stated that it 'will no longer review the Community law against the national *standards* of fundamental rights; especially since the essence of fundamental rights is generally guaranteed by the ECJ (emphasis added)'.[56] In the same decision, the FCC also wrote that the adherence of the Union to the ECHR, which guarantees only minimum protection of fundamental rights, although not formally binding, in principle already satisfies the conditions which the German Basic Law demands.[57]

To sum up, while the general *commitment* to fundamental rights may plausibly constitute national constitutional identity (and the lack of it even

53 Art 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

54 Bruno de Witte and Diane Fromage, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27 European Public Law 411, 420.

55 BVerfGE 73, 339 *Solange II* 22 October 1986, p 363.

56 Ibid. p 388.

57 Ibid. p 386.

justified the refusal of the EU primacy principle by the FCC), the specific national *interpretations* or *standards* of fundamental rights cannot.[58]

3.2 Identity as Commitments, Interpretations and Unique Fundamental Rights

Despite the suggested scholarly interpretation of the European identity clause above, the CJEU's case law, as well as some of the more recent claims of national constitutional identity by the apex courts, occasionally suggest otherwise.

First, Member States often argue that the general commitment to fundamental rights forms part of their national constitutional identity.[59] The German eternity clause,[60] Czech eternity clause,[61] or Italian *Controlimiti* doctrine[62] exemplify this. In that sense, identity as a general commitment to fundamental rights could only be plausible if the Union manifestly disregarded its own duty to respect fundamental rights.[63] Identity in that regard plays a role as the ultimate guardian of liberal values. Mere reasonable disagreement on the *interpretation* of fundamental rights does not fulfil that standard.[64]

Second, identity claims can serve to secure the concrete *procedural* level of fundamental rights protection in general. For example, the Czech Constitutional Court has argued that 'no amendment to the Constitution can

58 See also Giacomo Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards' (2019) 25 European Public Law 347, 348.

59 Luke D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361.

60 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009; Sabine Blömacher, *Die Menschenwürde als Prinzip des deutschen und europäischen Rechts: Kohärenz der Konzepte?* (1st edn, Duncker & Humblot 2016).

61 Czech Ústavní Soud, Case Pl. ÚS 19/08 *Treaty of Lisbon I* 26 November 2008, paras 109, 215.

62 Italian Corte Costituzionale, Case 1146/1988, 15 December 1988, para 2.1.

63 Luke D Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021).

64 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others* (*Weiss*) [2018] ECLI:EU:C:2018:1000; BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms'.[65] Hence, the Czech eternity clause or the identity of a constitution protects not only the general commitments to, but also the concrete procedural level of protection of fundamental rights. In that light, one can also observe an Italian *Taricco* saga. Articulated as national constitutional identity, Italy argued that the statute of limitations in Italian criminal law constitutes a matter of material rather than procedural law. Accordingly, it is subsumed under the principle of legality, which prohibits any retroactive action in criminal law.[66]

Third, national constitutional identity can relate to human dignity. Human dignity may be understood as the normative general guiding principle among the fundamental rights or a concrete right with a specific idiosyncratic meaning. For example, whereas the EU itself complies with human dignity, as articulated in Article 1 of the EU Charter and Article 2 TEU as the common foundational value, in the *Omega* decision, the CJEU nevertheless accepted the German claim that the particular German interpretation of human dignity justified disapplication of the respective EU norms.[67]

In addition, and apart from the issues of national language(s),[68] which should be treated as a separate phenomenon, concrete constitutional norms or principles might be seen as part of national identity: for example, the French principle of secularism (*la laïcité républicaine*, freedom of conscience, as distinct from the right to manifest religion or belief),[69] the

65 Czech Ústavní Soud, Case Pl. ÚS 36/01 *Bankruptcy Trustee* 25 June 2002, para 10; David Kosař and Ladislav Vyhnánek, 'The Constitutional Court of Czechia' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (2020) 166.

66 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.

67 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bon* (*Omega*) [2004] ECLI:EU:C:2004:614.

68 French Conseil Constitutionnel, Case 2004-505 DC *Constitutional Treaty* 19 November 2004; Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (*Runevič-Vardyn*) [2011] ECLI:EU:C:2011:291, para 84.

69 François-Xavier Millet, 'Constitutional Identity in France: Vices and – Above All – Virtues' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 149.

former constitutional protection of the right to life in Ireland,[70] or the Romanian claim (supported by the Latvian government and refused by the CJEU) that marriage only between persons of the opposite sex forms part of national identity.[71]

3.3 Treating Fundamental Rights Identity Claims Differently

Contrary to the suggested interpretation of Article 4(2) TEU, excluding fundamental rights (standards), the above-cited examples show that in practice fundamental rights often connect with claims of national identity. Accordingly, one should examine and evaluate these types of identity claims separately.

Identity claims in general cover a wide variety of issues: from general commitments to democracy and the rule of law,[72] to political and constitutional structures, essential elements of a state, security, migration, fiscal policy,[73] national sovereignty,[74] territorial integrity,[75] protection of languages,[76] religious questions[77] and many others. However, *fundamental rights identity claims* deserve special scholarly attention due to their specific normative foundation.

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70 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L060/131; Kos (n 21).

71 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (*Coman*) [2018] ECLI:EU:C:2018:385, para 42.

72 Helle Krunke, 'Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

73 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L060/131.

74 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, para 38; Anna Śledzińska-Simon and Michał Ziółkowski, 'Constitutional Identity in Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

75 José Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain: Commitment to European Integration without Giving Up the Essence of the Constitution' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 238.

76 Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* (*Groener*) [1989] ECLI:EU:C:1989:599.

77 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (*Egenberger*) [2018] ECLI:EU:C:2018:257.

