The coherence of the right "to be forgotten" in Germany and the EU

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Faculty of Behavioural, Management and Social Sciences
Public Governance across Borders - Bachelor Thesis
Date of presentation: 2nd of July 2020
Word count: 11.941 words

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Abstract

Violation of fundamental rights is a sensitive topic in the European context, as the judicial authority is not explicitly determined. The EU has developed measures in the past to protect basic rights for their citizens, the more recent legislature of the EU concerning personal data protection may overlap with national legislatures. This research tries to exemplify the background and reasoning behind judicial clashes between Member States and the EU, as well as the alteration of fundamental rights into the digital realm. One of them is the fundamental right to have all concerned data being deleted from the internet, better known as the right to be forgotten. To understand the development of fundamental rights in the age of digitalization and big data gathering, this paper gives insights about the key conceptions of the right to be forgotten and how it is enshrined in the German national constitution as well as the EU treaties. As to give more perspectives on how the right to be forgotten is enforced, the research analyses how this fundamental right is expressed in legislative acts as well as court decisions both from a constitutional court perspective as well as the perspective of the European Court of Justice.

List of abbreviations

ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
GCC	German Constitutional Court
GDPR	General Data Protection Regulation
TEU	Treaty on the European Union
U.S.	United States of America

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1.1 Introduction

“[The] [enjoyment] of [fundamental rights] entails responsibilities and duties about other persons, to the human community and future generations.”(Union, 2012, p. 395) Starting with this, the EU describes in the preamble of its Charter of Fundamental Rights the importance of fundamental rights in general in the context of living together as a society. The validity of these rights cannot be seen as dependent on context, but the application on a medium, namely the world-wide-web is dependent on present laws and legal frameworks. This is shown in the design of the Charter itself: Next to covering basic human rights concerning the dignity, integrity, and protection from exploitation, the Charter also focuses the protection of personal data, as described in Article 8 of the Charter of Fundamental Rights: “Everyone has the right to the protection of personal data concerning him or her.”

But why is the protection of data such a concern, that it needs to be included in a legal document, which deals with the protection of rights, for which people have thought for thousands of years to earn freedom and self-determination? It is difficult to cover all fundamental rights which find application in the online realm; thus, this research particularly focuses on the so-called “right to be forgotten”. One prominent case concerning this data was found to be ruled on the highest transnational level in the EU, namely the European Court of Justice (hereinafter referred to as ECJ). When Spanish judicative authorities on 27th February in 2012 requested a preliminary ruling by the ECJ in the case C-131/12 of the Spanish representation of Google (Google Spain SL) versus the Spanish data processing authority, the degree to which fundamental rights, such as the right to be forgotten, are covered under EU law had been questioned by the Member State Spain. In the preceding ruling of the Spanish national court, Google was found to be responsible to “withdraw personal data [….] from its index and to prevent access to the data in the future” about the Spanish citizen Mr. Costeja González (ECJ,2014). Since the enactment of the Data Protection Regulation in 2016, the scope of application of the fundamental rights protection and regulation became an issue for big data companies such as Google. In a recent decision, the ECJ had to clarify in a case between the Data Protection Authority of France against Google that the “right to be forgotten” was only applicable within the European Union (Scott, 2019). This raises the questions: What exactly does determine the right to be forgotten as a concept? On which legal framework does it rely on?

This research aims to give an insight into how the European integrated approach of legal texts of a constitutional kind may cause clashes between the national jurisprudence about a fundamental human right that is both protected in national as well as in a transnational context.

Further, this research aims to compare EU and national law to identify why these fundamental rights such as the right to be forgotten are double-protected under both established legal backgrounds. Two recent cases about the right to be forgotten in Germany will serve as key components to analyze how the German "Grundgesetz" covers the right to be forgotten and gives a more exemplified view on how it deviates from the conditions laid down in EU law, which will be exemplified by one of its latest judgments dealing with the same fundamental right. Finally, the aim of the comparison of the two may lead to a conclusion on why both legal protections differ and why they can coexist. This comparison is based on the following research question:

To what extent is the right to be forgotten protected consistently in the EU?

1.2 Scientific and Societal Relevance

According to data from Eurostat in 2018, 89% of the then Euro-28 states had access to the Internet (Eurostat, 2019). With access to internet comes access to social media. As people use these platforms to share their private life with others, they also share their private information. As this private information may also include voicing one's own opinion via online posts or blogs, these data can be stored for a long period. the period's length is determined by the social media operator. But how much say does the individual have in the accessibility their data? Do social media operators and media outlets have absolute power over my data? The answer to these questions by the scientific community has not been sufficient, as these usually refer to single legislative frameworks only, but do not take into account for the whole European scheme.

The societal relevant feature, in this research is to answer how far fundamental rights are protected in the EU and Germany. In connection to that, it is important for the citizen to know which legislative framework takes precedence under which circumstances. A different legislative framework could also mean a different conceptualization of law, which could mean a different outcome of court decision. Therefore, it is necessary to investigate the boundaries of national and EU legislative frameworks and how both are connected.

Secondly, this research specifically focuses on only one particular fundamental right, the scope of the research to which extent fundamental digital rights are covered is already determined. Meaning, that the relevance of this study is only applicable to the discussion around this particular right and may struggle in generalizing it for every other fundamental right. However, as the characteristics of the

conceptualization of this right are for both German law and EU law, it can provide knowledge to the question of how consistent both legal approaches are, and what kind of problems consequentially may derive from that.

1.3 Research Design and Methodology

As it is already indicated in the research question, this thesis will be based on how the EU and Germany embedded the protection of (their) citizens' digital rights. This research will try to incorporate a present definition and clarification on what digital rights might entail under the GDPR. As digital rights are closely connected to the protection of personal data, the GDPR may also be a bridge towards the connection to the protection of fundamental rights. This section of the paper will present a general outline of the upcoming research on how the right to be forgotten is protected in a consistent manner in the EU.

The idea for the right to be forgotten, affecting the digital realm, was already established in the Directive 95/46/EC (better known as the Data Protection Directive) from 1995. However, it is not clear where its conception originated from for the analogue world. The second chapter of this thesis will therefore be concerned with the original conception of the right and from which other fundamental rights it was derived from. The paragraph about the conception will be guided by the following question:

1)What does the right to be forgotten entail?

After identifying the key characteristics of the right to be forgotten, one will take key legal cases in which the right to be forgotten acted as a major threshold for the confrontation between single legal persons and other institutions in the societal system such as the media in a counter play between possibly contradicting legal concepts, specifically the right of free speech. This becomes apparent in the two cases of constitutional complaints to the German Constitutional Court (hereinafter referred to as GCC). Both cases, 1 BvR 16/13 –"Right to be forgotten 1" (hereinafter mentioned as RTBF 1) as well as case 1 BvR 276/17 -Right to be forgotten 2(hereinafter called RTBF 2) deal with the deletion of personal data from search engines and online media centres, but use different legal frameworks as base of reference. RTBF 1 uses the German Basic Law contrary to RTBF 2 which uses the EU Charta of Fundamental Rights as the standard of review. The justifications for both decisions will have to be compared with the latest decision regarding the right to be forgotten of the ECJ. Consequently, the study focuses on the following question as guidance:

2) To what extent do the decisions of the German constitutional court and the ECJ reveal a common understanding of the right to be forgotten?

