Constitutional Courts as Guarantors of EU Charter Rights: A Rhetorical Perspective on Constitutional Change in Austria and Germany

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The 'rights revolution' and 'displacement doctrine' of the European Court of Justice – EU Charter as a yardstick for constitutional review – Constitutional Courts of Austria and Germany: Charter judgment and Right to Be Forgotten II order – Rhetoric, persuasion and eloquence in judicial reasoning

Constitutional courts and the Charter: a return from 'displacement'

In recent years, domestic courts across Europe have sought to integrate the EU Charter of Fundamental Rights into their national legal systems. In particular, several constitutional courts have used these rights as a yardstick for their constitutional review.[1] With this move, the courts have extended their jurisdiction and secured their say in European fundamental rights matters.[2] One may

[1]E.g. Austrian VfGH 14 March 2012, U 466/11, *Charter*, English version available at https://t1p.de/l6n1u, visited 18 April 2024; Italian CC, 7 November 2017, 269/2017, para 5.2, English version available at https://t1p.de/phx72, visited 18 April 2024; Belgian CC, 15 March 2018, 29/2018, French version available at https://t1p.de/kuagn, visited 18 April 2024; German BVerfG 6 November 2019, 1 BvR 276/17, *Right to be Forgotten II*, English version available at https://t1p.de/6q78f, visited 18 April 2024.

[2]M. Wendel et al., 'Better in than out: When Constitutional Courts Rely on the Charter', 16 *EuConst* (2020) p. 1 at p. 1-2; C. Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments', 22 *Cambridge Yearbook of European Legal Studies* (2020) p. 258 at p. 278.

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understand this as a response to a development in European constitutional law that Jan Komárek has hyperbolically described as the 'displacement' of national constitutional courts by a 'rights revolution' expedited by the European Court of Justice, which has allegedly instrumentalised the Charter in order to replace constitutional courts as the ultimate guarantors of fundamental rights in Europe.[3]

Among those constitutional courts that have adopted the Charter as a benchmark for their judicial review, the constitutional courts of Austria and Germany have received particular scholarly attention.[4] The Austrian Constitutional Court has attracted this attention because it was one of the first constitutional courts in Europe to consider itself competent to review petitions claiming violations of Charter rights in its so-called Charter judgment.[5] And the German Constitutional Court is often considered to be the most influential constitutional court in Europe[6] that does not shy away from using this influence vis-à-vis the European Court of Justice to act as a kind of (unelected and sometimes opinionated) class spokesman for the assemblage of domestic constitutional courts. Accordingly, the German Constitutional Court's reconsidered stance on the applicability of the Charter of Fundamental Rights in its *Right to Be Forgotten II* order[7] caused great astonishment.[8]

It seems tempting to portray these developments in the European constitutional order either from the perspective of pure legal doctrine devoid of any critical reflection on institutional practices[9] or from the perspective of power politics, which conveys the impression that the courts only play power

[3]J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy', 12 *International Journal of Constitutional Law* (2014) p. 525 at p. 527.

[4]For scholarly discussions of both cases *see* references in nn. 2, 13, 33-37, 91-92, 94-96.

[5]*Charter*, *supra* n. 1.

[6]J. Martín y Pérez de Nanclares, 'El TJUE como actor de la constitucionalidad en el espacio jurídico europeo: la importancia del diálogo judicial leal con los tribunales constitucionales y con el TEDH', 39 *Teoría y realidad constitucional* (2017) p. 235 at p. 245 calls the German Constitutional Court a 'judicial lighthouse' (author's translation); *see also* M. Claes and B. de Witte, 'The Roles of Constitutional Courts in the European Legal Space', in A. von Bogdandy et al. (eds.), *Constitutional Adjudication: Common Themes and Challenges* (Oxford University Press 2023) p. 495 at p. 515.

[7]*Right to be Forgotten II*, *supra* n. 1.

[8]M. Wendel, 'The Two-faced Guardian – Or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court', 57 *Common Market Law Review* (2020) p. 1383 at p. 1383-1384.

[9]For recent encouragement to include external perspectives in legal scholarship *see* A. Bailleux, 'From the Stage to the High Seas: Concluding Thoughts on the Present and Future of EU Legal Studies', 18 *EuConst* (2022) p. 737 at p. 750–751.

games to secure or even extend their jurisdiction, rather than to apply the law.[10] This article sheds light on an often neglected element of such decisions, namely the courts' use of rhetoric, i.e. strategies and methods designed to enhance the persuasiveness of the legal argument.[11] In this, it intends to provide a genuine standpoint from which the two perspectives of legal doctrine and political scholarship can be triangulated.[12]

More specifically, this article analyses the role rhetoric played in the two decisions made by the Austrian and German constitutional courts. These decisions are perfect material for an in-depth comparison, as both courts faced similar interpretive challenges and used comparable arguments to reach complementary results.[13] Both decisions are also prototypical examples of constitutional change without textual change. While the terms *verfassungsgesetzlich gewährleistete Rechte* ('constitutionally guaranteed rights', Article 144 Bundes-Verfassungsgesetz) and *Grundrechte* ('fundamental rights', Article 93(1) no. 4a Grundgesetz) were traditionally understood as referring to only national fundamental rights,[14] the constitutional courts promoted a wider understanding of these terms. As a result, *verfassungsgesetzlich gewährleistete Rechte* and *Grundrechte* now also include the fundamental rights of the EU Charter. This semantic change of constitutional provisions raises serious questions about whether these two constitutional courts have a mandate to amend the national constitutions by reinterpretation without the approval of the legislature, which is usually considered the primary institution for constitutional amendments.[15] Given the delicacy of this matter, courts would be well advised to present a well-reasoned decision in order to be as convincing as possible for their audiences. This hypothesis raises the question of whether the reasoning of the constitutional courts of Austria and Germany uses rhetoric. This article will show which rhetorical techniques, be they argumentative or ornamentative, can be traced in

[10]For a call to take the legal context seriously, *see* A. Grimmel, '"This is Not Life as It Is Lived Here": The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law', 7 *European Journal of Legal Studies* (2014) p. 61.

[11]For further explanations of the term 'rhetoric' *see* below in the section 'Rhetorical analysis as a means to detect persuasion and eloquence'.

[12]*Cf* J. von Bernstorff et al., 'Courts as Rhetorical Actors: A Rhetorical Analysis of Judicial Conflict Avoidance', 81 *Heidelberg Journal of International Law* (2021) p. 1001 at p. 1005.

[13]For a doctrinal comparison *see* Rauchegger, *supra* n. 2, p. 264-271; S. Bohnert et al., 'Das Charta-Erkenntnis des VfGH und die Beschlüsse Recht auf Vergessen I & II des BVerfG – Zwei Wege zur Grundrechtsvielfalt', 28 *Journal für Rechtspolitik* (2020) p. 159.

[14]In Austria, the rights of the ECHR have also been considered national fundamental rights since 1964.

[15]On constitutional legislation through constitutional interpretation *see* A. Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters', 4 *Cambridge International Law Journal* (2015) p. 423 at p. 431-432.

the reasoning of the courts – and whether these techniques have increased the level of acceptance of the decisions.

The *Charter* judgment and the *Right to be Forgotten II* order: two landmark cases

To gain a full understanding of the importance of these decisions, it is necessary to briefly explain the background against which they were made, the courts' reasoning and the effects the decisions have had.

