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Some Kind of Right

Jud Mathews*

The *Right to Be Forgotten I* and *II* remind us – if anyone could have forgotten – that Europe today is a Europe of rights.¹ What motivates the German Federal Constitutional Court (GFCC) to act in the *Right to Be Forgotten II*, on the Court’s telling, is the discovery of a gap in Europe’s rights architecture. The problem: for legal provisions fully harmonized under European Union (EU) law, EU rights protections take precedence over the fundamental rights in Germany’s constitution, the Basic Law. But the court with ultimate responsibility for vindicating EU fundamental rights, the Court of Justice of the European Union (CJEU), cannot hear rights claims in every situation that the GFCC could.² In the Europe of rights, a gap in rights protection generates a response from courts roughly analogous to what a gap in U.S.-Soviet missile stockpiles would produce among Cold War military planners: a scramble to close it. And so the GFCC leaps into the breach, ruling that it can review the application of EU law by German authorities for conformity with EU fundamental rights in situations such as this.

One of the most cited American administrative law articles is a 1975 piece penned by Judge Henry Friendly and titled *Some Kind of Hearing*.³ The piece

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¹ I borrow the phrase from Helen Keller and Alec Stone Sweet. *THE EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (Hellen Keller & Alec Stone Sweet eds., 2008). Their book concerns the European Convention of Human Rights.

² While individuals can directly bring challenges to EU acts in the CJEU under Article 263 TFEU, individuals cannot bring challenges in the CJEU to *national* legislation that implements EU law. Rather, the CJEU reviews such legislation only via the Article 267 preliminary reference procedure, and preliminary references can be made only by courts. Under the expansive individual complaint provision of the Basic Law, litigants in German courts can normally seek GFCC review when they believe their fundamental rights to be violated, *see* Basic Law art. 93 para. 1 lit. 4a. In areas of fully harmonized EU law, however, it is only EU fundamental rights and not German fundamental rights that apply.

³ Henry J. Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267 (1975). The phrase “some kind of hearing” is taken from Supreme Court Justice Byron White’s majority opinion in *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

SOME KIND OF RIGHT

reflected on the “due process revolution” in U.S. constitutional law, at the heart of which was the idea that persons were entitled to a hearing of some sort when facing adverse government action in a broad range of circumstances. The *Right to Be Forgotten II* crystallizes one lesson from Europe’s rights revolution: persons should be able to call on some kind of right to protect their important interests whenever those interests are threatened under the law. Which rights instrument should be deployed, and by what court, become secondary concerns.

The GFCC’s high-minded rights talk might fall flat with a cynic, or with a political scientist who studies courts (but I repeat myself). To such an observer, the *Right to Be Forgotten II* is another confirmation that the GFCC is one of Europe’s most powerful constitutional courts because it is one of its canniest. From its earliest days, the GFCC has fought challenges to its authority and relevance by crafting a constitutional jurisprudence that ensures the Court a central role in Germany’s governance processes. An important chapter in this story is the Court’s third-party effect doctrine, as inaugurated, famously, in the 1958 *Lith* decision and expanded in the following decades, pursuant to which the values encoded in constitutional rights penetrate the entirety of law, including the private law.⁴ When the GFCC suits up as the “Defender of the Constitution” to extend the reach of Basic Law rights, as a nifty side-effect it extends its own reach. But the old playbook works less well once European law starts displacing national law. In a world of Europeanizing law, a court that lacks the competence to say what EU law means faces a loss of relevance and influence. And so from a strategic perspective, it makes sense that the GFCC, which had ridden the rights of the Basic Law so far, would dismount and saddle up the Charter of Fundamental Rights of the European Union.

Ultimately, it is no criticism of the *Right to Be Forgotten II* to say that it advances the GFCC’s role in European governance, so long as the decision also makes sense in the context of the European and German law. My aim here is to argue that it does, for a specific reason. The *Right to Be Forgotten II* represents a sensible approach to managing the complex pluralism of the legal environment in which Germany and other EU member states find themselves.

I do not intend to join the debate over how to properly characterize Europe’s legal pluralism: as a feature of European constitutionalism, or an alternative to

⁴ JUD MATHEWS, *EXTENDING RIGHTS’ REACH: CONSTITUTIONS, PRIVATE LAW, AND JUDICIAL POWER* (2018).

constitutionalism.⁵ At this point, I just want to make the case that pluralism runs deep in the European legal order and poses challenges for participants in its legal systems. In order to set up the argument, I begin with a few gestures in the direction of legal theory.