The boundaries of domestic and transnational law are not set. The two newest cases of constitutional complaints to the GCC may give more insights into that regard. Both cases will be used as case studies for the fact that they deal with the potential violation of the same legal right but are being reviewed under two different legal frameworks. For one case, the German basic law was chosen as the standard of review, while for the other the EU Charter of Fundamental Right was chosen. For both cases, one will use the official press releases of the GCC.

In this research, one will analyze which measures are taken by the EU, to safeguard the right to be forgotten. Furthermore, the national regulations in Germany will be a part of the research, which will be based on the two fundamental legal frameworks in German law, namely the German basic law (*Grundgesetz)*, as well as the German civil code (*Bürgerliches Gesetzbuch)*. These two legal provisions may indicate which measures Germany takes to protect fundamental rights by its jurisdiction. These sources give us the needed background for the following questions:

3)To what extent do the different approaches of the German Constitutional Court and the ECJ depend on existing normative texts?

Both the GCC and the ECJ have different standards of review, which they usually base their decisions on. The GCC usually uses the German "*Grundgesetz*" (hereinafter referred as German Basic Law) as their standard of review, it is the highest national instance for the interpretation of German law. On the other hand, the ECJ proclaims to be the highest authority for the interpretation of European Union law. In the case of domestic law, it is only applicable to the specific national territory, whether it is physical or digital. For EU law, it depends on the level of competence that the EU has in a policy and law field. In some fields, both EU jurisprudence and Member State jurisprudence may overlap. Therefore, it is important to clarify, which of the two legal frameworks will be/are applicated. The previously mentioned constitutional complaints will give support in that case, as they both apply the different legal frameworks, based on their specific characteristic.

It was decided in case C-6/64 by the European court that European legislation gives precedence over national legislation in cases, where national law contradicts EU law (European court, 1964). However, this does not guarantee the EU court to be the last instance of interpretation of EU law. It is highly disputed between national courts and the ECJ, to which extent a national court may interpret EU law (Schütze, 2014, p. 525).

Secondly, the paper will address in which regard Article 51 of the EU Charter of Fundamental Rights, which is in itself a reference to the principle of subsidiarity and therefore the integrated sovereignty of an EU Member State. This paper will analyze, to which extent this paragraph may limit

the scope of EU jurisdiction for fundamental rights. As well as to what extent EU law and therefore, the Charter may apply to the protection of fundamental human rights in the EU Member States.

Following that, both institutions need to be intertwined and interact with each other. This applies to the concept of European integration, which includes all national and EU institutions cooperating to enforce rules and norms instead of countering each other. As to why there is a legitimate argument in differences to the legal frameworks and to why it is not set into stone when one of the frameworks comes into application. Hence, the following question can be raised:

4)*To what extent do theories of European integration help to explain the different approaches of the ECJ and Constitutional Court of Germany?*

It has been already indicated in the introduction, that EU jurisdiction and law interpretation depends on several layers within the European context of Institutions. However, the distinction whether domestic law is appropriate as being sufficient to review complaints may differ in the view of EU. Especially in terms of how they may extend or enrich the basis on which the national court can wage the different arguments and value decisions. This research assesses, whether both "constitutions" build on each other. Furthermore, it can give an example of how constitutional disputes are solved for digital rights, and which of both jurisprudences cover the digital fundamental rights more thoroughly.

1.4 Key concepts and body of knowledge

This section covers the clarification and background of important concepts for this study. This includes major legal and theoretical concepts for two reasons: First, there are concepts, that can only be understood with existing legal definitions, regarding the origin of fundamental rights and how scholars do define them. Second, to understand how the responsible governmental authorities, namely the judicative and legislative, interact in the European context, one has to provide existing theories on how the shape of this interaction can be explained.

Digital rights

It is difficult to precisely construct the concept of "digital rights", one can argue that according to Postigo (2012) "… is to a broad set of practices that are not always or necessarily "digital"." (Postigo, 2012, p.4) However, the phenomenon he describes as "digital rights activism" gives some more clues what it could mean, in his case, it includes: "[The] effort to ensure the rights of consumers and users of digital media and technology. The issues generally addressed include privacy, free speech, fair use, technological innovation, and first sale." (Postigo, 2012, p.4). This, at least, which might givea that includes our understanding of privacy in the case of fundamental rights for the internet.

As it is the case for the EU, digital rights are closely connected to the protection of data, as to who and how data are used. Specifically, the protection of personal data is enshrined in the Charta of Fundamental Rights under Article 8 as well as being laid out as a goal under Article 16 of the TEU. According to Avbelj et al. (2016), these articles, including the right to privacy and family, in article 7 of the Charta, are regularly used to reasoning the GDPR as well as used by the ECJ to decide on personal data violations or abuses(Avbelj & Fröhlich, 2016). As the right to be forgotten is manifested in the GDPR, the conception of digital rights gives us insights on where the reasoning behind the right to be forgotten stems from.

Fundamental rights

Fundamental rights belong to a type of law which is most directly applicable to the citizen as they are found on the origins of human rights (Albers, Hoffmann, & Reinhardt, 2014). Human rights entail concepts such as human dignity, the right to live, the prohibition of slavery and forced labor as well as the right to the integrity of a person, all of which are protected in the EU Charter of Fundamental Rights of the EU. However, there is a reason for the EU's idea behind founding a Charter for the basic fundamental rights: As States within the EU realm have already created certain norms and values in the time of existence, these "invisible, universal values", which are pre-existing, are consequences of the basic principles of a republican state, namely democracy and the rule of law at the heart of the Unions spirit to safeguard each living individual within the EU realm (TFEU, Preamble). The Charter is the physical manifestation to ensure and safeguard these values, while also accepting and enrich cultural and local heritages within the Member States (TFEU, Preamble). Further, it is to safeguard the fundamental conditions for free trade within the EU Area of Freedom, Security, and Justice, namely the free movement of persons, services, goods, and capital. Contextually, the right to be forgotten is concerned with the ownership of an individual over her or his private data, which is why the justification for its existence is based on the rights that are articulated in the Charter of Fundamental Rights.

Right to be forgotten

The right to be forgotten is the essential legislative concept of this thesis. As there is no explicit definition of the right in German law, the definition of the EU can give the first introduction to how it can be conceptualized.

Concerning present business practices to gather data in order to conduct business, the right to be forgotten provides a chance for citizens to have more access to the commodification and spread of information of themselves. More precisely, data that is concerned about a citizen (subject) can on their demand be "rectified" and potentially erased. This applies to the definition laid out in the Data Protection Regulation of the EU data which (…)" are no longer necessary about the purpose for which

they are collected or otherwise processed” (…) (European Commission, 2016, p.12). According to regulation, this comes with the withdrawing of the consent to further process such data in a sense that it also applies to the online realm. Here, the data processors(controllers) are obliged to delete if requested, any links to the data subject, making it unavailable, for other online users (European Commission, 2016).