The 'displacement' of constitutional courts in the European legal system

Both decisions were issued in light of the above-mentioned 'displacement' of national constitutional courts. This 'displacement' was primarily caused by the well-known doctrines of the primacy and direct effect of EU law, as well as the expansion and penetration of EU law into the legal systems of the EU member states.[16] Once the European Court of Justice declared itself the only institution competent to overrule EU acts,[17] it took over one of the fundamental tasks of constitutional courts, namely setting aside legislation.[18] Moreover, the preliminary reference procedure enables ordinary domestic courts to refer their cases directly to the European Court of Justice without first referring them to their constitutional or supreme courts.[19] Ordinary courts were also empowered to leave national law unapplied if it contravenes EU law.[20] All in all, it can be said that the European Court of Justice's 'constitutionalisation' of the European legal order[21] has brought it not only into contact with but also into conflict with national constitutional courts.[22]

[16]C. Rauchegger, 'The Charter as a Standard of Constitutional Review in the Member States', in M. Bobek and J. Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) p. 483 at p. 483-484.

[17]ECJ 22 October 1987, Case C-314/85, *Foto-Frost* v *Hauptzollamt Lübeck-Ost*, para. 11-20.

[18]D. Paris, 'Constitutional Courts as European Union Courts', 24 *Maastricht Journal of European and Comparative Law* (2017) p. 792 at p. 793-794; Claes and de Witte, *supra* n. 6, p. 502-504.

[19]M. Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M. Claes et al. (eds.), *Constitutional Conversations in Europe* (Intersentia 2012) p. 287 at p. 294-296.

[20]ECJ 9 March 1978, Case C-106/77, *Amministrazione delle Finanze dello Stato* v *Simmenthal*, paras. 13-24.

[21]J.H.H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) p. 2403.

[22]Martín y Pérez de Nanclares, *supra* n. 6, p. 237.

In particular, when the Charter came into effect in 2009, the European Court of Justice transformed into a human rights court.[23] Although the judges of the European Court of Justice are reluctant to accept this label,[24] the Court has been confronted with an increasing number of fundamental rights cases brought before it by domestic courts. The Court's jurisprudence on data protection is just one example of its growing importance in the field of fundamental rights.[25] At the national level, most constitutional courts have been reluctant to rely on EU law; in particular, EU fundamental rights have not been considered as a standard of review and their enforcement was left to the ordinary domestic judiciary.[26] As a result, domestic constitutional courts also lost one of their key functions as the ultimate guarantors of fundamental rights.[27] Further decisions of the European Court of Justice, such as in *Åkerberg Fransson*[28] and *Melloni*,[29] exacerbated this development by promoting a wide understanding of the applicability and primacy of the Charter.[30] This approach has been criticised as an

[23]G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht Journal of European and Comparative Law* (2013) p. 168 at p. 168-170.

[24]A. Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?', 14 *Journal of Human Rights Practice* (2022) p. 204 at p. 208-212; J.C. Bonichot, 'Aspects récents de la protection des droits fondamentaux dans l'Union européenne', *Revue québécoise de droit international (Hors-séries)* (2020) p. 465 at p. 468; V. Skouris, 'Höchste Gerichte an ihren Grenzen – Bemerkungen aus der Perspektive des Gerichtshofs der Europäischen Gemeinschaften', in M. Hilf et al. (eds.), *Höchste Gerichte an ihren Grenzen* (Duncker & Humblot 2007) p. 19 at p. 35-36 and 38; for critical remarks on this attitude *see* D. Sarmiento, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice', 29 *European Journal of International Law* (2018) p. 1.

[25]M. Brkan, 'The Unstoppable Expansion of the EU Fundamental Right to Data Protection: Little Shop of Horrors?', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 812 at p. 815-819.

[26]J. Komárek, 'The Place of Constitutional Courts in the EU', 9 *EuConst* (2013) p. 420 at p. 429-430 and 443-444; Rauchegger, *supra* n. 2, p. 259; Paris, *supra* n. 18, p. 798-801.

[27]A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', 19 *Jurisprudencija* (2012) p. 1269 at p. 1273.

[28]ECJ 26 February 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, paras. 16-31; but *see also* the less radical approach in ECJ 6 March 2014, Case C-206/13, *Cruciano Siragusa* v *Regione Sicilia*, para. 24 and ECJ 10 July 2014, Case C-198/13, *Víctor Manuel Julian Hernández and Others* v *Reino de España and Others*, para. 34.

[29]ECJ 26 February 2013, Case C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, paras. 55-64.

[30]F. Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog', 9 *EuConst* (2013) P. 315 at p. 332; A. Edenharter, 'Fundamental Rights Protection in the EU: The ECJ's Difficult Mission to Strike a Balance between Uniformity and Diversity', 10 *Italian Journal of Public Law* (2018) p. 390 at p. 392-394; Rauchegger, *supra* n. 2, p. 263-264.

over-integrative use of the Charter that imperils the federal diversity of fundamental rights among the member states.[31]

Coming back even stronger

The Austrian Constitutional Court reacted to this unfavourable dynamic with the so-called *Charter* judgment in 2012, within which it considered itself competent to hear cases concerning violations of Charter rights. Seven years later, in November 2019, the German Federal Constitutional Court issued two long-awaited orders. The Court announced, first, that the application of German fundamental rights takes precedence when the national law in question is not fully determined by EU law (*Right to Be Forgotten I*) and, second, that the Court will apply Charter rights when EU law fully harmonises the applicable legal provisions (*Right to Be Forgotten II*). In particular, the second order closely resembles the previous *Charter* judgment of the Austrian Constitutional Court in three ways:

1. Both courts overturned the previous case law according to which they had no jurisdiction to hear cases concerning Charter rights.
2. Both courts changed the understanding of the respective jurisdiction clauses in the constitutions of Austria and Germany.
3. Both courts relied on comparable argumentative topoi, such as arguments from division, the rule of justice, and hierarchy.[32]

Both decisions were considered also landmark cases for the two jurisdictions individually and for the European constitutional order as a whole.[33] All in all, the decisions were mostly praised for their practical consequences but criticised for their reasoning. For example, Thomas von Danwitz and Vassilios Skouris, two

[31]J. Masing, 'Unity and Diversity of European Fundamental Rights Protection', 41 *European Law Review* (2016) p. 490 at p. 500-502 and 509-512; A. Voßkuhle, '"European Integration Through Law": The Contribution of the Federal Constitutional Court', 58 *European Journal of Sociology* (2017) p. 145 at p. 152-153; *see also* P.M. Huber, 'The Federal Constitutional Court and European Integration', 21 *European Public Law* (2015) p. 83 at p. 106.

[32]On the origin of these arguments in rhetoric *see* C. Perelman and L. Olbrechts-Tyteca, 'The New Rhetoric: A Treatise on Argumentation', vol 2 (University of Notre Dame Press 1969) p. 218-220, 234-241, and 337-345.

[33]On the importance of the *Charter* judgment for the Austrian jurisdiction *see* M. Vašek, 'Constitutional Jurisdiction and Protection of Fundamental Rights in Europe', in von Bogdandy et al. (eds.), *supra* n. 6, p. 325 at p. 377 n. 474; for an overview of the subsequent practice of the Austrian Constitutional Court *see* S. Kieber and R. Klaushofer, 'The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union', 23 *European Public Law* (2017) p. 221; on the importance of the *Right to Be Forgotten* cases *see* P. Friedl, 'A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten', 5 *European Papers* (2020) p. 447.