First, in contrast to other insurmountable differences, fundamental rights identity claims are often shallow constitutional disagreements revolving around shared basic liberal constitutional commitments. Moreover, occasional idiosyncratic interpretations and tolerance towards constitutional interpretations can hardly undermine the principle of primacy, effectiveness and unity of EU law. Finally, the constitutional *interpretation* of fundamental rights is subject to change by its very nature. Even the highest courts may err. Contrary to some understandings of identity as sameness[78] – which grants the argument of identity an additional normative strength – idiosyncratic interpretations of fundamental rights as national identity are subject to constant and continuous change by their very nature.

In addition, one may perceive fundamental rights identity claims as a mechanism to mitigate potentially conflicting multilevel fundamental rights standards. In that sense, the argument of identity undertakes a different, more functional[79] role to navigate the constitutional tensions. I call it the *functional aspect of identity*, which counter-balances the increasing European trajectory of unification and harmonization of fundamental rights standards. The national apex courts are occasionally better suited to determine the concrete considerations of conflicting fundamental rights, locally more sensitive to the specificities of the respective community, and with a higher democratic legitimacy. In light of the foregoing, it would be unwise to force the same standards developed by the CJEU on all the Member States. Fundamental rights identity claims thus have the potential to open a dialogue where one settles the right equilibrium between the 'ever closer Union' and national diversity.

In conclusion, the special nature of fundamental rights identity claims requires that we give them special consideration, and in turn raises the following question: Is this special type of identity claim the best way to navigate multilevel fundamental rights standards, or does the connection of fundamental rights and identity rather create more problems than it promises to solve?

78 Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010); Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010); Pietro Faraguna, 'Constitutional Identity in the EU–A Shield or a Sword?' (2017) 18 German Law Journal 1617, 1625; Tímea Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) 21 German Law Journal 105, 112.

79 Kassandra Wetz, *Funktionen von Verfassungsidentität als Gerichtliches Konzept in der Europäischen Union*, vol 18 (1st edn, Mohr Siebeck 2021).

The following sections highlight the new case law which addresses both previously outlined challenges: the lack of a consistent and foreseeable constitutional design concerning multilevel fundamental rights standards, and consequently the problematic adherence to identity claims to manage constitutional conflicts. The research outlines two recent landmark decisions by the FCC, the *Right to be Forgotten I*[80] and *II*,[81] which signal a significant change of paradigm.[82]

80 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019.

81 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019.

82 Pieter Aertgeerts, 'Between Unity and Diversity: EU Data Protection Legislation as a Catalyst for a Constitutional Trilogue' in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming).

4 *Right to be Forgotten I* – National Standards of Review

This section presents the new case law *Right to be Forgotten I* (4.1) and continues with a critical analysis of the new approach – directly applying national fundamental rights standards under the Basic Law within the scope of application of EU law which is not fully harmonized (4.2). It then critically evaluates whether the said case law embraces or rather facilitates fundamental rights diversity in the EU (4.3). It concludes with an assessment of how the said case law partially marginalizes the EU Charter, but concurrently offers a solution of fundamental rights diversity without adhering to fundamental rights identity claims (4.4).

4.1 To be Forgotten I – *Reviewing the Basic Law's Standards*

In the case *Right to be Forgotten I*,[83] the FCC addressed the matter of fundamental rights standards in the context of a national constitutional complaint concerning legislation which was *not* fully harmonized by Union Law.[84] The question raised was whether the FCC could apply its national standards of fundamental rights protection, although the matter 'falls within the scope of the EU law'.

The Complainant had murdered two people and heavily injured the third on the high seas in 1981, a story extensively covered by the media. In 1999 the magazine *Spiegel Online* decided to make its entire archive of articles available online. In 2002, when the Complainant had been released from prison and was trying to reintegrate into society and start a new life, every Google search of his name quickly revealed his notorious past. The Complainant argued that he could not establish and cultivate social contacts in society when he was continuously associated with his previous crimes. The considerable elapse of time and his full legal redemption for the committed actions should give him the right to exercise some control over the easily obtained information online about him. The right to person-

83 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019.

84 The same question was addressed by CJEU in the Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 29.

ality should entitle him to obtain some protection regarding his name: in particular, the right to be forgotten.[85]

The FCC decided that the amount of time which had passed should be considered as the decisive factor when determining the proper balance between the affected person's private life on the one hand, and on the other hand the freedom of expression and freedom of the press, as well as the right to access information for the purpose of learning and public debate in a democratic society.[86] It concluded that upon the Complainant's notification, at least some protection relating to his name, without unduly restricting the access to the articles as such, should have been applied.[87]

4.2 The Basic Law as the Standard of Review in EU Matters

The subject matter fell within the scope of EU law, but was not fully regulated by EU law – allowing the Member States leeway as to concrete legislative conditions of the freedom of expression and information, including the processing of personal data for journalistic purposes ('media privilege').[88] Concretely, the General Data Protection Regulation (GDPR)[89] affords the subject the right to obtain the erasure of personal data, but concurrently under Article 85(1) enables the Member States to reconcile the right to the protection of personal data with the right to freedom of academic, artistic and literary expression and for journalistic purposes.

The FCC determined:

> 'The standard of review applicable to the constitutional complaint are the fundamental rights of the Basic Law. This applies irrespective of whether in the challenged decision the Federal Court of Justice had to

85 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 1.
86 Ibid. para 113.
87 Ibid.
88 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/88, art 85.
89 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1.

> take into consideration provisions of ordinary domestic legislation that constitute an implementation of EU law within the meaning of Art. 51(1) first sentence of the Charter of Fundamental Rights of the European Union.'[90]

With this decision, the FCC challenged the established application of the EU Charter according to the CJEU's previous case law. The FCC acknowledged the change, specifically stating that it 'reviews domestic law and its application against the standard of the fundamental rights of the Basic Law even where the domestic law *falls within the scope of application of EU law* but is not fully determined by it'.[91] The FCC justified this turnaround with the argument that the 'binding effect of fundamental rights is a corollary of the political responsibility for decision, and thus corresponds to the respective responsibilities of the legislator and the executive'.[92] In other words, the concrete standards of fundamental rights are attached to concrete political bodies. If the Member States have the possibility for independent domestic regulation of one particular issue within EU law, this particular matter is the subject of the national fundamental rights standards.