Constitutional pluralism/supremacy

Connected to the research case of the GGC and the ECJ with the right for competences, based on established treaties with other national states, it becomes unclear who of the two parties has the upper hand when it comes to the manifestation of jurisdiction based on a constitution. In this case, the framework of national states and the EU can be described via the concept of constitutional pluralism. This concept is necessary as background knowledge for this paper, as it gives us an existing scientific theory on how different national legislation, in our case Germany, may interact with supranational legislation, in this case European Union law.

First, constitutionalism itself is in broad terms, a collection of ideas that try to define what a constitution should or does include(Schütze, 2014). To understand how there can be several layers or two equally different constitutions in one physical setting, the normative sense of constitutionalism gives according to Schütze's (2014) arguments that constitutional laws” …prescribe [government] composition and powers. Standing above all ordinary laws, constitutional laws are identified with those norms that represent the highest laws within a society.” (Schütze, 2014, p.2).

Based on that conception, the question arises, which of the legal frameworks is accepted as the highest norm, one of the EU or one of the Member States? As the treaties do not grant the European Union all legal powers as well as the competence in all legal cases, the phenomenon of a pluralist constitution arises, where both “political bodies”, namely the EU and the Member States do have “connotational claims”, which may enter into a contest on particular occasions (Schütze, 2014, p.6). In this “political equilibrium” as described by Schütze, questions regarding the main authority for norms and sovereignty stay „suspended”, meaning that in the case of a conflict where the Member State righteously claims to be the main authority, the Union itself dissolves in that particular field into a simple international organization, with no claims to stay higher in the legal sovereign hierarchy (Schütze, 2014, p.69). Therefore, Schütze states that constitutional pluralism as a practice does accept “the coexistence of multiple constitutional orders that are not hierarchically ordered but may interact hierarchically” (Schütze, 2014, p.7)

2. The right to be forgotten

2.1 introduction

This chapter aims at illustrating how the right to be forgotten has emerged as a right protected by several legal orders. In this regard, this first chapter will first give a shorter introduction of what merit online privacy protection has in the present legal protection for personal data and why it has been so highly debated and adopted over the years. One will look at other legal prerogatives from the side of the North American conception of the right to be forgotten. Combined, this leads to how the right to be forgotten is embedded in terms of potential counter playing laws and relations to other legal protections that limit the scope of the right to be forgotten.

2.2 What does the right to be forgotten entail?

According to Terwangne, the right to be forgotten grants the natural person the right to have their available data deleted after a certain period (De Terwangne, 2012). This stems from the three rights that are the foundation to the right to be forgotten: The right to data protection, the right to privacy and the right to identity/personality (Andrade, 2012; Weber, 2011): "Personality", as to have a sphere of privacy that is maintained under the presumption that one has the right to integrity and therefore, cannot be infringed(Weber, 2011, p. 2). The right to privacy, which includes, to be able to keep things secret, which has also been extended to the internet realm, including, to have their activities untraceable to a third person (Weber, 2011). In the European context also known as "right to oblivion" in the Italian and French law, has a strong focus on the issue of privacy (De Baets, 2016). However, there has been a clear distinction from having the right to forget things and the right of the media to reveal information about a specific person. Here, it is in the interest of the media as being "newsworthy" (Mantelero, 2013). One facet of the right to be forgotten as well as the notion of newsworthiness deal with the amount of time that has passed since then. When it comes to the deletion of criminal records, the question of what can be considered as a "substantial amount of time" becomes the subject of how discreet the term is seen by the court(Weber, 2011). It usually depends on how necessary the information is to protect the public in present times(Weber, 2011, p. 2).

2.3. Legislative developments of the right to be forgotten

The first developments of the right to be forgotten in European continental legal frameworks, can be traced back to the European Convention on Human rights by the Council of Europe in 1953, where Articles 7 and 8 gave supranational legal provisions to protect private and family life. Article 8

explicitly mentions the need to protect personal data (Ambrose & Ausloos, 2013). One part of the encoded law, is to give individuals the tools to have some form of authority over their data origins, including a strong emphasis on a right to have privacy as an individual (Petkova, 2019). Specifically, the European approach is strongly connected to respect someone's public image and reputation, which is framed as a so-called “dignity-based” approach, that is connected to the German law notion of informational self-determination (*Informationelle Selbstbestimmung*)(Rustad & Kulevska, 2014). This right essentially gives an individual the right to be the self-determent, on how he or she is portrayed in public or to third parties(Rustad & Kulevska, 2014, p. 359).). In the following years, automatic processing became more dominant topic, due to technological advances, which not only caused the Council of Europe to update their stance on personal data protection concerning the mentioned automatic processing of personal data, but also triggered the European Union to adopt the first Data Protection Directive, which was also known as the “ePrivacy Directive”(Ambrose & Ausloos, 2013).

The Data Protection Directive demanded every Member State to pass legislation in regard to the protection of “the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data” (Rustad & Kulevska, 2014, p. 359). One of the reasons for this proposal was that the data protection varied to a great extent across Europe, from very strong traditions of privacy protection in France, Germany and the United Kingdom to low standards of privacy protection in a state such as Greece (Rustad & Kulevska, 2014, p. 359). In 2012 the European Commission proposed a new regulation that should repeal the Data Protection Directive, namely the General Data Protection Regulation (GDPR). According to the Commission Working Paper “Impact Assessment” (SEC(2012) 72/2), the main reason for the ambition to repeal this directive were the new challenges for the protection of data, specifically regarding globalization, the development of the Internet and the increased scale of data collection and sharing across borders (European Commission, 2012, p. 13). In this proposal, the European Commission included Article 17, which provides the individual (data subject) the right to demand the erasure of all data by the data controller under specific circumstances, such as the reason why they were collected in the first place is obsolete; the data subject withdraws the consent on which the data processing is based or objects in general to the processing of their data(McGoldrick, 2013, p. 3).

2.5 Conclusions

The purpose of this chapter was to answer the following sub-question: “what does the right to be forgotten entail?”. To do so, this chapter first gave an outlook, what kind of challenge the protection of privacy and other fundamental rights were faced with in the times of the Internet. One of the main problems that public authorities faced, was that they had to rely on private actors in the form of an

Internet Service provider to implement and enforce digital regulation on the Internet. When privacy and explicitly the processing of personal data became more important, due to technological advances and the potential to abuse these data by private actors in form of Internet Service Providers, public authorities as well as internet activists searched for a solution to protect personal data, especially in the European context to have the right to self-determine the public image of oneself(Bassini, 2019, p. 185). As it was already said that even within Europe, the protection and notion of the right to be forgotten may vary, the next chapter will look more thoroughly into the exemplified cases of the most important decisions by the European Court of Justice and on the other hand, the two latest decisions by the German Constitutional Court. The next chapter will also discuss how the ECJ developed the right to be forgotten out of existing legislation.