European Court of Justice judges, as well as European Commissioner for Justice, Viviane Reding, expressly welcomed the *Charter* judgment of the Austrian Constitutional Court as a meaningful approach to incorporating the Charter into domestic proceedings.[34] Austrian legal scholars were more reserved, contesting the Court's legal reasoning from a doctrinal point of view.[35] Indeed, many claimed that the decision was primarily motivated by reasons of judicial politics. They alleged that the Court was attempting to (re)gain influence in fundamental rights matters that it had previously lost through the Europeanisation of national law.[36] The German Constitutional Court's *Right to Be Forgotten II* order was also unequivocally considered an attempt to recover competences the Court had lost through the Europeanisation of fundamental rights law.[37] Some suspected the decision was a declaration of contempt towards the European Court of Justice,[38] whereas others stressed the Court's cooperative attitude, as displayed in its profound examination of Luxembourg's case law.[39]

[34]T. von Danwitz, 'Verfassungsrechtliche Herausforderungen in der jüngeren Rechtsprechung des EuGH', 40 *Europäische Grundrechte-Zeitschrift* (2013) p. 253 at p. 261; A. Müller, 'An Austrian *Ménage à Trois*: The Convention, the Charter and the Constitution', in K.S. Ziegler et al. (eds.), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) p. 299 at p. 307.

[35]A. Orator, 'The Decision of the Austrian *Verfassungsgerichtshof* on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?', 16 *German Law Journal* (2015) p. 1429 at p. 1437-1444 and 1447; Müller, *supra* n. 34, p. 308-312 and 319-320; M. Pöschl, 'Verfassungsgerichtsbarkeit nach Lissabon: Anmerkungen zum Charta-Erkenntnis des VfGH', 67 *Zeitschrift für Öffentliches Recht* (2012) p. 587; F. Merli, 'Umleitung der Rechtsgeschichte', 20 *Journal für Rechtspolitik* (2012) p. 355; C. Bezemek, 'Wording and Determinateness – Indeterminately Worded: A Few Remarks on Questions to be Asked Again', 7 *ICL Journal* (2013) p. 95 at p. 96-97.

[36]D. Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU', 11 *EuConst* (2015) p. 389 at p. 399; Müller, *supra* n. 34, p. 319; Orator, *supra* n. 35, p. 1442-1444; Pöschl, *supra* n. 35, p. 589-590; Merli, *supra* n. 35, p. 359.

[37]D. 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', 21 *German Law Journal* (2020) p. 1 at p. 11-12; J. Mathews, 'Some Kind of Right', 21 *German Law Journal* (2020) p. 40 at p. 41; D. Thym, 'Friendly Takeover, or: The Power of the "First Word": The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review', 16 *EuConst* (2020) p. 187 at p. 197, 204-205 and 209; J.A. Kämmerer and M. Kotzur, 'Vollendung des Grundrechtsverbunds oder Heimholung des Grundrechtsschutzes?', 39 *Neue Zeitschrift für Verwaltungsrecht* (2020) p. 177 at p. 177-178; Wendel et al., *supra* n. 2, p. 1-3.

[38]Burchardt, *supra* n. 37, p. 15-17; Kämmerer and Kotzur, *supra* n. 37, p. 177-179.

[39]Thym, *supra* n. 37, p. 197-198, 199-200, 208 and 211-212; Wendel et al., *supra* n. 2, p. 7; Wendel, *supra* n. 8, p. 1403-1404 and 1424-1425 (but *see* for remaining doubts about the willingness to refer cases to the ECJ p. 1412-1414).

Rhetorical analysis as a means to detect persuasion and eloquence

Before analysing the use of rhetorical techniques and strategies in the two decisions, it is necessary to determine why it can be assumed that constitutional courts use rhetoric. The following section also clarifies what is meant by the terms rhetoric and rhetorical analysis in this study.

Law, its language and argumentation are usually seen as formalistic, devoid of any candour or flourish.[40] In particular, constitutional courts might be said to have no need to convince anyone, since they make the final decision without any higher authority.[41] However, as Alexander Hamilton has rightly observed, the judiciary 'has no influence over either the sword or the purse; no direction of the strength or the wealth of the society'.[42] For a power that has 'neither FORCE nor WILL, but merely judgment',[43] using rhetoric when presenting its reasoning is crucial.[44] The efficacy of its judgments depends, to a large extent, on their acceptance by the other branches of power, the other courts, the disputing parties, legal experts, and the general public. This acceptance requires well-reasoned, convincing decisions, especially when a court is acting as a constitutional change-maker.[45] Moreover, the multi-level court system of European constitutional law is often described as a paradigm of transnational judicial interaction and cooperation that is based on the authority of the courts involved[46] and this authority depends on the court being accepted and approved of, which is more likely to be the case if

[40]On the character of legal language *see* H.E.S. Mattila, *Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas*, 2nd edn. (Routledge 2013) p. 96-98.

[41]G. Damele, 'Rhetoric and Persuasive Strategies in High Courts' Decisions: Some Remarks on the Recent Decisions of the Portuguese Tribunal Constitucional and the Italian Corte Costituzionale on Same-Sex Marriage', in M. Araszkiewicz et al. (eds.), *Argumentation 2011: International Conference on Alternative Methods of Argumentation in Law* (Masaryk University Press 2011) p. 81 at p. 82.

[42]A. Hamilton, 'Federalist Paper No. 78 (1788): The Judiciary Department', in T. Jefferson et al. (eds.), *America's Founding Documents: The Declaration of Independence, the Articles of Confederation, the United States Constitution, the Federalist Papers, and the Bill of Rights* (First Avenue editions 2018) p. 620 at p. 622.

[43]Ibid., p. 622.

[44]M. Claes et al., 'Introduction: On Constitutional Conversations', in M. Claes et al. (eds.), *Constitutional Conversations in Europe* (Intersentia 2012) p. 1 at p. 1; R. Moss, 'Rhetorical Stratagems in Judicial Opinions', 2 *Scribes Journal of Legal Writing* (1991) p. 103 at p. 105; J. Greene, 'Constitutional Rhetoric', 50 *Valparaiso Law Review* (2016) p. 519 at p. 539.

[45]M. de Visser, 'Constitutional Courts Securing Their Legitimacy: An Institutional-Procedural Analysis', in von Bogdandy et al. (eds.), *supra* n. 6, p. 223 at p. 224-226 and 239-240.

[46]Martín y Pérez de Nanclares, *supra* n. 6, p. 267.

its decisions are persuasive to other courts and the general audience.[47] This is where rhetoric becomes important.

Rhetoric is understood as both the theory and practice of persuasive and eloquent speech. Generally speaking, persuasion in a rhetorical sense is accomplished through the use of arguments with the aim of 'influencing the audience's mental state, commonly as a precursor to action'.[48] In legal texts specifically, reasoned and logical argumentation (or, as it is referred to in rhetoric, *logos*) is undoubtedly the most important technique of persuasion.[49] In contrast, eloquence is often portrayed as the opposite of persuasion because it is closely related to the use of figures of speech and, therefore, 'refer[s] primarily to the artistic expression of a speech as opposed to its argumentation'.[50] Despite this dichotomy between persuasion and eloquence, the importance of eloquence for persuasion should not be underestimated. An eloquent discourse is more likely to secure the agreement of those it seeks to persuade. Moreover, the use of eloquence depends on the concrete communicative situation with its particular conditions, possibilities, and constraints, as well as on the expectations of the audience: in short, it must be appropriate (*aptum*). Thus, in legal texts, eloquence is always a specific type of eloquence that is characterised by an abstract, dispassionate, objective and formalistic style. Pierre Bourdieu has aptly described this form of juridical eloquence as 'a rhetoric of impersonality and of neutrality';[51] eloquence can, indeed, 'entail the expression of sophisticated thinking in simple language'.[52] Persuasion and eloquence are just as deeply intertwined as form and substance.[53]

In what follows, I offer a comparative rhetorical analysis of the Austrian *Charter* judgment and the German *Right to Be Forgotten II* order. This analysis delves into the courts' reasoning to show how the arguments are structured,

[47]G. Lübbe-Wolff, 'Transnational Judicial Interactions and the Diplomatization of Judicial Decision-Making', in C. Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations*, (Cambridge University Press 2019) p. 233 at p. 239-240; L. Coutron, 'Pédagogie judicaire et application des droits communautaire et européen', in L. Coutron (ed.), *Pédagogie judiciaire et application des droits communautaire et européen* (Bruylant 2012) p. 1 at p. 5-6.