In accordance with the *Åkerberg Fransson*[93] decision, in a situation where action of the Member States is not entirely determined by EU law, national courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection under the EU Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not thereby compromised.[94] While the respective case law allows for application of national standards, subject to the above-cited conditions, the FCC's decision to apply the Basic Law directly as the *default* standard of review within the scope of application of EU law arguably stretches the *Åkerberg Fransson* formula to its ultimate limits, if not beyond.[95]

Aware of these considerations, the FCC introduced another layer of argumentation. It determined that concurrently to the Basic Law, 'the EU

90 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 41.
91 Ibid. para 42 (emphasis added).
92 Ibid.
93 Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
94 Ibid. para 29.
95 For a critique of the so-called Russian doll-like 'standards within standards', see Karsten Schneider, 'The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-Inflicted Institutional Vulnerabilities' (2020) 21 German Law Journal 19, 25.

fundamental rights are applicable in addition to the fundamental rights guarantees of the Basic Law'[96] as well. While applying national fundamental rights standards, the FCC made a presumption that the level of protection of the EU Charter is simultaneously ensured.

4.3 Embracing or Facilitating Diversity of Fundamental Rights in the EU

The *Right to be Forgotten I* is not a self-absorbed and parochial decision, despite giving to the national fundamental rights standards within the scope of EU law more significance than ever before. On the contrary, it has a reconcilable tone, innovative approach, and non-hierarchical understanding of multilevel constitutional orders. It seeks dialogue in acknowledging the need for frequent preliminary reference procedures, and it does not posit absolute claims against EU law. Finally, it seeks more diversity in the fundamental rights field – recognizing the existing national differences in fundamental rights standards, as well as institutional complexities in providing adequate protection by regional, national, supranational and international institutions and courts.

Matthias Goldmann wrote that the *Right to be Forgotten* decisions are 'opening a new chapter in judicial dialogue'.[97] Mattias Wendel similarly argued that the said decision made a considerable step further towards European pluralism of fundamental rights, moving away from dualistic and exclusivist understandings of *Åkerberg Fransson* and fixation on the separation of the federal levels in fundamental rights protection.[98] However, although the said jurisprudence resonated positively among the European pluralists,[99] the default interpretation of the Basic Law in light of the EU Charter does not come without ambiguities and challenges.

As highlighted by Karsten Schneider, the FCC did not acknowledge the underlying reasons for the respective constitutional change concerning the legal basis for constitutional complaints.[100] Moreover, the FCC pushed the

96 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 44.

97 Matthias Goldmann, 'As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism' (2020) 21 German Law Journal 45, 46.

98 Mattias Wendel, 'Das Bundesverfassungsgericht Als Garant Der Unionsgrundrechte' (2020) 75 JuristenZeitung 157, 160.

99 Matej Avbelj, 'The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism' (2020) 21 German Law Journal 27, 27.

100 Schneider (n 95) 21.

concept of fundamental rights diversity quite far. Schneider argued that the 'very idea of versioning – i.e. distinguishing between a European version of EU fundamental rights and some kind of Karlsruhe version of EU fundamental rights – runs contrary to safeguarding the unity and coherence of Union law'.[101] For example, the FCC argued:

> '[I]nterpretation [of the Basic Law's fundamental rights] is in part informed by Germany's historical experiences and must take into account the specific structures of the legal order and the social realities in the Federal Republic of Germany. An interpretation that is open to European and international law, takes into consideration other supranational fundamental rights catalogues and draws inspiration from their interpretation does not require–based on the open wording of the fundamental rights–every interpretation made by international or European courts to be adopted.'[102]

Hence the FCC's aim in not seeking to merge the various standards of interpretation *within the scope of EU law*, but rather openly embracing the differences.[103] Moreover, in the described scenario, the EU Charter only serves as the minimum level of protection generally committed to fundamental rights. To use a metaphor, the EU Charter is the highway, and the national apex courts are the cars winding left and right within.

Finally, as will be explained in the following, the EU Charter's role and nature is twofold. Concerning fully harmonized EU law, the EU Charter ordinarily serves as the only and fully encompassing standard of review in regard to fundamental rights protection. In that role it determines concrete standards and solutions when several conflicting or colliding fundamental rights must be balanced. Alternatively, in the scenarios of the *Right to be Forgotten I*, when EU law is not entirely harmonized and the Member States have some leeway for diverse solutions, the EU Charter still applies, but only as the general framework, providing the minimum level of protection. That raises the following question: Can the same legal source concurrently fulfil two distinctive roles which are somewhat contradictory? In other words, the latter application of the EU Charter would necessarily limit the concrete standards of the EU Charter from the former role. The FCC did not clarify whether the described bi-functional EU Charter may produce

101 Ibid. 22.
102 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 62.
103 Ibid. para 61.

inconsistent and contradictory case law, or predict what kind of legal consequences there might be for the development of fundamental rights in the EU.

4.4 Marginalizing the EU Charter but Forgetting Constitutional Identity

Concerning the *Right to be Forgotten I,* the sub-section highlights three further considerations. It illustrates how the said case law may potentially marginalize the EU Charter;[104] it warns against a disintegration of fundamental rights standards in Europe; and aims to explicate what are the consequences of the said case law for claims of national constitutional identity concerning fundamental rights.

First, if the Member State's apex courts no longer apply the EU Charter as the primary standard of review in non-fully harmonized EU law, that renders the EU Charter of secondary importance. In a way, it marginalizes its significance. While the respective approach obviously does not further unity and coherence of EU law,[105] it also reduces the EU Charter to a secondary level of protection of general nature – according to Wendel, a potential 'marginalisation of the European fundamental rights':[106] to a mere 'inspiration', as the FCC literally wrote.[107] Considering the impressive development of fundamental rights protection in the EU in the last decades,[108] they must not change trajectory and regress from the importance of the EU Charter.