3.The ECJ and GCC court decisions

3.1 Introduction

In the previous chapter, the position of potential conflicts of fundamental rights, in which the right to be forgotten is embedded, was elaborated. This chapter analyses more in-depth, to which extent a common understanding of the right to be forgotten can be identified, in the European context. The understanding of the right to be forgotten will be analyzed under the scope of the following question: "To what extent do the decisions of the German constitutional court and the ECJ reveal a common understanding of the right to be forgotten?". In order to answer this question, the chapter will firstly analyse one decision by the ECJ about the right to be forgotten, namely case C-131/12 (Google Spain vs AEPD & Mario Costeja González). This case was chosen, because it set precedence in EU law about the legal existence of the right to be forgotten and how it is derived from in pre-GDPR existing legal texts. Secondly, the chapter analyses the decisions by the German Constitutional Court in the two cases 1-BvR 16/13 (RTBF 1) and 1-BvR 276/17 (RTBF 2). Both cases are chosen for the reason that even though both deal with the right to be forgotten, only one is decided upon German Basic Law while the second uses the Charter of Fundamental Rights and sets the first precedence of a German Constitutional Court choosing to use the Charter as the standard of review. Finally, the various decisions will be assessed in order to understand whether these are similar or not in their application of the right to be forgotten.

3.2 The ECJ case

In the first case, the ECJ set jurisprudence for the right to be forgotten in the EU: In 2014, a request for a preliminary ruling by Spanish authorities was made, to interpret specific paragraphs from the then existing Data Protection Directive 95/46/EC. (Samonte, 2019)

In the spanish court procedure, the two conflicting sides were for once Google Spain and Google Inc. as the defendant, against the Agencia Española de Protección de Datos (Spanish Data Protection Agency) and Mr. Costeja González, who upheld a complaint that was issued by him against the two defending companies (Justice, 2014, p. 2). In this case, the plaintiff filed a complaint against a larger Spanish publisher of a daily news outlet in Spain, Vanguardia Ediciones SL to erase a certain article about him(Rustad & Kulevska, 2014, p. 363). Secondly, he also filed a complaint against Google Spain, as when his name was typed in the search engine, the article of the newspaper was the first thing to pop up(Frantziou, 2014). The background of the article was concerned with Mr. Gonzalez's involvement in insolvency proceedings, which derived from social security debts in the late

90s(Frantziou, 2014; Lynskey, 2015). The reasoning behind Mr. Gonzalez's request was because the proceedings had been concluded, the information in this paper around his persona was no longer of any relevance(Lynskey, 2015). The Data protection agency dismissed the first complaint, based on the fact that the publishing of the article was ordered by the Ministry of Labor and Social Affairs, to attract more bids for the auction, which made the advertisement of the article lawful and legitimate (Frantziou, 2014; Lynskey, 2013). However, the Data protection agency found enough legal basis to proceed with the complaint against Google, to make the article no longer available, via their internet browser. According to them, the individual (Mr. Gonzalez), has, based on the right to data protection and dignity of a person, to ask the search engine operator to erase the personal data and make it unavailable to third parties(Frantziou, 2014; Lynskey, 2015). As Google appealed to the complaint by Mr. Gonzalez and the Spanish Data Protection Agency, the Spanish High Court asked for guidance from the ECJ and advice concerning the application for the Data Protection Directive (Kulk & Borgesius, 2014) and posed questions regarding the territorial application of the Directive, the notion of what the "data controller" is in the specific context of a search engine, and a question specifically concerning the existence of the right to be forgotten *de jure* (Lynskey, 2013).

In the judgment of the ECJ, the court decided in the first two questions, that the activities that Google is carrying out, apply to the act of processing personal data, which is why the search engine can be described as a so-called "controller"(Frantziou, 2014, p. 765).

In view of the scope of the Directive, the court argued first, that based on Article 4 of the directive, the Directive is applicable in case the data controller is established in one of the EU Member States, or is established outside of the EU territory, but "makes use of equipment on the territory of the Member State for processing"(Lynskey, 2015, p. 525). Secondly, the court determined that based on Article 4(1)(a) of the Data Protection Directive, due to the inseparability of the in the U.S. seated Google Inc., which makes a profit based on advertising services through keyword identifications in the search engine, and its subsidiary Google Spain as the Spanish branch of the company, which promoted this keyword advertising space on Spanish territory, are liable and therefore applicable under EU law and the directive as well as its responsiveness towards fundamental rights protection(Hijmans, 2014; Lynskey, 2015).

The ECJ in this regard, examined whether the legal text, the Data Protection Directive, gave leeway to give legitimacy for obligations by search engine operators to remove personal data and make it unavailable to third parties, based on a request by the concerned individual which owns the personal data (Lynskey, 2014). Concerning the protection of privacy and ultimately the erasure of such data, the court not only referred that the Directive itself is established on the basis to ensure a high standard for the right to privacy, also the whole normative point of reference for this directive has to be directed

and interpreted from the EU Charter of fundamental rights(Lynskey, 2014), which will be later discussed in this thesis. Additionally, the ECJ referred to two particular articles of the Charter, namely Article 7, which is concerned with the right to privacy and Article 8, which is concerned with data protection as both being important as a legal backbone for the Data Protection Directive(Lynskey, 2014). Article 7 state that everyone has the right to protection of their personal data(Union, 2012). Article 8 specifically mentions that everyone has the right to the protection of their data, as well as that their data is being processed fairly and that everyone can rectify and access their collected data(Union, 2012)

The court then turned towards potential important articles in the Data Protection Directive, which is found in the Article 12(b) of the directive, which gives individuals (subjects) "the right to obtain rectification, erasure or blocking of data the processing of which does not comply with the Directive", especially based in case of "incomplete" or "inaccurate" nature of the data(Iglezakis, 2014, p. 10; Lynskey, 2014). The ECJ also makes it clear that in the present case of Mr. Gonzalez, the decision needs to include considerations under Article 7(f) of the Data Protection Directive. Where it is important to balance opposing rights of the data controller to use the data for commercial use, while also considering the rights of the data subject, in this case, Mr. Gonzalez, and on the other hand to take the Charter, as mentioned above, to consider against the balancing of rights (Lynskey, 2014).

Concerning the last question raised by the Spanish court decision, the ECJ ruled in the case of Mr. Gonzalez, the data subject's right to privacy and data protection generally overrule the commercial concerns of the data controller and the access of information by third-party internet users, in this case, Google. The only exemption being the public having a special interest in the data (Lynskey, 2014). For example, this could be if the subject has been predominantly displayed in public life(Hijmans, 2014).