[48]D.J. O'Keefe, 'Persuasion', in T.O. Sloane (ed.), *Encyclopedia of Rhetoric* (Oxford University Press 2001) p. 575 at p. 575.

[49]M. Paso, 'The Court of Justice of the European Union as a Rhetorical Actor', 19 *Maastricht Journal of European and Comparative Law* (2012) p. 12 at p. 16; Greene, *supra* n. 44, p. 538.

[50]E. Fantham, 'Eloquence', in Sloane, *supra* n. 48, p. 237 at p. 237.

[51]P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings Law Journal* (1987) p. 814 at p. 819; *see also* J. Harrington et al., 'Law and Rhetoric: Critical Possibilities', 46 *Journal of Law and Society* (2019) p. 302 at p. 305.

[52]Fantham, *supra* n. 50, p. 237.

[53]A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) p. 300-301; A. Jakab, *European Constitutional Language* (Cambridge University Press 2016) p. 70-71.

framed and presented. The analysis also asks whether these legal arguments resemble rhetorical arguments or so-called topoi.[54] This comparison is based on the classification of rhetorical arguments designed by Chaim Perelman and Lucie Olbrechts-Tyteca.[55] In addition to argumentative structures, it also examines the eloquence of the courts' reasoning as displayed in their style and their use of rhetorical devices. The study reflects on the extent to which these figures fit with and, thus, support the arguments being made. In addition to this speaker- and text-oriented approach, the analysis also takes into account how the primary audience of the two courts, i.e. the legal scholarship, has reacted to this reasoning. Given the inseparability of rhetoric and language, this analysis was initially conducted based on the original German versions of the decisions. The following quotations from the decisions are from the English translations provided by the courts. Occasionally, I provide an alternative, more literal translation to make the rhetorical features in the original German versions visible when they would otherwise be unrecognisable.

A word in advance: One should be cautious about drawing far-reaching conclusions from the following comparison. Judicial rhetoric is always a product and a reflection of a specific legal culture.[56] The style of judicial reasoning may vary from jurisdiction to jurisdiction and even from court to court. For example, decisions of French courts are known for their extreme brevity and authoritative tone, whereas courts in common law jurisdictions produce lengthy and argumentative decisions, sometimes even colloquial in style and tone. Even within Germany as a single jurisdiction, the Constitutional Court stands out for its unique style of academic comprehensiveness, which rather resembles a treatise than a judicial decision.[57] And the Austrian Constitutional Court, despite belonging to a legal culture that shares many characteristics with its German neighbour, tends be more straightforward, positivist and brief in its reasoning compared to its German counterpart.[58] The success of rhetorical techniques depends to a large extrent on the expectations of the audience(s). These expectations are strongly influenced by the legal traditions and legal education

[54]On topoi *see* M.H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Routledge 2016) p. 27-28.

[55]Perelman and Olbrechts-Tyteca, *supra* n. 32, part three.

[56]Harrington et al., *supra* n. 51, p. 303-309.

[57]D.P. Kommers, 'Germany: Balancing Rights and Duties', in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006) p. 161 at p. 210; M. Jestaedt, 'The Karlsruhe Phenomenon: What Makes the Court What It Is', in M. Jestaedt et al. (eds.), *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2020) p. 32 at p. 55 and 67.

[58]For a comparison of both styles of judicial reasoning *see* A. Jakab, 'The Reasoning of Constitutional Courts in Europe', in von Bogdandy et al. (eds.), *supra* n. 6, p. 169 at p. 210-213.

in a jurisdiction. For this reason, the following observations are country- and case-specific.

Overturning previous case law

Prior to these two decisions, neither court considered Charter rights as a standard for their constitutional review. The Austrian Constitutional Court explicitly stated that neither the Charter nor the Treaty on the Functioning of the European Union were provisions of Austrian constitutional law. As a result, they could not be used as a standard for reviewing the constitutionality of a law.[59] Only in exceptional cases, when EU law was applied in an illogical or arbitrary manner did the Court indirectly review EU law by declaring this application of EU law a violation of Austrian fundamental rights.[60]

In its *Charter* judgment, the Austrian Constitutional Court overruled its prior case law without openly admitting doing so. Rather, it cloaks its overruling by pretending to merely distinguish the present case from its prior case law. Of course, distinguishing is an accepted legal technique[61] but its roots can be traced back to a rhetorical topos, namely the so-called argument of division. Arguments of division are based on '[t]he concept of the whole as the sum of its parts'[62] and enable opposing arguments to be made simultaneously: *a pari* (treating the parts of the whole similarly) or *a contrario* (treating the parts of the whole differently).[63] The Court justifies its revised standpoint with a combination of two arguments of division:

> (1a) 'Rendered before the entry into force of the Lisbon Treaty, these decisions on European Union law cannot be transferred to the Charter of Fundamental Rights. In European Union law, the Charter is an area that is markedly distinct from the "Treaties". [sic] (cf. also [sic] Article 6(1), TEU: "the Charter of Fundamental Rights and the Treaties"), to which special provisions apply arising from the domestic constitutional set-up.'[64]

The first argument of division is combined with an argument of silence. The Court argues that the previous case law was '[r]endered before the entry into

[59]VfGH 24 September 2011, G107/10, para. 6, only German version available at https://t1p.de/999xc.

[60]Pöschl, *supra* n. 35, p. 590 n. 6.

[61]T.M.J. Möllers, *Legal Methods: How to Work with Legal Arguments* (C.H. Beck 2020) p. 277-278.

[62]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 234.

[63]Ibid., p. 241.

[64]*Charter*, *supra* n. 1, para 25.

force of the Lisbon Treaty' and, therefore, says nothing about the treatment of Charter rights in Austrian constitutional practice. The previous case law is, thus, separated from the current *Charter* judgment and treated as something distinct (argumentation *a contrario*: different treatment of the parts of the whole). This division is supported by a stylistic dichotomy. Previously –in quote (1a) – the Court referenced this earlier case law by repeatedly using the word 'general':

> (1b) 'the Constitutional Court found that European Union law *in general* is not a standard of review for its decisions',
>
> (1c) 'In VfSlg. 15.215/1998, it [scil., the Court] *generalised* its argument as follows',
>
> (1d) 'The Constitutional Court then *generally* held that European Union … law was not a standard for its own judicial review.'[65]

This use of the word 'general' in quotes (1b)-(1d) creates a contrast with the statement in (1a) that the Charter 'is markedly *distinct* from the "Treaties"', with the result that '*special* provisions apply'. Thus, the Court eloquently establishes a stylistic dichotomy between general, generalised and generally versus distinct and special, which fits well with the argument of division.