Second, while the decision signals cooperation with the CJEU, it also encourages application of diverse standards. The Basic Law as a starting point embraces national doctrinal solutions and focuses on national peculiarities rather then European similarities. After all, the respective case law concerns European legislation. Searching for points of convergence in the light of the

104 Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21 German Law Journal 1, 13.

105 Ibid. 22.

106 Wendel (n 98) 165.

107 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 62.

108 Thomas Kleinlein, *Grundrechtsföderalismus*, vol 287 (1st edn, Mohr Siebeck 2020) 60ff. Armin von Bogdandy and Christoph Krenn, 'Zur demokratischen Legitimation von Europas Richtern eine vergleichende Rekonstruktion der Richterauswahl zu EGMR und EuGH' (2014) 69 JuristenZeitung 529, 530.

EU Charter may be a better attitude than justifying a direct application of national standards, which can facilitate disintegration of fundamental rights standards. Moreover, the legislative leeway is a result of legislative choice considering the European principle of subsidiarity – the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.[109] The said approach can facilitate a wrong dilemma: either to fully harmonize more European legislation as necessary, to avoid application of national standards, thereby reducing national diversities; or to further applications of national fundamental rights standards within the scope of application of EU law. To apply the latter scenario in the case at hand: Is it appropriate that in the same scenario under the GDPR the German Claimant successfully achieved that his name was erased from online articles concerning his previously committed crimes; whereas a Spanish Claimant, for example, in a comparable scenario under the same GDPR, could not demand that? Or to put it differently, what has the said case law of the FCC achieved for the Claimant, if he should move to Austria, where he would not be successful with his constitutional complaint before the Austrian constitutional court? People in Austria would then continue to have access to *Spiegel Online* articles.

Third, the *Right to be Forgotten I* has significant consequences for the claims of national constitutional identity concerning fundamental rights standards, as highlighted also by Goldmann.[110] If the above-outlined German approach spreads among the Member States' apex courts and eventually becomes the European approach, the courts could no longer claim that the EU Charter's fundamental rights standards, in the non-fully harmonized areas of EU law, violate their national constitutional identities; because the courts would no longer apply these European standards, but their own. The fundamental rights identity claims in this respect would become redundant. Henceforth, the new approach of the first senate of the FCC has substantially challenged the previously established identity review by the second senate.[111]

109 Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 224.

110 Goldmann (n 97) 52.

111 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, paras 49, 53.

5 *To be Forgotten II* – The Change of Paradigm

The second decision, the *Right to be Forgotten II*,[112] introduced a true novelty. It addressed the question of constitutional complaints relating to the fully harmonized legislation by EU Law.[113] In this context, the FCC ruled that it would no longer scrutinize potential fundamental rights violations against the Basic Law, but directly apply the EU Charter as the only relevant standard of fundamental rights review.

The section presents the *Right to be Forgotten II* decision (5.1) and analyzes it in the light of constructive constitutional pluralism in action (5.2). It further elaborates on the inner tensions of the said decision: inter alia, the difference between applying and interpreting the EU Charter (5.3). Finally, the chapter evaluates how the *Right to be Forgotten II* co-shapes the multilevel landscape of fundamental rights protection, creates a shield against the rising illiberal tendencies, and thereby contributes to active constitutionalization of the EU (5.4).

5.1 Direct Application of the EU Charter in Constitutional Complaints

The *Right to be Forgotten II* decision concerned a CEO of a company (Claimant) who wanted to remove a search result from Google which linked her to a file containing a transcript of the broadcast. In a TV magazine article of 2010, titled 'Dismissal: the dirty practices of employers', the Claimant was accused of unfair treatment towards her employee and was portrayed in a negative light. The TV magazine also included an interview with the Claimant, who explained from her perspective the circumstances of the particular termination of the contract of employment. After several years the Google machine still showed the link to this file among the top searching results when entering the full Claimant's name in the search engine. The Claimant thus sought an injunctive relief against the search engine operator to remove the link from the search results.

112 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019.

113 The same question was addressed by CJEU in the Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras 56–8.

The Claimant argued violation of her right to personality and her right to informational self-determination.[114] The TV magazine's title of 'dirty practices' misleadingly portrayed her in a negative light which had affected her private life. Finally, the Claimant contended that due to time having passed, the public no longer enjoyed legitimate interest in this information.[115]

On the first level, the district court ordered a removal of the link, while the appellate court on the second level overruled this decision. Both courts referred to the *Google Spain*[116] case law by the CJEU, since the matter fell entirely within the scope of EU law. While the district court followed the main tenor of the *Google Spain* decision, the appellate court argued that the circumstances in the respected case fundamentally differed.[117] The dispute ended up at the FCC, which received a constitutional complaint, arguing that the fundamental right of the Claimant had been violated.

In contrast to *Right to be Forgotten I*, the matter was fully harmonized by the GDPR. Traditionally, the FCC is only competent to interpret the Basic Law. However, in the case at hand, the FCC radically changed its previous position and introduced a new paradigm. It stated that '[r]egarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from the fundamental rights of the Basic Law, but solely from EU fundamental rights'.[118]

The FCC construed this new competence from the previously developed *Solange II* condition that the fundamental rights protection in the EU is 'essentially equivalent'[119] to the national constitutional protection guaranteed by the German Basic Law.[120] The German constitutional system warrants to every individual who believes that her fundamental rights are being violated to turn to the FCC, which has the power and obligation to scrutinize whether the fundamental rights of an individual are being

114 BVerfG Press Release No. 84/2019, 27 November 2019, para 2.
115 Ibid.
116 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (*Google Spain*) [2014] ECLI:EU:C:2014:317.
117 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 10.
118 Ibid. para 42.
119 BVerfGE 73, 339 *Solange II* 22 October 1986, p 387.
120 Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (Cambridge University Press 1994) 494. The translation 'im wesentlichen gleichzuachten' is inaccurately translated as 'substantially similar' here.