3.3 The GCC cases

3.3.1 (BvR 16/13)

In November 2019, the German Constitutional Court decided on two constitutional complaints concerning the distribution of their information in articles of online media archives. The plaintiff in the first case(BvR 16/13), labeled as "Right to be forgotten 1", was convicted with murder sentenced with life imprisonment in December 1982 (Bundesverfassungsgericht, 2019a). After the renowned magazine *"Der Spiegel"* covered his story in three different articles on print, the news outlet *"Der Spiegel Online GmbH"*(hereinafter also referred to as the defendant), uploaded the articles on the magazines' online archives without restrictive access to it (Bundesverfassungsgericht, 2019a). It was also the case that the articles were among the top results when his name was typed into online search engines (Burchardt, 2020). After the plaintiff was released in 2002, in 2009 he acquired the knowledge

that the articles were still available, which caused him to send a cease and desist letter to Der Spiegel Online GmbH, but it was ignored and declined. He then, filed a request to the GCC but was rejected by that based on the court's notion that this information regarding his murder are of public interest and the right to receive information, as his murder was an important event in "contemporary history" as well as the defendant's right to freedom of expression to outweigh the plaintiffs right to protection of his personality(Bundesverfassungsgericht, 2019a, p. 2). In his latest complaint against the Der Spiegel Online GmbH, the complainant claimed again that the appearance of the three articles, when typing his name in search engines, violates his right to personality enshrined in the German Basic Law under Article 1(1) and 2(1)(Burchardt, 2020). Further, he argued that even though his murder is part of contemporary history, it would not automatically mean that the public was interested in knowing his name(Bundesverfassungsgericht, 2019a). Because of that, he claimed it is unjustified that the three articles appear as top results, based on simple name-based online research(Burchardt, 2020). Regarding the claims of the defendant, the court invoked to balance the plaintiff's rights against the freedom of expression and freedom of the press, which are codified in German Basic Law under Article 5 (1) and (2). The court admitted that in balancing the rights of the plaintiff against the one's of the defendant, time is a relevant factor(Bundesverfassungsgericht, 2019a). Especially regarding the technological development that enables a third person to receive info of the culprit even a long time after it was convicted, which was not possible in times when only printed media existed(Bundesverfassungsgericht, 2019a, p. 5).

The German Constitutional Court decided to review this complaint based on the German Basic Law to review this potential violation of a fundamental right. It justified the decision with Article 51 of the EU Charter of Fundamental Rights, as the legal principle of "media privilege" , which is a topic that is not harmonized under EU law. The case could therefore be reviewed under domestic law standards for fundamental rights protection. (Bundesverfassungsgericht, 2019a, p. 3)

This is explicitly supported in EU law. Both in the repealed Data Protection Directive as well as the newly placed GDPR, as the balancing of the right to privacy against the right on freedom of expression is deferred towards the Member states(Rossi, 2020). This includes the usage of personal data in specific cases, which are undertaken for journalistic purposes, as well as artistic and literary expression(Friedl, 2019; Rossi, 2020). This notion of discretion to the Member States is also upheld in the Charter under Article 51(1), in the sense, that the provisions in the charter are only applicable to the extent to which powers are conferred to the European Union and law is fully harmonized, which is according to the German Constitutional Court's decision, are not present in this particular case (Bundesverfassungsgericht, 2019a, p. 2)

In its final decision, the German Constitutional Court ruled in favor of the plaintiff's claims, after balancing the defendant's right of free expression as it is enshrined in the freedom of press and freedom of opinion, against the plaintiffs right to personality(Burchardt, 2020). The court ruled further, that even though there may exist some form of public interest in the event, the journal itself has to make sure that the three articles are not included in the top three results by using any technical means and measures possible.(Burchardt, 2020).

3.3.2 (BvR 276/17)

In the second case (BvR 276/17), which was negotiated at the very same day, the court applied different sets of standards to review. In the case at hand, the German broadcast NDR ran a new piece of their segment *"Panorama"* with the title "Dismissal: the dirty tricks of employers" on the 21st January 2010, which featured an interview with the complainant in her function as the CEO of a company(Bundesverfassungsgericht, 2019b). In the segment, she is confronted with the accusation of having taken unfair measures to get rid of an employee who wanted to establish a works council within the company(Bundesverfassungsgericht, 2019b). After the segment had been uploaded on the broadcast's website, a link to the segment was among the top results when typing in the complainant's name in the search engine Google(Burchardt, 2020). After the complainant's request to the search engine operator, to remove the links to her name to de-reference her had been denied, she launched an action against the engine to a higher regional court, which also dismissed the case(Bundesverfassungsgericht, 2019b). The launched complaint at hand has been field under the premises that the search engine violated the complainant's right to personality as well as the right to informational self-determination, as the search results would portray a negative image of her and therefore, has the capability of reviling her private life(Bundesverfassungsgericht, 2019b; Friedl, 2019).

As the plaintiff's complaint is directed towards the search engine to de-reference her and not as in the first case towards a media outlet, the German Constitutional Court decided to use EU law as the standard of review and decided against using German Basic Law(Rossi, 2020). The reasoning behind that, was that dereferencing in search engines falls under fully harmonized legal EU provisions, instead of provisions with a certain level of discretion for EU Member States, as it was in the first displayed case (BvR 16/13). Therefore, the GCC had to identify, whether the complainant's rights had been violated under the European legal protection of fundamental rights, the EU Charter of Fundamental Rights, specifically Article 7 and 8[1] (Burchardt, 2020). These rights on the one hand, needed to be balanced against the freedom to conduct business in the position of Google, which is protected under

[1] For explantions regarding both Articles, see chapter 3.2

Article 16 in the Charter (Bundesverfassungsgericht, 2019b). On the other hand, even though it does not apply to the search engine, Article 11 of the Charter the freedom of expression also has to be balanced against the concerns of the plaintiff, as the de-referencing would influence third parties like Internet users but also directly the NDR Broadcast(Bundesverfassungsgericht, 2019b; Burchardt, 2020). The Court took a stance in his final decision that the complaint has been dismissed because not much time has been passed since the broadcasting of the segment and secondly that the complainant voluntarily agreed to contribute to the segment via the interview(Burchardt, 2020).

3.4. To what extent do the decisions of the German constitutional court and the ECJ reveal a common understanding of the right to be forgotten?

After decisions regarding the protection of fundamental rights by both the domestic and the European highest judicial body have been analyzed, the following question can be posed: “To what extent do the decisions of the German Constitutional Court and the ECJ reveal a common understanding of the right to be forgotten?”. For the case of the ECJ as well as the second case of the GCC, it can be said that both decisions are based on the very same standard of review, namely the EU Charter of Fundamental Rights. Both Courts specifically refer to article 8 and 7 of the Charter as for the right to privacy as well as data protection, while the Federal Court was able to rely on the GDPR’s enshrined article 17 “the right to be forgotten”, the ECJ at that time, could only rely on existing legal norms previously laid out in the processor of the GDP, the Data Protection Directive, where the right to be forgotten was not yet clearly defined. The ECJ found the Articles 12 (b) and 7 (f) in the Data Protection Directive to be sufficient to justify the obligation to data controllers to erase and stop processing data from a data subject if it does object to it. Secondly, the court found in 7(f) legal bases, to wage the interest of the data subject against the commercial interest of the data controller. In the decision by the German Court of case 1-BvR 16/13, the court decided for the plaintiff based on the articles 2(1) as the right to personality in connection with article 1(1) the right protecting against statements concerning one’s person. The German court made, like the ECJ, use of the factor of time as decisive to evaluate the urgency to mention the name of the plaintiff in the articles of the Spiegel. This shows that even though both courts use different standards of review, both courts have some variables which equally reoccur in their decisions. Moreover, all three decisions reveal that in order to come to a decision the rights of the plaintiff and the defendant have to be balanced against one another: One the side of the plaintiff, the court regards some form of the right to privacy and/or data protection. On the other hand, for the defendant, the right to conduct business or media privilege is used as the counter-balancing factor. This means that in all cases, the right to be forgotten is not an absolute right, but has to be considered against other fundamental rights.