The second argument of division in quote (1a) distinguishes the Charter from other primary law by referring to Article 6(1) TEU. The Court claims that the Charter is different from the other two treaties of the European Union because Article 6(1) TEU mentions both as separate entities ('the Charter of Fundamental Rights *and* the Treaties'). Two things need to be said about this argument. First, for the sake of clarification, it is important to be aware that the official English translation of the judgment does not quote Article 6(1) TEU correctly. Article 6(1) TEU reads as follows: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union …, which shall have the same legal value as the Treaties.' Evidently, the last subordinate clause states that the Charter 'shall have the same legal value as the Treaties.' However, the official English version of the Treaty does not include the clause 'the Charter of Fundamental Rights and the Treaties' that is included in the Austrian Constitutional Court's English version of the judgment in quote (1a). This erroneous quotation is the result of a literal translation of the original German version of Article 6(1) TEU. The original German text reads as follows: 'Die Union erkennt die Rechte, Freiheiten und Grundsätze an, die in der Charta der Grundrechte der Europäischen Union. niedergelegt sind; die Charta der Grundrechte und die Verträge sind rechtlich gleichrangig.' Translated literally, the

[65]Ibid., paras. 19, 23 and 24 (emphasis added).

last clause (after the semicolon) can be rendered '*the Charter of Fundamental Rights and the Treaties* are of equal legal rank' and, in quote (1a), the Austrian Constitutional Court is referring to this direct translation from the German Treaty version. However, the Austrian Constitutional Court's reference to the last clause of Article 6(1) TEU is incomplete. It only quotes the first part of the subordinate clause as highlighted here in italics 'die Charta der Grundrechte und die Verträge' and, thereby, omits the very essence of the clause 'sind rechtlich gleichrangig' (= 'shall have the same value' or, more literally, 'are of equal legal rank'). Legal scholars have expressed their dissatisfaction with such a dubious persuasive attempt.[66]

Like its Austrian counterpart, the German Constitutional Court also uses an argument of division to justify its new approach. Prior to the *Right to Be Forgotten II* decision, the German Constitutional Court had followed a so-called separation thesis for many years.[67] According to the separation thesis, the Court considered national fundamental rights applicable when the member states enjoy discretion in the implementation of EU law.[68] Only when EU law completely determines a situation (in an 'agency situation') has this Court considered EU fundamental rights applicable. In such cases, the Court has followed the *Solange II* doctrine and refrained from exercising its judicial review, preferring to leave this task to the ordinary domestic courts in cooperation with the European Court of Justice.[69] All in all, the Charter was of no vital importance for the Court's case law.[70] By declaring the Charter as a standard of review in the *Right to Be Forgotten II* decision, the German Constitutional Court mitigated the self-exclusionary effects of the separation thesis.[71] In doing so, the Court overturned its previous case law using an argument of division:

> (2a) 'In its past decisions, the Federal Constitutional Court has not yet expressly considered the possibility of directly conducting a review on the basis of EU fundamental rights. … Those decisions of the Federal Constitutional Court directly or indirectly concerned challenges to the validity of EU law.'

[66]For harsh criticism *see* Müller, *supra* n. 34, p. 308; Orator, *supra* n. 35, p. 1437; Bezemek, *supra* n. 35, p. 96; Pöschl, *supra* n. 35, p. 591.

[67]D. Thym, 'Separation versus Fusion', 9 *EuConst* (2013) p. 391 at p. 401-407; Rauchegger, *supra* n. 2, p. 261-262.

[68]BVerfG 19 July 2011, 1 BvR 1916/09, paras. 87-88, English version available at https://t1p.de/kn9p9, visited 18 April 2024.

[69]Ibid., para. 91.

[70]Rauchegger, *supra* n. 16, p. 493-494.

[71]Rauchegger, *supra* n. 2, p. 265; Wendel, *supra* n. 8, p. 1386 and 1402-1405 even considers the separation thesis to be 'abandoned' by the *Right to Be Forgotten* decisions.

> (2b) 'In the case at hand, however, what is at issue is not the validity or applicability of EU law, but the proper application of fully harmonised EU law in light of the fundamental rights of the Charter .... At least in such cases, the Federal Constitutional Court cannot entirely refrain from conducting a fundamental rights review; rather, it is called upon to ensure fundamental rights protection on the basis of EU fundamental rights.'[72]

The German Constitutional Court argues that its previous case law had, thus far, only dealt with the validity or applicability of EU law and remained silent on the circumstances found in the present case, namely whether to apply fully harmonised EU law in light of the Charter rights. Similar to the Austrian Constitutional Court, the German Constitutional Court also justifies its reconsidered stance by distinguishing the previous case law from the current situation in combination with an argument of silence. With this argumentative strategy, the two courts create the impression of consistency for although they overturn their previous positions, they at least signal that they are taking their previous case law seriously by distinguishing it from the current situation.

The construction of the last sentence of the above quote (2b) heralds the upcoming eloquent rhetoric of amplification used by the German Constitutional Court.[73] It is a compound sentence divided into two clauses by a semicolon. The first clause reads: 'At least in such cases, the Federal Constitutional Court cannot entirely refrain from conducting a fundamental rights review'. The second clause reads: 'rather, it is called upon to ensure fundamental rights protection on the basis of EU fundamental rights'. If one reads these two clauses carefully, one discovers a redundancy because the first clause makes almost the same declaration as the second clause. This redundancy is a technique for rhetorical amplification that stresses a particular thought, in this case, the German Constitutional Court's obligation to ensure the comprehensive protection of fundamental rights. We will return to this point again below.

Using the rule of justice

In its reasoning, the Austrian Constitutional Court mentions and cites several judgments made by the European Court of Justice that established the principle of equivalence.[74] This principle obliges member states to make procedural rules and enforcement mechanisms for rights deriving from Union law no less favourable than for rights deriving from domestic law. The Austrian Constitutional Court states:

[72] *Right to be Forgotten II*, *supra* n. 1, paras. 51-52.

[73] Amplification is an umbrella term for rhetorical strategies that seek to elevate the significance of a topic or an opinion: H.F. Plett, 'Amplification', in Sloane, *supra* n. 48, p. 25.

[74] *Charter*, *supra* n. 1, paras. 26-28.

(3a) 'From this judgment the Constitutional Court infers that under Union law, rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States.'

(3b) 'The Constitutional Court has thus concluded that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the Charter of Fundamental Rights may also be invoked as constitutionally guaranteed rights ... and that they constitute a standard of review in general judicial review proceedings.'[75]

The principle of equivalence invoked by the Austrian Constitutional Court is, of course, a legal principle. From a rhetorical perspective, however, it can also be understood as an expression of what Perelman and Olbrechts-Tyteca call the 'rule of justice', a maxim that 'requires giving identical treatment to beings or situations of the same kind'.[76] The reasoning of the Austrian Constitutional Court resembles this maxim in that the Court concludes that Charter rights must be applied in proceedings brought before the Constitutional Court in the same way as fundamental rights under domestic constitutional law. However, scholars have argued to the contrary, claiming that the principle does not require *identical* treatment of Union rights and domestic rights, only *no less favourable* treatment of Union rights.[77] According to these scholars, it is sufficient that Charter rights can be invoked in proceedings before ordinary courts, as it was already common practice before the *Charter* judgment. The Austrian Constitutional Court promotes a broader understanding of the principle of equivalence, resembling the rule of justice as the Court advocates for an *identical* treatment of Charter rights and constitutional rights.

In quotes (3a)-(3b) above the Austrian Constitutional Court also uses the rhetorical device of personification. The Constitutional Court 'infers' and 'concludes', both of which are human activities that only individual judges can perform. The Court itself is an abstract entity but, through this use of language, it is metaphorically endowed with the human-like ability to 'infer' and 'conclude'. Such a practice of personification 'becomes rhetorically significant when the argument that so presents the object [scil., as human] ... then calls for us to respond to it as if it were human – to, say, reason with it'.[78] Thus, in a rhetorical reading, the Court's language can be understood as an attempt to create a

[75]Ibid., paras. 29 and 35.

[76]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 218.

[77]Pöschl, *supra* n. 35, p. 594; Paris, *supra* n. 36, p. 396-397 and 399.