properly accorded or not. On the EU level one does not have a functional equivalence in protecting fundamental rights of individuals through the process of individual constitutional complaint. Accordingly, when the matter falls within the fully harmonized EU law, an individual is left with comparatively less protection in an operational sense. From this protection loophole (*Schutzlücke*)[121] the FCC developed its competence to carry out an individual constitutional complaint – but instead of reviewing the national Basic Law, it decided that is should directly review the EU Charter. The argumentation was strengthened with reference to Article 23(1) of the Basic Law, which foresees the participation of Germany and its institutions in any further integration in the EU. This participation (*Mitwirkung*) bestows the FCC with the competence to review the EU Charter. The FCC established that it is competent and called upon to carry out constitutional complaints which fall within the scope of application of EU law with fully harmonized legislation. Accordingly, the FCC reviews the application of fundamental rights by domestic specialized courts, while using the EU Charter as the only relevant standard of fundamental rights review.[122]

The FCC recognized equivalent, not identical fundamental rights standards. It stated:

> 'It cannot be assumed that the Charter, insofar as uniform fundamental rights protection is to apply in all Member States to fully harmonised EU law, corresponds with the Basic Law and is congruent with its guarantees in all details […] This holds true all the more given that fundamental rights protection in Germany is based on a long tradition of comprehensive case-law on fundamental rights that gives specific shape to the fundamental rights on the basis of the broad procedural powers of the Federal Constitutional Court within the German legal order. An interpretation of fully harmonised EU law in light of the fundamental rights of the Basic Law would thus run the risk of prematurely applying to EU law the standards developed domestically–this would then imply that these standards would also have to apply to the other Member States.'[123]

The FCC acknowledged that domestic fundamental rights standards reflect differences among the Member States. It stated that these differences re-

121 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 61.
122 Ibid. paras 51, 61.
123 Ibid. para 45.

flect various factors and different country-specific historical experiences.[124] Accordingly, domestic and EU fundamental rights 'must be regarded as distinct regimes'.[125] The explicit recognition of so-called *fundamental rights diversity* (*Grundrechtsvielfalt*)[126] among the Member States recognizes the challenges of the multilevel constitutional landscape as highlighted at the beginning of this chapter. However, as shown in the following, even a direct application of the EU Charter does not eliminate these differences entirely, but rather gives the apex courts the means for proactively and constructively co-shaping the meaning of the EU Charter.

5.2 Constructive Pluralism in the Field of European Fundamental Rights

The FCC retreated from a confrontational and resisting attitude towards the CJEU, symptomatic to the previous case law.[127] It explicitly and unequivocally committed itself to applying the EU Charter in 'close cooperation'[128] with the CJEU. Moreover, it reassured that it will only apply fundamental rights due to the EU Charter when the CJEU would already clarify their interpretation, or when their application would be clear from the outset based on established principles of interpretation and case law by the ECtHR. If not, the FCC would submit a preliminary question to the CJEU.[129]

The new dogmatic position of the FCC increased the importance of the EU Charter and the primacy of EU fundamental rights. It awarded the EU Charter much broader scope of application procedurally, since it now enabled individuals to invoke it directly in front of the national (constitutional) court. Should the other apex courts follow this paradigm and apply the EU Charter as the only standard of review in fully harmonized European legislation, the EU Charter would gain in significance. In that

124 BVerfG, 1 BvR 276/17, Press Release No. 84/2019, 27 November 2019, sec I(2)(a).
125 Ibid.
126 Moritz Schramm, '"Grundrechtsvielfalt" als Allzweckwaffe im Rechtsprechungsverbund: Anmerkungen zu der Recht auf Vergessen I-Entscheidung des BVerfG' (*Verfassungsblog*, 5 December 2019) <https://verfassungsblog.de/grundrechtsvielfalt-als-allzweckwaffe-im-rechtsprechungsverbund/> accessed 24 February 2023.
127 Cf BVerfGE 73, 339 *Solange II* 22 October 1986; BVerfGE 89, 155 *Maastricht* 12 October 1993; BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009; BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.
128 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 68.
129 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 70.

light one can understand the comments of the CJEU's president noting that the case law *Right to be Forgotten* is eventually strengthening the EU Charter.[130]

Additionally, were the national apex courts increasingly and directly applying the EU Charter in their constitutional complaints,[131] that would in turn bring national constitutional standards together, as well as convergently influencing the CJEU's further development of the EU Charter, still as the ultimate and final interpreter.[132] With the presented paradigm the apex courts could more actively cooperate in the development of the European fundamental rights standards – in the light of the constructive constitutional pluralism which 'demonstrates how a pluralist-minded court elevate itself from and above the constitutional confines of its own legal order'.[133]

5.3 *The Tensions of the* Right to be Forgotten II – *Applying and Interpreting*

One of the challenges of the new approach is the difference between applying and interpreting the EU Charter. As the present sub-section shows, the FCC claimed that the relevant subject matter was already clarified by the CJEU's previous case law and therefore did not need to issue a preliminary reference procedure.[134] Concurrently, it also stated that the respective matter differs fundamentally from the facts of the case in the matter of *Google Spain*, which was the legal basis for the respective decision.[135] The FCC consequently developed a solution which de facto departed from the cited

130 Thomas Kleinlein, 'Neue starke Stimme in der europäischen Grundrechts-Polyphonie' (*Verfassungsblog*, 1 December 2019) <https://verfassungsblog.de/neue-starke-stimme-in-der-europaeischen-grundrechts-polyphonie/> accessed 24 February 2023.

131 Note that not all the Member States have the system of individual constitutional complaint.

132 The national apex courts would co-define common European values. See also Mattias Wendel, 'Taking Up the European Mandate: The Charter Before German Courts' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 182, 194.