However, what seems more interesting, is the justification by the GCC on the enforcement and interpretation of fundamental rights: While the Court did not apply Union law in form of the EU Charter of Fundamental rights, as it does not clearly define the concept of "media privilege", the German court reassures that both the Basic Law and the Charter are based on the same origin, namely the European Convention on Human Rights (ECHR), which the German Court states as the point of reference (Bundesverfassungsgericht, 2019a, p. 3). This leads to the next chapter of the thesis, in which one will focus more on the normative texts which laid down the decisions by both courts and on how normative texts may establish the overall notion of the right to be forgotten.

4. Fundamental rights protection in European legal frameworks

4.1. Introduction

In the last chapter, both a decision by the ECJ as well as two decisions by the GCC concerning the application of a right to be forgotten were analyzed. In the case of the ECJ and the first decision by the German Constitutional Court, EU law was used as the standard of review. Both cases were of special concern to potential violations of the individual's fundamental rights, which is why the EU Charter of Fundamental Rights was used as the main legal document to derive a decision. In the second decision by the German Constitutional Court, the court used the German Basic Law as the standard of review and decided against using EU law. This chapter will focus on the contents of these both legal frameworks, how both interpreted the individual rights at stake, how they interpreted the cases based on that, and how both frameworks are connected.

4.2. The EU Charter of Fundamental rights application

The last chapter of this paper already asserted that the decision to grant data subjects the right to demand the erasure of one's publicly available data by commercialized data controllers such as search engines by the ECJ, relied on articles enshrined in the Data Protection Directive together with special freedoms granted in the Charter of Fundamental Rights(Lynskey, 2014). The Data Protection Directive did not explicitly mention the right to be forgotten, as the GDPR does in its Article 17, nonetheless, it gave the individual certain rights to demand the removal of links on third-party webpages by search engine operators in articles 12 and 14 (Lynskey, 2015). Furthermore, the decision by the ECJ as for the balancing of fundamental rights of both parties relied on Articles 7 and 8 of the Charter for the side of Mr. Gonzalez and the other side Article 11 of the Charter as for the freedom to expression and information (Frantziou, 2014).

Also in the second case of the German Constitutional Court, the court made use of the Articles 7 and 8 of the EU Charter of Fundamental Rights for the protection of data and the right to privacy as to balance whether the plaintiff's rights may have been violated(Burchardt, 2020). Surprisingly, when examining the first case of the German court, one recognizes that the court did not apply the EU Charter of Fundamental Rights. Usually, one assumes that EU law takes precedence over any domestic law in case of conflict, since the CJEU decision in the case Costa versus Enel case in 1964(Muir, 2014). However, the German Court took the German Basic Law as a standard of review for the case, instead of using the Charter of Fundamental Rights. How is that possible?

4.3. The scope of the Charter

Regarding the application of the EU Charter of Fundamental Rights in the Member States, there has been a lot of discussion between scholars about how complex the applicability of Fundamental rights is as it is closely related to the disputed scope of EU law (Groussot, Pech, & Petursson, 2011). As already mentioned, before the establishment of the EU Charter of Fundamental Rights, the ECHR already conferred protection for mainly civil as well as political rights, which includes all current EU Member States(Di Federico, 2010). As one can observe in the case C-6-64 of Costa vs. E.N.E.L., long before the establishment of the Charter, Member States have been obligated to act as a direct representative of EU authorities when applicating EU law within their jurisdiction (Groussot et al., 2011), but the Member States are not only bound to EU law when implementing or adopt administrative or legislative acts but also when they apply or interpret legal provisions, which fall under the scope of EU law(Groussot et al., 2011, p. 7). When the Charter acquired normative force in 2008 in the Treaty of Lisbon, the question arises whether the Charter is positioned in relationship to the European Treaties: The Article 6(1) TEU clearly states that the Charter itself has the same legal value as the Treaties, meaning that the Charter became EU primary law effectively.

To support this position of the Charter within the EU legal framework, four articles were included on the scope and interpretation of the Charter and the restrictions for the EU institutions and the applicability of the Charter (Di Federico, 2010, p. 4). The last two articles deal with the prohibition of potential misinterpretations of the established fundamental rights by first acknowledging as being interpreted based on the ECHR or the Member States' constitution as to not restrict human rights and fundamental freedoms as mentioned in article 53. It has to be mentioned though, that the ECJ never has found the ECHR or national standards to be legally binding to the Union fundamental law protection, it has admitted to using them as inspirational sources and guidance for the EU standards in the Charter (Schütze, 2012). Especially concerning the nature of EU law, which has as transnational law direct effect on citizens in the Member States, the prevention of violations against individuals by the predictive governmental authorities became more important. This in turn, meant that fundamental rights protection became more significant and important (Di Federico, 2010). The inevitable consequence, that not only there is a contractual agreement between Member states and the EU to uphold EU law as such, but that the individual is also commissioned to make use of the norms manifested in the EU treaties to protect itself against human rights violations by the Member state or any other given public national authority, which articulated and stated in the case C-26/62 *van Gend and Loos* in 1964 (Engle, 2009). This legal concept is the so-called Vertical Direct Effect(Engle, 2009).

The above-mentioned fact of EU law having a direct effect, having the position of supremacy over national law as well as that EU law pre-empts national law, but all of them only in special regard: This holds as long as the EU holds the competences as having occupied the particular legislative field(Di Federico, 2010). Special interests should, therefore, be paid to the development of the European legislation that safeguards the right to be forgotten and fundamental rights: The EU developed two instruments in the treaties, that are directly applicable and have "direct effect", namely decisions and regulations(Schütze, 2012). The instrument of a directive, however, is according to article 288 of the TFEU only binding "on" the Member States and not as a decision or regulations "in" the Member States, as it leaves it up to the Member States "the choice of form and methods"(Schütze, 2012, p. 96). Therefore, directives are not directly applicable and need to be adopted into and through the national legislation(Schütze, 2012). Though, directives can have a vertical-direct effect, in case a Member State does fail to properly establish norms according to an obligated directive, which was established in case 41/74 "Van Duyn v. Home Office"(Schütze, 2012, p. 96). The same however cannot be said regarding the horizontal-direct effect, as according to an ECJ decision in the case C-91/92 "Dori v. Recreb": The ECJ concluded that according to Article 288 TFEU a directive is directly obligated towards the Member States and not necessarily towards an individual, which is why a directive cannot be invoked against another individual(Schütze, 2012, p. 100).