The differences among competing theories of law often turn out to be, in significant part, differences of emphasis, and the bumper sticker versions of different theories often make plain what is being emphasized. What stands out about Neil MacCormick's concept of law as "institutionalized normative order"⁶—in contrast, say, with H.L.A. Hart's "union of primary and secondary rules"⁷—is the centrality of institutions. Institutions play several roles in law, including creating and enforcing legal norms, and—of particular importance for present purposes—they make norms more complete by elaborating their meaning, often in the course of deciding how they apply in concrete cases. This latter role is associated in particular with courts, although interpretation is neither the exclusive province of courts nor courts' only activity.

MacCormick's integration of institutions into the concept of law itself makes particular sense in light of an essential characteristic of most norms: they are not fully determinate. (Just ask the cyclist, the Segway rider, and the ambulance driver trying to determine if they are allowed into H.L.A. Hart's hypothetical park.⁸) For law to work as law requires a body that can say authoritatively how norms apply in concrete cases. It is not as though other legal theorists are unaware that institutions play important roles in legal systems, of course, but MacCormick's commitment to the ineluctable "institutionality" of positive municipal law—to the idea that institutions are, in an important sense, part of what law is—makes him alert to certain features of law that other theorists might skate past.⁹ His approach suggests, for instance, that "the rules and

⁵ Compare, e.g., NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010) with Alec Stone Sweet, *The Structure of Constitutional Pluralism*, 11 I-CON 491 (2013).

⁶ NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 11 (2007).

⁷ H.L.A. HART, THE CONCEPT OF LAW 79 (1961).

⁸ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). Hart famously conjures a rule that forbids taking vehicles into the public park and invokes some difficult cases (bicycle, roller skates, toy car) to illustrate his distinction between core of a legal rule and the surrounding penumbra of uncertainty.

⁹ MACCORMICK, *supra* note 6, at 13.

SOME KIND OF RIGHT

practices concerning recognition of binding precedents” are a proper subject for legal theorists and shape what the law is in different legal systems.¹⁰

A stripped-down model of law drawing on MacCormick’s institutional perspective can focus on two elements: norms, and the institutions that say how they apply (which, for simplicity’s sake, I will call courts). Such a model offers a good starting point for thinking about pluralism in its different forms. As the ideal type of non-pluralist law, we can imagine a legal system that features a single body of norms and a single set of courts responsible for interpreting those norms. The norms are internally consistent, or else contain conflict rules that direct which takes precedence in the case of inconsistency (*e.g.*, constitutional norms trump legislative norms). Call a body of norms with those features well-ordered norms. Similarly, the courts have jurisdictions that do not overlap, or else they are ordered hierarchically. Let’s call courts with these features well-ordered courts.

In life, of course, it is rare for everything to be well ordered, and in many legal systems, there are at least some elements of pluralism. Alec Stone Sweet and Clare Ryan offer a useful distinction for thinking about the forms pluralism can take. We can have source pluralism (or following the nomenclature I used above, norm pluralism) when there is more than one body of norms that applies in a legal system—or, what amounts to the same thing, where the governing norms are not well ordered.¹¹ We can also have jurisdictional pluralism (which I will call court pluralism) where we have multiple court systems operating (or, equivalently, a non-well-ordered court system).¹²

Of the two, norm pluralism is the easier to manage. The existence of competing bodies of norms can create confusion, most concretely for the parties the norms apply to. It is possible that norms can give contradictory guidance to an addressee, but so long as the court system is well-ordered, the legal system will be able to resolve the conflict one way or another and work its way eventually to a single authoritative answer about how the addressee should behave.

¹⁰ *Id.* at 57, 57-58.

¹¹ ALEC STONE SWEET & CLARE RYAN, *A COSMOPOLITAN LEGAL ORDER* 82-83 (2018). Stone Sweet and Ryan write specifically about rights protection regimes, but the distinction is useful for thinking about pluralism in legal systems more generally.

¹² *Id.* at 83.

Court pluralism poses a greater challenge. Even if courts dispose over a shared body of norms, court pluralism entails the possibility that they will arrive at contradictory interpretations. It seems reasonable to suppose that, the more open-ended the norms, the higher the potential that courts could develop divergent approaches. Norm pluralism can sap the law's ability to give guidance, at least until a court steps in to resolve conflicts between norms, but court pluralism raises the still more alarming prospect that different courts could impose mutually incompatible obligations on parties.