133 Avbelj (n 99) 30.

134 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 137. The BVerfG went on in length explaining why the matter is already sufficiently clarified and therefore does not need an additional involvement of the CJEU.

135 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 141.

decision and created a distinctive new interpretation of the fundamental rights involved.

The sub-section first outlines the *Google Spain* decision. In the next step it explains how the FCC differentiated its outcome from the said case law. The details of both decisions serve to illustrate how application of allegedly clear case law quickly, if not always, became its interpretation.

In the *Google Spain*[136] decision, a Spanish Claimant requested the internet search engine Google Spain SL to remove his personal data, so that after entering his name in a search engine he would no longer appear in the links to a daily Catalonian newspaper, *La Vanguardia*. This newspaper's articles from 1998 kept mentioning the Claimant's name in relation to a real-estate auction for the recovery of his social security debts.

In the preliminary proceeding the CJEU had to determine the scope of the right to be forgotten under Directive 95/46,[137] considering that the information in question had been lawfully published by the third parties. The CJEU had to achieve balance between the following conflicting rights and interests: the economic interests of the search engine operator; respect and sensitivity of information regarding the Claimant's private and family life; protection of personal data under Articles 7 and 8 of the EU Charter; the nature of information in question; and the interest of the public in accessing and having the respective information –varying according to the role of the Claimant in public life.[138]

The CJEU determined that the rights of the Claimant under Articles 7 and 8 of the EU Charter, respect for private and family life and protection of personal data, as a rule override[139] economic interests of the operator as well as the interest of the general public in having access to that information – provided that there are no reasons justifying such an interference: for example, the role played by the data subject in public life.[140]

Some scholars have heavily criticized the cited outcome of this milestone decision by the CJEU.[141] In particular, the reporting judge in the *Right to*

136 Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317.

137 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

138 Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317, para 81.

139 Ibid. 97.

140 Ibid. para 99.

141 Claes G Granmar, 'Global Applicability of the GDPR in Context' (2021) 11 International Data Privacy Law 225, 232. Peggy Valcke and Simon Verschaeve, 'Going Dark

be Forgotten case law, Johannes Masing, allegedly the intellectual father of the respective new paradigm,[142] already in 2014 published his critical scholarly observations concerning the *Google Spain* decision.[143] He advocated for a different, more holistic and nuanced approach. Concretely, he found the cited arguments unconvincing, namely that data protection and privacy of an individual categorically outweigh the interests of the internet search engine, which the CJEU detached from the freedom of speech. In his observations, such separation insufficiently and artificially divides two spheres which are intrinsically connected and mutually independent. He argued that the limitation of the internet search engine limits not only the economic freedom of the internet provider, but concurrently impacts and limits the freedom of expression. The publishers are freely expanding and casting their media content via the internet, and readers are freely obtaining the information online.[144]

Right to be Forgotten II departs from the *Google Spain* decision precisely in that regard. The FCC argued that in the matter of informational self-determination, one cannot omit the third party's freedom of expression in the balancing test, since the prohibition of data processing by the internet search engine operator inescapably to some extent also deprives the third party from an important platform for disseminating its publication.[145] Moreover, due to the freedom of, and access to information under Article 11 of the EU Charter, the 'balancing must also take into account Internet users' interest in having access to the information in question'.[146]

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or Living Forever: The Right to Be Forgotten, Search Engines and Press Archives' in Elisa Stefanini et al. (eds), *The Cambridge Handbook of Information Technology, Life Sciences and Human Rights* (Cambridge University Press 2022) 189ff. Oskar J Gstrein, 'The Right to be Forgotten in 2022: Luxembourg judges keep surfing the legislative void' (*Verfassungsblog*, 20 December 2022) <https://verfassungsblog.de/rtbf-2022/> accessed 24 February 2023.

142 Marten Breuer, 'Wider das Recht auf Vergessen … des Bundesverfassungsgerichts!' (*Verfassungsblog*, 2 December 2019) <https://verfassungsblog.de/wider-das-recht-auf-vergessen-des-bundesverfassungsgerichts/> accessed 24 February 2023.

143 Johannes Masing, 'RiBVerfG Masing: Vorläufige Einschätzung der „Google-Entscheidung" des EuGH' (*Verfassungsblog*, 14 August 2014) <https://verfassungsblog.de/ribverfg-masing-vorlaeufige-einschaetzung-der-google-entscheidung-des-eugh/> accessed 24 February 2023.

144 Ibid.

145 BVerfG, 1 BvR 276/17, Press Release No. 84/2019, 27 November 2019, sec II(2)(b).

146 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 110.

The FCC created its own holistic approach, which purposely ignored the fact that the European legislator deliberately decided to empower individuals with the specifically formulated right to be forgotten which (with the exception of the media privilege), under the Article 17(1)(a)(c) GDPR, states that 'data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her [...] where the personal data are no longer necessary in relation to the purposes for which they were collected [...] and there are no overriding legitimate grounds for the processing'.[147] The FCC consciously acknowledged its departure from the CJEU's case law, stating the following: 'Therefore, it cannot be presumed that protecting the right of personality takes precedence; rather, the conflicting fundamental rights must be balanced on an equal basis.'[148] It concluded that the Higher Regional Court appropriately undertook the balancing test between three fundamental rights: the right to personality, freedom to conduct business, and freedom of expression. The decision to refuse the Claimant's injunctive request that the internet engine cease to display the respective link was within the margin afforded to ordinary courts.[149]

As Schneider pointed out, the application of constitutional norms is inevitably and mainly its interpretation. 'There is no question of "right application"[150] of EU fundamental rights that cannot turn into a question of "interpretation of fundamental rights".'[151] Whereas the FCC asserted that it is solely applying the EU Charter, in fact it introduced its own interpretative standards.