Putting this into the context of the Data Protection Directive being used to establish the right to be forgotten in EU case law: When the directive was adopted in 1995, the EU Charter of Fundamental Rights was not yet established and not part of EU primary law. By repealing the directive with a regulation that is directly binding, having vertical as well as a horizontal direct effect, also, the mentioned rights codified in Articles 7 and 8 of the charter belong to the category of "hard rights", which has, unlike the "soft principles" that deal with such matter as environmental protection, direct effect and can be invoked in court (Schütze, 2012, p. 444).

Does this however justify the abolishment of national fundamental rights protection, which then shall be substituted by EU law as a conception of the GDPR and the EU Charter of Fundamental rights to solve any cases of the right to be forgotten violations? The answer can be found in the articles that define the scope of the Charter. These articles will now be looked at more in-depth.

According to De Frederico (2010), the most prominent articles are Article 52 and Article 51, while the latter is of most concern for this paper for the following: Article 52 and also Article 51(2) confirm that even tough universal basic standards for fundamental rights protection have been established via this Charter, the Charter does not grant any newly conferred powers to the EU which are not already mentioned in the Treaty (Di Federico, 2010) which is also explicitly affirmed again in the TEU under Article 6(1). Secondly, Article 51 deals with the applicability of the Charter, because it

states that the Charter only applies to the enactments of Member States when they are enforcing Union law (Ankersmit, 2012). This article is what makes the EU Charter of Fundamental Rights different compared to the U.S equivalent to the Federal Bill of rights: It does not have the same authoritative value as a federal standard. It is however, regarded as a universal standard in cases where Member States execute and implement EU law and act as an agent to the EU(Groussot et al., 2011). This s also limits the ECJ in its capability to review cases of fundamental rights violations, as the court itself lacks the authority to review such cases that do fall out of the scope of EU law(Groussot et al., 2011, p. 16). Though it has to be mentioned that the scope as to which the EU Charter applies, may depend on whether the scope should be interpreted in the narrow sense, as formulated in Article 51 of the Charter, or interpreted in the broader sense(Muir, 2014). For example, the latter was used in a case of tax evasion in 2013, case C-617/10 Åklagaren v Hans Åkerberg Fransson, where according to the plaintiff, the national penalties where not justified under the current domestic legislation, which did according to him, not include the adopted provisions laid out in the EU Value Added Tax Directive 2006/112/EC(Muir, 2014). This triggered the ECJ to step in and make use of the EU fundamental rights protection even though the legislation left discretion to the Member States on how to punish and sanction tax evasion(Muir, 2014, p. 32).

This is why in the first complaint of the German Constitutional Court (1-BvR 16/13), the court was authorized to make use of the German Basic Law to review the case of the plaintiff, as it was connected to the concept of media privilege, which is not covered in current European law.

4.4 Conclusion

This chapter analyzed the different normative frameworks, that are the basis for the GCC and the ECJ. The chapter was guided by the following question: To what extent do the different approaches of the German Constitutional Court and the ECJ depend on existing normative texts?

Regarding the cases of chapter 3, the chapter explained why the German Constitutional Court could review the first complaint based on the German Basic Law, instead of making use of the EU Charter of Fundamental Rights. Even though the Charter provides some sort of minimum standard for the legal protection of fundamental rights in Europe, the EU has no extended authority to every facet of fundamental rights protection and is limited to the competencies that have been conferred to it. The Charter limits itself to be only applied by Member States when they are executing or dealing with EU legislation. From those structural limitations, the question arises how it is possible to have two co-existing legislative frameworks and what sort of limitations are behind it? The following chapter will go more in-depth about how two constitutionally designed frameworks interact and co-exist with each other based on the concept of constitutional pluralism.

5. European Fundamental Rights Governance

5.1. Introduction

The last chapter revealed that article 51 of the Charter of Fundamental Rights grants the EU Member States the authority to make use of their legal framework of fundamental rights protection, as long as the legal field is not already occupied by the EU or does not belong to the conferred powers of the EU. This was established via case law in the Costa vs. ENEL[2] case before it was explicitly stated in the Treaties as a doctrine. This explains why national courts use different standards of review, depending on the specific case at hand whether it is covered under European legislation or national legislation. It is however yet unclear, under which scheme both domestic legal frameworks and the European framework interact. This chapter gives a thorough analysis on how the EU Treaties and the national framework for fundamental rights protection interact and counteract each other and what the underlying concept is under the guidance of the following question: "To what extent do theories of European integration help to explain the different approaches of the ECJ and Constitutional Court of Germany?" First, the concept of constitutional pluralism[3] will be applied and analyzed to which degree it is connected to the interactions between the ECJ and national courts. Then, one will look at potential or ongoing conflict within this framework and current changes to it.

5.2. Constitutional Pluralism in Europe

Explaining the relationship between the EU and Member States' national orders is a difficult undertaking, as the European governance system in itself is multi-layered with multiple interests and multiple legal authorities(Goldoni, 2012). In general, EU Members see themselves as an integrated part of the European governance system as part of an integrated Europe.

There has been a lot of theorizing around how to perceive the pluralistic system within the European context. The general stance that constitutional pluralists have, regarding the interaction between the different layers within the pluralistic governance framework, is that they interact via a permanent dialogue(Goldoni, 2012, p. 387). One of these theories was established by Mattias Kumm, who ascribed the European pluralistic constitutional system a constant state of conflicting constitutions to maintain a coherent European legal order (Goldoni, 2012). According to Goldoni

[2] case C-6-64

[3] See body of Knowledge: „Constitutional pluralism/supremacy"

(2012), Kumm's theory argues that pluralism itself is only "a means to manage constitutional conflicts"(Goldoni, 2012, p. 389). In the following part, we will briefly look at one of these conflicts.

There are two specific topics where there is no common ground between national courts and the EU, which already caused several tested exchanges between the ECJ and national courts and a vast landscape of literature(Dyevre, 2013), regarding judgments such as Case C-11/70 (*Internationale Handelsgesellschaft*) or Case C-6/64 (Costa v ENEL). The conflicts of the ECJ and national courts can be separated into two connected questions: Firstly the question of who of the judiciaries (ECJ or highest national court) is the highest authority in the EU(Schütze, 2014)? Secondly, and complementary to the first question, which of the parties involved decides the boundaries of EU law(Beck, 2011)?

5.3 The highest judicial body

Concerning the European judiciary system, it is generally accepted that the EU Treaties stand above as the primary source of EU law and above all other European legislative acts that exist (Schütze, 2014, p. 3). It has also been established, that whenever there is a normative conflict between Union law and domestic law that takes place within the range of EU competences, the EU norms prevail over domestic law. However, the character of EU law which finds its legitimacy in the conferred powers settled in the Treaties is defined by the Member States being the gatekeepers of the Treaties as sovereign states(Goldoni, 2012, p. 387).