When we have competing bodies of norms and competing systems of courts, the possibilities for conflicts multiply, especially when the content of the competing bodies of norms is substantially different. Nor is it the case, when both norm pluralism and court pluralism are in play, that courts necessarily must limit themselves to interpreting "their" norms: courts can maintain their own views about what "the other's" law require. We can call the result crossover pluralism. Europe is a legal environment where this kind of robust pluralism obtains. It should not be surprising that MacCormick, with his attention to the interplay between norms and institutions, was one of the first scholars to devote serious attention to European legal pluralism.¹³

Operating in a legal system with this kind of robust pluralism places significant demands on all involved. What this simple model does not make clear is that pluralism is at least partly endogenous to the process of judicial dispute resolution. In other words, in the course of deciding cases, courts may have the opportunity to address questions about how different bodies of law or the authority of different courts relate. Their responses have the potential to make the legal environment more or less coherent. A challenge that courts face in robustly pluralistic environments is managing that pluralism through their rulings so that the legal system provides reasonably clear guidance to the individuals and entities to whom norms are addressed.

By these lights, the *Right To Be Forgotten II* does a good job. Yes, the decision does increase crossover pluralism by making the GFCC, for the first time, a co-curator of the EU Charter, alongside the CJEU.¹⁴ But at the same time, it is part of a broader move by the GFCC tending to cabin norm pluralism, by

¹³ NEIL MACCORMICK, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993).

¹⁴ While this is the first case in which the GFCC has taken upon itself to hear challenges based on European fundamental rights, the phenomenon of national courts in Europe ruling on questions of European law is itself nothing new. *See, e.g.*, KRISCH, *supra* note 5, at 292.

SOME KIND OF RIGHT

partitioning the legal landscape into different domains and assigning a single body of norms priority over each. So the First Senate in the *Right To Be Forgotten II* makes clear that, in areas of full harmonization, EU law boxes out the Basic Law, just as in the *Right to Be Forgotten I* it provides that the Basic Law takes priority in matters not fully harmonized. The decision limits the potential for conflicts between the GFCC and the CJEU, even though both are interpreting the same rights instrument. Under the *Right To Be Forgotten II*, the GFCC will be stepping in to make pronouncements on the meaning of EU Charter rights only in situations where the CJEU, for jurisdictional reasons, could not. The GFCC has a strong argument that, by ensuring that EU Charter rights apply to all challenges in areas of full harmonization, it is not only fulfilling its obligation to aid European integration, but making the law more, rather than less, coherent.

That being said, how this approach works out in practice will depend on how the GFCC performs its new role going forward. If substantively, the body of EU charter jurisprudence that the GFCC develops diverges from the CJEU's over time, then the *Right To Be Forgotten II* could come to stand as a source of legal inconsistency. And while the GFCC acknowledged the CJEU as the final authority on EU rights, one could not describe the German court's approach to CJEU precedent in the *Right To Be Forgotten II* case as one of strictest fidelity. Though the CJEU had found that the right of personality took precedence in the cases it had decided, the First Senate breezily distinguished those decisions in justifying its own approach to the balancing of interests.

But the prominence of balancing in their rights adjudication is what may keep the GFCC and CJEU from straying too noticeably from each other. The rights jurisprudence of both courts is built around proportionality review, in which balancing plays a central role. In proportionality systems, what courts owe to rights claimants is not so much a particular outcome as a particular decision-making procedure.¹⁵ By design, proportionality is highly sensitive to the particulars of disputes, and the balancing analysis is open-ended enough that,

¹⁵ See ALEC STONE SWEET AND JUD MATHEWS, *PROPORTIONALITY BALANCING AND GLOBAL CONSTITUTIONALISM: A GLOBAL AND COMPARATIVE APPROACH* (2019). The canonical proportionality analysis asks whether a measure alleged to violate a fundamental right: (1) serves a proper purpose, (2) is a suitable means of achieving the purpose, and (3) infringes on a fundamental protected no more than alternative measures that serve the same purpose equally well. If the challenged measure passes all of these tests, the court proceeds to ask whether it is proportional in the strict sense: that is, whether the measure's benefit to the common good outweigh the harm it imposes on the right.

in a given case, courts could frequently justify more than one possible result. In other words, the wide tolerances of proportionality mean that a range of outcomes can count as consistent. Proportionality also helps explain why the GFCC can so casually switch from the Basic Law to the EU Charter as the basis for its review. Not much is at stake in whether the GFCC operates under the banner of European or German fundamental rights if the Court can essentially proceed the same way: by plugging the facts into proportionality analysis.¹⁶

How this all plays out in practice is something that will only become clear over time. Lawyers and scholars will keep a close eye on the ruling's impact for years to come. The *Right to Be Forgotten II* will not be forgotten any time soon.

¹⁶ See Walther Michl, *In Vielfalt geeinte Grundrechte*, VERFASSUNGSBLOG (Nov. 27, 2019), <https://verfassungsblog.de/in-vielfalt-geeinte-grundrechte/>.