[78]G.Y. Trail, *Rhetorical Terms and Concepts: A Contemporary Glossary* (Harcourt College Publishers 2000) p. 132.

humanised vision of the Court that idealises its character (*ethos*) and generates authority.[79]

Although the German Constitutional Court does not use the principle of equivalence in its *Right to Be Forgotten II* order, it also relies on an argument similar to the rule of justice.

> (4a) 'Today, EU fundamental rights, too, are part of this fundamental rights protection that can be enforced vis-à-vis German state authority. … EU fundamental rights are applicable at the domestic level and constitute a functional equivalent to the fundamental rights of the Basic Law. Embedded in a comprehensive fundamental rights catalogue, the EU fundamental rights, as regards their contents and objectives, fulfil largely the same function for EU law and its interpretation as German fundamental rights do for the law within the ambit of the Basic Law: within their scope of application, they serve to protect the freedom and equality of citizens …. Already in its Preamble, the Charter places itself within the tradition of inviolable and inalienable human rights …. Thus, it invokes the same tradition as the one in which Art. 1(2) GG places the fundamental rights of the Basic Law.'
>
> (4b) 'Accordingly, as EU law currently stands, fundamental rights protection vis-à-vis the ordinary courts and their application of the law would remain incomplete if EU fundamental rights were not included in the Federal Constitutional Court's standard of review.'[80]

In (4a), the German Constitutional Court describes the Charter as 'a functional equivalent to the fundamental rights of the Basic Law'. Both national and European fundamental rights serve the same purpose of protecting the individual against the state. Given this functional equivalence, the Court argues, in (4b), that Charter rights need to be included in its standard of constitutional review. This echoes the argumentation of the Austrian Constitutional Court, which also stressed that Charter rights and domestic fundamental rights are somehow interchangeable. Both courts rely on the argument that fundamental rights serve the same purpose, regardless of their source. Keeping in mind that the rule of justice requires identical treatment of similar things, Charter rights must enjoy the same procedural protection as domestic rights.

It is also worth noting the solemn style of the Court's reasoning in (4a). The Charter rights are '*[e]mbedded* in a comprehensive fundamental rights *catalogue*', a metaphor that suggests the rights are firm and solid. Moreover, the Charter rights are presented as having desirable human capacities (personification) when the Court states that 'they *serve* to protect the freedom and equality of

[79]Paso, *supra* n. 49, p. 17.
[80]*Right to be Forgotten II*, *supra* n. 1, paras. 59-60.

citizens'. The Charter rights stand 'within the tradition of *in*violable and *in*alienable human rights', an alliteration that forms an idiomatic expression also used, for example, in Article 1(2) Grundgesetz. The use of the word 'tradition' is then repeated when the Court states that the Charter 'invokes the same *tradition* as the one in which Article 1(2) GG places the fundamental rights of the Basic Law'. This style of solemnity emphasises the importance of fundamental rights[81] and complements the rule of justice argument because the rights from both domains – both the national and European domains – are presented as being of equally high status and necessarily, therefore, enjoying the same kind of protection, specifically, by both being invokable before the Constitutional Court.

Interestingly, we find hints of this rhetoric of solemnity in the Austrian *Charter* judgment as well. The Austrian Constitutional Court also highlights the similarities between Austrian and European fundamental rights in a celebratory style:

> (5) 'For the scope of application of European law, the Charter of Fundamental Rights has now enshrined (ensuing) rights as they are guaranteed by the Austrian Constitution in a similar manner as constitutionally safeguarded rights.'[82]

The Austrian Constitutional Court speaks metaphorically of rights being 'enshrined' in the Charter, which suggests that they enjoy a kind of sanctity. This high register is maintained when the Court goes on to compare these 'enshrined' Charter rights to the rights '*guaranteed* by the Austrian Constitution ... as constitutionally *safeguarded* rights'. The words 'guarantee' and 'safeguard' both imply something worthy that must be protected with the utmost vigilance. It also implies that the actor responsible for guaranteeing these rights is entrusted with an important task and empowered to provide this protection. This strengthens the perception of the Austrian Constitutional Court as a guarantor of fundamental rights.

Arguments from hierarchy

Both courts underline their particular role within their national legal systems. The Austrian Constitutional Court emphasises its superior position in an authoritative tone:

> (6) 'The system of legal protection set out in the Federal Constitutional Act provides in general for a concentration of claims for violation of constitutionally

[81]On solemnity in legal language Mattila, *supra* n. 40, p. 123-124.
[82]*Charter*, *supra* n. 1, para. 30.

> guaranteed rights with one instance, i.e. the Constitutional Court, which also is the only instance to adjudicate on such violations through general norms, i.e. statutory acts and regulations, and the only instance that has competence to set aside such norms.'[83]

The Court argues that it is the only judicial body competent to review complaints concerning rights guaranteed by the Austrian Constitution. To a reader of this passage, it seems inevitable that a court in such a superior position would act as the ultimate guarantor of fundamental rights. Yet, how does the Austrian Constitutional Court achieve this effect? From an argumentative perspective, it uses a topos of hierarchy to place itself in a position above other courts.[84] This is remarkable since the Court could have also instrumentalised an argument of equality, e.g. the previously mentioned rule of justice, to argue that it is competent to review claims of violations of Charter rights in addition to other domestic courts. Instead, the Court emphasises its superior position in the hierarchy of courts in Austria. This topos of hierarchy is supported by the unnecessary repetition of the term 'one instance' respectively 'only instance' in the course of articulating the parallel parenthesis ('i.e. the Constitutional Court' and 'i.e. statutory acts and regulations'). The repeated use of the term 'instance' evokes connotations such as 'the ultimate instance' or 'the highest instance'.

This connotation of an ultimate or highest instance is supported by conceptual metaphors. Conceptual metaphor is a term introduced by the cognitive linguists George Lakoff and Mark Johnson. In their understanding, metaphor is not a phenomenon of 'the poetic imagination and the rhetorical flourish' but of 'ordinary language'.[85] They argue that there are metaphors used so ubiquitously in everyday language that although their metaphoricity goes unnoticed, they nonetheless structure the way we think about certain ideas or concepts. For example, we speak and think of time in terms of money ('You're *wasting* my time.' or 'This gadget will *save* you hours'[86]). In the paragraph analysed above, the Court speaks of itself as 'the only instance to *adjudicate on* such violations through general norms'. The verb 'to adjudicate on' is a standard legal term. Yet to a cognitive linguist, 'to adjudicate *on*' implies a certain *elevation* just as talking of 'a person standing *on* the ground' locates the person above the ground. This conceptual metaphor becomes clearer when viewed in conjunction with a comparable phrase in the same paragraph. In the last clause, the Court states that

[83]Ibid., para. 33.

[84]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 337 call this a 'Double Hierarchy Argument' because 'behind any hierarchy there may be discerned the outline of another hierarchy'. For the present purpose, I will speak simply of arguments of hierarchy.

[85]G. Lakoff and M. Johnson, *Metaphors We Live By* (University of Chicago Press 1980) p. 3.

[86]Ibid., p. 7; *see also* Mattila, *supra* n. 40, p. 99-101 on metaphors in legal language.

it 'has the competence to set aside such norms'. In the original German version of the judgment, the Court uses the term 'aufheben', which literally means 'to lift'. Thus, the phrase 'to set aside/to lift such norms' sounds like a normal use of legal language. Yet, from a cognitive linguistic perspective, the verb 'to lift' contains the same metaphoricity as 'to adjudicate on'. Only a person in an elevated position can lift something. The argument of hierarchy implicit in the representation of the Court as 'the one instance' respectively 'the only instance' is embedded in two conceptual metaphors that convey the same impression of superiority. Unfortunately for the Austrian Court, this argument was not well received by the legal community. Scholars have criticised the Court, arguing that the Bundes-Verfassungsgesetz does not provide for this centrality and superiority of the Constitutional Court. Rather, the Constitution establishes a diffuse system of fundamental rights protection for which all higher courts, including the Supreme Court and the Highest Administrative Court, bear responsibility.[87] In this case, the rhetoric of the Constitutional Court is unconvincing because it uses an exaggerated, inapt illustration of the Constitutional Court's position.