But does that automatically mean that the ECJ is also the highest judicial authority in the EU framework? What is the ECJ's reasoning to have supremacy over national law in case of a constitutional conflict?

The main backdrop for the ECJ's justifications on being the supreme authority within the judicial framework in Europe is for once the already in EU case law established doctrines of succeeding national law in cases where it conflicts EU law within their fields of competence, which has then been codified Article 19 of the TEU as the ECJ" shall ensure that the interpretation and application of the Treaties the law is observed". However, this is not shared in any instance of overlapping EU legislation and national legislation as it became apparent in the case C-11/70 of "*Internationale Handelsgesellschaft mbH* v. *Infer- und Vorratsstelle für Getreide und Futtermittel"*, where the ECJ ruled that even in the case of fundamental rights violations under national law, the validity of EU law could not be affected by the national norms(Schütze, 2014, p. 4). This happened with the reasoning by the ECJ that in their eyes, it is necessary to uphold the primacy of EU law to guarantee the uniform application of Union law throughout all Member States, as otherwise the legal order of the EU could not be sustainably upheld (Beck, 2011, p. 472). The consequences that follow this particular

assessment that even though the EU does not have a formal constitution, the Treaties would then in fact have according to Schütze (2014) a distinct constitutional character that overrides any constitution of the national Member States(Schütze, 2014, p. 4).

5.4 Who is competent?

To counter the view of the ECJ, the GCC developed their theory of the interplay between the Treaties and the national constitution in their *Solange* doctrines. These doctrines can be historically categorized into three different parts, beginning with the first decision of the GCC in 1974. In this decision, the GCC developed the theory of "relative supremacy" of EU law. The decision flowed that EU law prevails national norms only if the (Union) has erased any form of conflict of norms by establishing adequate legislation to protect fundamental rights based on the powers conferred to them in the treaty(Beck, 2011, p. 472; Schütze, 2014, p. 4). This is supported in Article 23(1) of the German Basic law, where the Republic of Germany pledges to support the development of the European Union, which not only build on the principles of rule of law, democracy and subsidiarity but also on the understanding that it guarantees equivalent protection of fundamental rights as given in the German constitution.

This means, that as long as the European Community (EC) at that time had not developed fundamental rights protection legislation equivalent to the national constitutional norms, the national Courts would keep reviewing cases based on the standards of the national constitutional law(Sadurski, 2008). In the course of that, the EC attempted to develop fundamental rights protection over their case law, which prompted the GCC to slightly adjust their decision in 1986 to a more moderate position that they would restrain from applying national norms on fundamental rights cases as long as the EC preserves their established fundamental rights protection (Sadurski, 2008, p. 2; Schütze, 2014, p. 5). Underneath this exchange between ECJ and the GCC, another conflict became apparent, namely the question of who has *Kompetenz-Kompetenz* connected to the control of so-called *ultra vires* control, the control over an act which was executed without the necessary authority (Schütze, 2014).

In this sense, *Kompetenz-Kompetenz* is connected to the authority that has to determine how far the scope of EU law reaches and where the outer limits are (Beck, 2011). However, regarding the discussion to determine the authority to set the scope of EU law, the authority to control the ultra vires has to be established in the first place. Especially national courts were eager to provide arguments for them to curtail the EU law scope by making judgments such as the GCC did in 1993 in its Maastricht judgment:

The German court accepted the supremacy of EU law, based on the condition that it was assessed and consented by the national parliament as well as being open to being reviewed by the national court under two reasons: First, that the EC does not exceed its powers laid down in the treaties and, secondly, that it does not repudiate fundamental rights which are granted in the national constitution(Beck, 2011, p. 747). Even though several other European countries adopted this strategy; the question of who determines the scope of EU law is still not cleared yet.

5.5 Conclusion

This chapter elaborated on the complexity of the judicial framework on European fundamental rights protection in the light of multilateral governance under following question: "To what extent do theories of European integration help to explain the different approaches of the ECJ and Constitutional Court of Germany?" From the analysis conducted, it can be derived that the European Integration Process of the legal framework of the Member States and EU is not straight forward coming from one direction, but happens via judicial exchanges between the national courts and the ECJ. In this sense, the answer to the sub-question is that the theory of constant judicial dialogue is the driving force of European integration of the European judiciary system. The constant interferences of national courts in the ECJs assumed supremacy acts as a sort of "checks and balances" for the European pluralistic constitutional framework. Further, the fact that there is no clear hierarchical order between the courts. It is apparent that from the view point of the treaties, the ECJ is the highest court in the European framework. However, it is not clear, whether the national court or the ECJ determines the who the final authority has in regard to legitimize administrative actions by the EU and the Member States.

To summarize the findings of the thesis until now: Following through the analyses of what the right to be forgotten entails, as a right for a person to develop its personality free and unbound by the prejudice of actions committed in the past. This thesis did focus on three decisions by the ECJ and the GCC, especially the two German cases were of special interest as they both were decided based on different standards of review. The decisions revealed, that there are provisions in the EU Charter of Fundamental Rights that give guidance to the EU Member States to make use of their own fundamental rights protection frameworks as long as they do not execute EU law and as long as they are not occupied in a law field, which is part of an EU competence. It was then suggested, that the process of European Integration can be used to explain this difference in fundamental rights protection and differences in judicial approaches.

6. Conclusion

The purpose of this study was to find an answer to the following research question: "To what extent is the right to be forgotten protected consistently in the EU?". Based on these findings, one can conclude that the right to be forgotten is protected consistently in regard to the digital realm. That is to say because it is manifested in the GDPR, which is in particular concerned with the protection of digital private data. However, the right to be forgotten stems from rights that belong to the category of fundamental rights such as the right to privacy and the right to data protection. The GDPR is an EU law regulation, which is why the digital application of the right to be forgotten is consistent within the EU. For the rest, that is not explicitly mentioned in this regulation, the right to be forgotten is protected under different schemes of national law framework. This for example the case, when it comes to violations which are not covered under EU law such as media privilege, EU Member States have the right to make use of their domestic legislation.

The research showed that even though the EU established regulations and norms that directly engage with the right to be forgotten, it does not automatically imply that it is coherently protected throughout the EU. Further, the different legal frameworks pose a challenge to the interpretation of the right to be forgotten, where more than one Member State is involved. What about a potential case, were personal data are displayed by several media outlets in the EU? Does the person than have to go to every single Member State to get their data erased?

Unfortunately, most of the academic literature deals with the EU development of the right to be forgotten or how it is protected in comparison to the U.S. Further, the newest journal articles are concerned with the impact that the decisions by the GCC have on the judicial dialogue between national courts and the ECJ. However, there has been little literature on what the protection of the right to be forgotten means in the bigger context of constitutional pluralism and fundamental rights protection. Therefore, it is necessary to further investigate the role of the right to be forgotten in the context of fundamental rights protection in the EU and how the European constitutional framework means for the protection of the right.

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