5.4 Co-Shaping the Process of Constitutionalization of the EU

As illustrated above, despite paying lip service to cooperation and primacy of EU law, the FCC did not issue a preliminary reference procedure, nor did it directly follow the previous case law of the CJEU. This may entail some dangerous implications. However, the case law still counts as a valu-

147 GDPR, art 17(1)(a)(c).
148 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 121.
149 Ibid. para 136.
150 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 69.
151 Schneider (n 95) 23.

able change of direction, signalling considerable advantages in the process of constitutioanalization of the European Union.[152]

The *Right to be Forgotten II* moves away from strictly dividing spheres of national and supranational law, merging both worlds together.[153] It is precisely the critique in the previous section, the introduction of national differences directly under the EU Charter, which helps to bridge the various standards. After all, the CJEU remains the final interpreter of the EU Charter, and if the interpretation of the respective principles moves too far away from its initial interpretation, the CJEU can quickly remedy that.

Furthermore, the new paradigm enables the national apex courts not only to impact on the interpretation of the EU Charter, but also indirectly to take part in the constitutionalization of the Treaties.[154] The EU Charter contains provisions which go beyond human rights and reassert some provisions from the Treaties. For example, prohibition of discrimination under Article 18 and freedom of movement under Article 21 TFEU are duplicated in the EU Charter in Articles 21 and 45. It remains to be seen whether the national apex courts could also through direct application of the EU Charter influence and co-shape the other rights under the Treaties, for example the principle of discrimination, freedom of movement, or EU citizenship.

A direct application of the EU Charter by the FCC and potentially other national apex courts offers a correcting mechanism to the interpretative outcome of the CJEU's decisions, which may lead to a constructive competition of best constitutional practices. The local and context-specific constitutional peculiarities would have to prove their value in the broader perspective, showing why an alternative approach might be preferred.

Additionally, the FCC broadened the scope of the EU Carter's applicability. It remedied the lack of a European constitutional complaint, enabling individuals to directly invoke violations of fundamental rights, even when the matter is fully harmonized by EU law. In light of *Solange I*, this development could encourage European institutional architects to consider

152 Masing (n 4) 1043.

153 Francesco Saitto, 'Do Not Forget Solange I: The Protection of Fundamental Rights in Europe and the Struggle Over the Concretisation of the European Legal Order' (forthcoming).

154 See also Wendel (n 98) 166.

introducing a European constitutional complaint under the EU Charter for all European citizens.[155]

In addition to increased institutional power by the FCC relating to European fundamental rights and European constitutionalization in general, as well as strengthening individual access to fundamental rights protection under fully harmonized EU law, the respective case law has another effect. *Right to be Forgotten II* has been seen as an intelligent stand against rising authoritarian and illiberal tendencies.[156] The said illiberal trajectories are trying to exploit the normative argument of constitutional pluralism, and thereby abusing the inherent limits of the EU primacy principle. The said case law put both, national and supranational, fundamental rights systems heterarchically[157] on an equivalent level. Thereby it fully acknowledged the democratic legitimacy of the EU Charter. As Goldmann put it: 'The simple recognition that the Charter may at times offer superior protection to the citizens than the one afforded by the domestic constitution makes the whole authoritarian constitutionalist edifice collapse.'[158] The applicable fundamental rights standards are therefore those which offer the most comprehensive and robust protection to individuals. That is a brilliant way to ensure that any national constitutional backsliding can be remedied by directly applying the EU Charter.

155 See also Jud Mathews, 'Some Kind of Right' (2020) 21 German Law Journal 40.
156 Goldmann (n 97) 46.
157 See also Ana Bobić, 'Developments in The EU-German Judicial Love Story: The Right To Be Forgotten II' (2020) 21 German Law Journal 31.
158 Goldmann (n 97) 53.

Both decisions can be seen as a constructive proposal addressing the interplay between various fundamental rights standards. Yet, without denying the powerful voice of the FCC, the suggested new paradigm is still predominantly a national (German) approach. Although the apex courts of Spain and Austria have already examined questions regarding the direct applicability of the EU Charter as the relevant yardstick (*Prüfungsmaßstab*) in national constitutional proceedings,[159] the outcome has not been as clear as the above-cited German decisions.

However, the proposed change of paradigm is not without its own problems. Three main points will be made in this respect. As long as the new approach remains solely a German solution, not followed by the other Member States, national constitutional complaints based on the EU Charter do not extend to all European citizens. This leads to an unequal status among EU citizens, although bound by the same EU rules.[160] Moreover, the approach by the FCC of directly *applying* the EU Charter raises the question of transparency of national case law in applying the EU Charter, as well as equal application or interpretation of EU law. Finally, it has the inherent potential to enable national apex courts to assume the role of de facto interpreters of the EU Charter, which is reserved for the CJEU only.

Most importantly, how does the above-described case law relate to fundamental rights identity claims? The suggested paradigm change may signal the end of fundamental rights identity claims, or at least a significant decline. When areas of the law are not fully harmonized, Member States may directly apply their own fundamental rights standards. Hence, their national constitutional identity relating to idiosyncratic national fundamental rights standards cannot be challenged – because EU law is reviewed only and directly against national standards. Fundamental rights identity claims are thus no longer needed.

159 Austrian Verfassungsgerichtshof, Case U 466/11 ua, 14 March 2012.

160 A potential solution could be to create a new procedural remedy in the form of a common 'European individual complaint' in front of any national apex court, but directly pertaining to the EU Charter – an improvement perhaps to be seen in the future.

Otherwise, when EU law is fully harmonized, the apex courts would directly apply the EU Charter. Accordingly, national fundamental rights (standards) would no longer be applicable as the yardstick of constitutionality. Because national standards would no longer be relevant for constitutional review, the apex courts would have no reason to claim that these national standards must be applied – in the name of national constitutional identity.