In contrast, the German Constitutional Court has been much more successful in convincing scholars that it is competent to review Charter rights cases as a consequence of its position in the German judicial system. In its reasoning, the Court repeatedly stresses its importance as a guarantor of fundamental rights:

> (7a) '[F]undamental 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.'
>
> (7b) 'Guaranteeing effective fundamental rights protection is one of the key tasks of the Federal Constitutional Court. . . . The constitutional complaint is deliberately broad and comprehensive in scope. Under Art. 93(1) no. 4a GG, any person who asserts that their fundamental rights have been violated is entitled and has standing to lodge a constitutional complaint, challenging any act of public authority. The constitutional complaint thus seeks to provide comprehensive fundamental rights protection vis-à-vis the entire German state authority in all its manifestations.'
>
> (7c) 'As the organ guaranteeing comprehensive fundamental rights protection at the domestic level, the Federal Constitutional Court must review the decisions of the ordinary courts in this respect.'[88]

[87]Bezemek, *supra* n. 35, p. 96; Merli, *supra* n. 35, p. 357-358; Pöschl, *supra* n. 35, p. 595-596; Orator, *supra* n. 35, p. 1431.

[88]*Right to be Forgotten II*, *supra* n. 1, paras. 45, 58, and 66.

The Court uses figures of amplification such as redundancies, synonyms and repetitions to magnify the importance of its function as a guarantor of fundamental rights. The tradition of protection of fundamental rights in Germany is '*long*' (as traditions usually are, given they would not otherwise be considered a tradition) (7a). The case law of the Court is '*comprehensive*', it is based on '*broad* procedural powers' and has given '*specific* shape' to the fundamental rights of the Grundgesetz (7a). The protection of fundamental rights must be '*effective*' and is one of the '*key* tasks' of the Court (7b). Thus, the scope of the constitutional complaint is 'deliberately *broad* and *comprehensive*' because '*any* person' can challenge '*any* act of public authority' (7b). Again, the constitutional complaint provides for '*comprehensive*' protection as it can be lodged against the '*entire* German state authority in *all* its manifestations' (7b). All in all, the Constitutional Court is 'the organ guaranteeing *comprehensive* fundamental rights protection' or – if we translate this passage more literally – the 'guarantor of comprehensive protection of fundamental rights' ('Garant eines umfassenden … Grundrechtsschutzes') (7c).

Scholars have also noted that the Court boasts about its influence, importance and reputation, giving the subtle impression that a system of fundamental rights protection without the German Constitutional Court would be terribly incomplete.[89] This rhetoric of amplification seems to refer less to a strictly legal point of view than to the high level of acceptance of the Court in empirical-sociological terms because no one would ever doubt that the German Constitutional Court is competent to hear fundamental rights cases. The redundant repetition of the importance of the Court's fundamental rights function is, thus, remarkable. It encourages the assumption that the Court wants to emphasise the trust that it enjoys among its audiences.[90] This assumption is supported by the Court's self-portrayal as a 'guarantor of comprehensive fundamental rights protection' (7c) as a guarantor is someone you can rely on. A guarantor is someone who is trusted with important capacities and competencies.

As a communication strategy, this plays out quite well. Despite some critical remarks,[91] the majority of scholars have praised the decision specifically because of the popularity and experience of the German Constitutional Court. For example, Ulrich Karpenstein and Matthias Kottmann noted that the Court rightly holds 'a unique position in the constitutional order and persistently enjoys high levels of

[89]Kämmerer and Kotzur, *supra* n. 37, p. 181; Burchardt, *supra* n. 37, p. 11-12

[90]The German Constitutional Court is often considered a very popular court, both in comparison with other state authorities and in comparison with courts in other countries. *See* M. Hailbronner, *Traditions and Transformations* (Oxford University Press 2015) p. 151-165; U. Kischel, *Comparative Law* (Oxford University Press 2019) Ch. 6 margin nr. 310.

[91]Burchardt, *supra* n. 37, p. 11-12; K. Schneider, 'The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-inflicted Institutional Vulnerabilities', 21 *German Law Journal* (2020) p. 19 at p. 24.

trust among the general public'.[92] They also praised the decision because the Court will be able to act as a 'competent interlocutor' for the European Court of Justice, which is, in their view, 'not a genuine fundamental rights court'.[93] Furthermore, Daniel Thym predicted, with the same subtle tone of German epistemic hubris, that the newly established competence will allow the German Constitutional Court to 'project the wealth of experience and doctrinal opulence of German human rights case law to the European level'.[94] Interestingly, even some of those who have strongly criticised this reasoning for being nothing less than an interpretation *contra legem* have welcomed the outcome of the decision for its long-awaited recalibration of the Constitutional Court's position and role.[95] Walther Michl, for example, criticised the decision thoroughly from a doctrinal point of view[96] but nevertheless concluded by saying that 'in view of the high standard of Karlsruhe's caselaw in fundamental rights matters as well as the high level of trust among the German population, the new approach is to be welcomed without any reservation'.[97] This is remarkable because this strong support of the consequences of the decision does not express a genuine legal argument, it rather resembles the 'Pragmatic Argument', a rhetorical topos, which 'permits the evaluation of an act ... in terms of its favourable or unfavourable consequences'.[98]

Changing semantics and using the disposition of arguments

In this section, I deal with some rhetorically remarkable observations that relate exclusively to the German Constitutional Court but are not reflected in the

[92]U. Karpenstein and M. Kottmann, 'Vom Gegen- zum Mitspieler – Das BVerfG und die Unionsgrundrechte', 31 *Europäische Zeitschrift für Wirtschaftsrecht* (2020) p. 185 at p. 185 and 188 (author's translations).

[93]Ibid., p. 188.

[94]Thym, *supra* n. 37, p. 211; *see also* J. Kühling, 'Das "Recht auf Vergessenwerden" vor dem BVerfG – November(r)evolution für die Grundrechtsarchitektur im Mehrebenensystem', 73 *Neue Juristische Wochenschrift* (2020) p. 275 at p. 289 (the Court will be able to 'contribute the particular wisdom of German fundamental right scrutiny to the Union's fundamental rights discourse': author's translation); R. Hofmann and A. Heger, 'Das Selbstverständnis des Bundesverfassungsgerichts als Hüter des Kompetenzverhältnisses zwischen der Europäischen Union und Deutschland', 47 *Europäische Grundrechte-Zeitschrift* (2020) p. 176 at p. 182 ('Now the FCC can assert the German specifics of the protection of fundamental rights much more strongly': author's translation).

[95]A. Edenharter, 'Die EU-Grundrechte-Charta als Prüfungsmaßstab des Bundesverfassungsgerichts', 73 *Die Öffentliche Verwaltung* (2020) p. 349 at p. 353 versus p. 357; R. Streinz, '"Recht auf Vergessenwerden" zwischen Unionsrecht und Verfassungsrecht', 44 *Datenschutz und Datensicherheit* (2020) p. 353 at p. 357.

[96]W. Michl, 'Die Neuausrichtung des Bundesverfassungsgerichts in der digitalisierten Grundrechtelandschaft', 42 *Juristische Ausbildung* (2020) p. 479 at p. 483-485.

[97]Ibid., p. 490 (author's translation).