The described change of paradigm leaves us with numerous questions, one of which concerns the FCC's attestation in the *EAW*[161] decision to carry out an identity review in the name of human dignity and fundamental rights. Will the FCC maintain this line of reasoning, despite the new paradigm and highly disputed[162] reasoning in the said decision? For example, the FCC itself acknowledged that the admissibility of *EAW* stands in contrast to the 'past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively'.[163] However, even though in the identity review the FCC scrutinized EU law against German fundamental rights, it also relied heavily on fundamental principles as enshrined in Article 6 TEU and reflected in the EU Charter.[164] Accordingly, the new right to be forgotten framework can close that chapter on the German identity review, focusing onwards directly and solely on human dignity and fundamental rights as guaranteed directly under the EU Charter.

The new framework offers and enables the possibility to consign to the past the identity review of EU law in the name of national fundamental rights (interpretations). The question remains, however, whether the damaging nature of identity claims is sufficiently recognized: the lack of transparency, diverse national understandings of identity, identity's confusing terminology, assumptions of unchangeability and democratic irreversibility, and the introduction of a constitutional hierarchy and its immense potential for abuses, to name a few.[165] Only then would there be sufficient

161 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, paras 49, 53.

162 Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549.

163 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, para 34.

164 Ibid. paras 93, 98, 102, 104.

165 Christoph Schönberger, 'Identitäterä: Verfassungsidentität zwischen Widerstandsformel und Musealisierung des Grundgesetzes' (2015) 63 Jahrbuch des öffentlichen

motivation to use the potential of the new paradigm in light of the right to be forgotten. If not, and in the absence of a more suitable mechanism,[166] national claims of constitutional identity may carry on mitigating the tensions of fundamental rights standards between the Union and the Member States.[167]

Finally, this new framework offers both diversity and collective unity without adhering to fundamental rights identity claims. In the first scenario, while allowing the application of diverging national standards, the Union remains committed to nurturing national diversity without forcing the Member States to apply the same standards. As the FCC lucidly stated, 'differences in domestic fundamental rights frameworks reflect factual differences between the Member States resulting from various factors, including country-specific historical experiences'.[168] The diversity of Member States, also concerning fundamental rights standards, constitutes the value of the Union.[169] Nurturing diversity enriches reality and offers a multitude of solutions that most adequately address a particular community's linguistic, cultural, historical and political characteristics.

In the second scenario, applying the EU Charter by all national apex courts could enhance the judicial dialogue and the competition of the best judicial practices, inviting all Member States to cooperate in shaping the interpretation of the common standards of the EU Charter, led by the CJEU. However, one should not overlook the motivation of the apex courts to be seen as equal interlocutors with the CJEU.[170] That inclination has an inherent danger of taking control over the development of the European

Rechts der Gegenwart 41, 60; Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 23; Fabbrini and Sajó (n 3) 469; Scholtes (n 3); Pietro Faraguna and Tímea D Drinóczi, 'Constitutional Identity in and on EU Terms' (*Verfassungsblog*, 21 February 2022) <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> accessed 24 February 2023. Fabbrini and Sajó (n 4) 466, 469.

166 Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41 Brooklyn Journal of International Law 492.

167 Wetz (n 79).

168 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 44.

169 Spaventa (n 36).

170 Christoph Grabenwarter et al., 'The Role of the Constitutional Courts in the European Judicial Network' (2021) 27 European Public Law 43.

legal system. Moreover, it would question the effectiveness and the unity of the Union law, as well as the equality of the Member States.[171]

Finally, while identity claims, in general, will no doubt exist in the future, the above-suggested paradigm has the potential to diminish the least convincing *type* of identity claims: namely, claims of national constitutional identity as idiosyncratic fundamental rights standards or specific fundamental rights interpretations. Fundamental rights identity claims should serve only, if at all, to protect the general commitment to liberal constitutional principles and values. Used in that way, they can guarantee mutually for the Member States and the Union that the basic principles of constitutionalism are respected.

171 Koen Lenaerts, 'No Member State Is More Equal than Others' (*Verfassungsblog*, 8 October 2020) <https://verfassungsblog.de/no-member-state-is-more-equal-than-others/> accessed 24 February 2023.

7 Conclusion

The multilevel landscape of fundamental rights protection among the Union and its Member States occasionally creates constitutional disputes, partially explained by the gradual historical development of fundamental rights protection in the Union and its ambiguous contemporary constitutional design. The matter is complex, and cannot be solved simply with one stroke of the pen. To overcome these tensions, Member States at times claim highly volatile national constitutional identity in the field of fundamental rights. This chapter explicated the context of identity claims in the field of overlapping multilevel fundamental rights protection. Moreover, it outlined a specific type of identity claims, namely, identity claims which are derived from common and shared fundamental rights.

The chapter then presented the new case law from the FCC. It explained how the first decision, *Right to be Forgotten I*, introduced a new approach. In the proceedings of national constitutional complaint within the scope of application of EU law which is not fully harmonized, the FCC decided that it would directly apply the fundamental rights of the Basic Law as the primary standard of review, while at the same time assuming that EU fundamental rights were concurrently applicable.[172] The section critically scrutinized the new approach and concluded that *Right to be Forgotten I* embraces fundamental rights diversity, which in turn challenges fundamental rights identity claims and the centrality of the EU Charter.

The following section explicated the second decision, *Right to be Forgotten II*. As a true change of paradigm, the FCC decided that it would directly apply the EU Charter as the sole standard of review in areas fully harmonized by EU law.[173] The new turn could serve as a framework to mitigate convergence and divergence of various idiosyncratic standards of fundamental rights. Moreover, the section showed that despite the intellectually innovative and constructive solution by the FCC, the new understanding does not come without its own challenges and contradictions.

172 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 41.
173 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 33.

Finally, the chapter concluded with an assessment of what the new *Right to be Forgotten* case law means for fundamental rights identity claims.[174] It argued that the new paradigm enables the national apex courts to put aside fundamental rights identity claims, while at the same time still maintaining an adequate level of diversity concerning fundamental rights interpretation.

174 Cf Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 European Public Law 517, 521. Claes argued that fundamental rights should not be part of identity under Article 4(2) TEU anyway.