[98]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 266.

judgment of the Austrian Constitutional Court. The first observation concerns the Court's new understanding of the so-called integration clause, Article 23(1) Grundgesetz:

> (8) 'The Basic Law's openness to EU law under Art. 23(1) GG does not relieve the German state of its responsibility in matters for which competences have been transferred to the EU; to the contrary, this provision provides for the participation of Germany in developing and giving effect to European integration.'[99]

Article 23(1) Grundgesetz lays down the basic rules for the integration of the Federal Republic of Germany into the European Union. For example, it enables the transfer of sovereign rights to the European Union. Until now, the German Constitutional Court has promoted a rather defensive and nation-state-centred understanding of this 'responsibility for integration'. It was understood primarily as an obligation of the parliament to generate sufficient democratic legitimation for the European Union at the national level. Indeed, this understanding was based on the premise that the European Union itself does not enjoy the same degree of legitimacy as the national state.[100] In contrast, the German Constitutional Court has now adopted a much more pro-European reading of the responsibility for integration, which is also reflected in its rhetoric. The German state organs are 'not relieve[d] ... of [their] responsibility ...; to the contrary, this provision [scil., Article 23(1) Grundgesetz] provides for the participation of Germany in developing and giving effect to European integration'. Thus, the Court creates a dichotomy. On the one hand, there is the negatively connotated 'relief of responsibility'. On the other hand, there is the positive connotation of 'participation' that shall 'develop and give effect to the European integration'.

This binary opposition is more vividly expressed in the original German version of the judgment. The 'relief of responsibility' is a translation of 'Rückzug aus der Verantwortung', which may be translated more literally as a 'retreat from responsibility'. Similarly, the positively connotated 'participation of Germany in developing and giving effect to European integration' can be translated more literally as a 'collaboration in the unfolding of the European Union' ('Mitwirkung der Bundesrepublik an der ... Entfaltung [der Union]'). 'Retreat from responsibility' versus 'collaboration in unfolding' are two opposing options, of which the first is obviously less desirable. The word 'Rückzug/retreat' carries strong negative connotations of cowardice, weakness and irresponsibility, while 'collaboration' ('*Mitwirkung*') represents joint activity, and 'unfolding'

[99] *Right to be Forgotten II*, *supra* n. 1, para. 55.
[100] Wendel, *supra* n. 8, p. 1422.

('*Entfaltung*') reminds us of a flower bud opening up to reveal its beauty. Thus, it seems inevitable the reader will opt, with the Court, for a new, more participatory understanding of Germany's 'responsibility for integration'. From an argumentative perspective, such an argument can be described as a dissociative definition based on antitheses[101] because the Court presents the new, participatory understanding in contrast to the preceding defensive understanding of the 'responsibility for integration'.

This new understanding is then instrumentalised in a subsequent passage of the judgment, in which the Court addresses a potential counterargument:

> (9) 'Such an inclusion of EU fundamental rights is not precluded by the Constitution's wording, in particular Art. 93(1) no. 4a GG. It is true that, despite the open wording of this provision, its legislative history is such that it only refers to the fundamental rights of the Basic Law. However, as Art. 23(1) first sentence GG mandates that the Federal Constitutional Court participate in the application of EU law within the framework of its responsibility with regard to European integration, it follows that Art. 93(1) no. 4a GG is to be applied accordingly to challenges asserting a violation of rights under the Charter.'[102]

In rhetoric, the anticipation of a possible counterargument is called *prolepsis*.[103] In this *prolepsis*, the German Constitutional Court concedes that the historical background of Article 93(1) no. 4a Grundgesetz does not speak in favour of the newly established competence to review Charter rights-related cases. Article 93(1) no. 4a Grundgesetz establishes the competence of the German Constitutional Court to review constitutional complaints. The legislator conferred this jurisdiction on the Court in 1969, long before the Charter entered into force. At that time, the legislator only intended to cover the fundamental rights of the Grundgesetz and could not foresee the emergence of European fundamental rights and their codification in the Charter.[104] Nevertheless, the Court now interprets the norm dynamically. It argues that the historical counterargument is irrelevant because Article 23(1) Grundgesetz in its new, participatory understanding obliges the Court to contribute actively to the realisation of a united Europe. Given this obligation, Article 93(1) Grundgesetz also covers Charter rights in order to provide adequate protection of fundamental rights even in those cases where German fundamental rights are inapplicable due to the primacy of European Union law. The potential counterargument is, thus, addressed and immediately rebutted.

[101]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 444 and 447-448.
[102]*Right to be Forgotten II*, *supra* n. 1, para. 67.
[103]Trail, *supra* n. 78, p. 144.
[104]Michl, *supra* n. 96, p. 483-484.

From a rhetorical perspective, this *prolepsis* is interesting for additional reasons. First, the Court introduces this paragraph with the sentence: 'Such an inclusion of EU fundamental rights is not precluded by the Constitution's wording, in particular Article 93(1) no. 4a GG.' In so doing, the Court invokes the authority of the *whole Constitution*. However, in what follows the Court only deals with the *specific provision* of Article 93(1) no. 4a Grundgesetz. The second remarkable rhetorical feature is how this sentence is framed. The Court does not argue that Article 93(1) no. 4a Grundgesetz (or the Constitution as a whole) expressly provides for the newly established competence (in a positive sense). It only argues that the Constitution does not preclude the Court from doing so (in a non-negative sense). Third, the Court places this counterargument after a lengthy argument in favour of the new competence. This conveys the impression that this counterargument is not very important.[105] Only the fierce scholarly critique reveals how decisive this problem was from a doctrinal point of view.[106] This rhetorical strategy resembles one used by Cicero in the judicial oratory in which he downplayed the force of counterarguments by addressing them superficially, after emphasising all the supporting reasons in detail.[107] By rebutting the counterargument with the participatory understanding of the responsibility for integration, the Court relies on the positive connotations it created at the beginning of its reasoning.

Conclusion

The close reading of selected passages of the decisions shows that the legal arguments of the courts resemble rhetorical topoi that are supported by rhetorical devices which intensify the effect of the reasoning. This is evidence of the rhetorical patterns underlying the legal argumentation. Persuasiveness is, therefore, generated through a combination of substance and form. Yet, not every rhetorical strategy works to its user's advantage. The dubious attempt of the Austrian Constitutional Court to derive an argument from an incomplete citation of Article 6(1) TEU was exposed as mere trickery. Furthermore, the Austrian Court's authoritative rhetoric, in which it presented itself as the apex of the Austrian legal order, was criticised and found equally unconvincing. Only some European judges and officials praised the decision as a meaningful approach to incorporating the Charter into national law. Such a pragmatic, result-oriented view of a judicial decision is even more visible in

[105]Perelman and Olbrechts-Tyteca, *supra* n. 32, p. 490-491.

[106]Edenharter, *supra* n. 95, p. 353; Streinz, *supra* n. 95, p. 357; Michl, *supra* n. 96, p. 483-485; for the main doctrinal counterarguments *see* above before n. 104.

[107]L. Fotheringham, 'Repetition and Unity in a Civil Law Speech: The Pro Caecina', in J. Powell and J. Paterson (eds.), *Cicero the Advocate* (Oxford University Press 2004) p. 253 at p. 274.

the reception of the *Right to Be Forgotten II* decision. Several scholars, who were not convinced from a doctrinal point of view, still supported the decision of the German Constitutional Court because of its practical consequences. The rhetoric of amplification seems to have contributed to this acceptance because the Court's emphasis on its indispensable role as a guarantor of fundamental rights and an active promoter of the European human rights discourse corresponded with the audience's expectations. This rhetorical analysis has also shown that the reasoning of these two courts contains evidence of their underlying political ambition to remain influential institutions within both their respective legal orders and the overall network of constitutional and human rights courts in Europe.

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