Hitotsubashi Journal of Law and Politics 49 (2021), pp.1-15. © Hitotsubashi University
https://doi.org/10.15057/hjlp.2020001

TRILATERAL RELATIONS BETWEEN NATIONAL INFERIOR COURTS, NATIONAL SUPERIOR COURTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION: 'CONVERSION' OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

Yumiko Nakanishi*

Abstract

National inferior courts have challenged the decisions of national superior courts (supreme courts or constitutional courts), relying on the preliminary ruling procedure of Article 267 of the Treaty on the functioning of the European Union. Recently, a new reaction from one of the most stubborn national courts, the German Federal Constitutional Court, occurred. It changed its attitude towards the Charter of Fundamental Rights of the EU and the preliminary ruling procedure in the so-called 'the right to be forgotten II' case in November 2019. One of the reasons for this change lies in the growth of the role of national inferior courts and the weak influence of the German Federal Constitutional Court. This article describes the trilateral relations between national inferior courts, supreme courts or constitutional courts and the Court of Justice of the European Union and how the German Federal Constitutional Court changed its attitude towards the EU Charter and the Court of Justice of the EU.

Keywords: trilateral relations, national inferior courts, national superior courts, constitutional courts and the Court of Justice of the European Union, the preliminary ruling procedure of Article 267 TFEU, Case C- C-68/17 IR v JQ, the German Federal Constitutional Court, the Right to be forgotten II, the EU Charter of Fundamental Rights

Content

* Professor of European Union Law, Graduate School of Law, Hitotsubashi University, Tokyo, Japan, Visiting Scholar at the Max Planck Institute Luxembourg for Procedural Law. Email: yumiko.nakanishi@r.hit-u.ac.jp.

I. *Introduction*

National inferior courts[1] are subject to national superior courts. For example, a German national inferior court (ein Landesverwaltungsgericht) is subject to the German Federal Administrative Court (das Bundesverwaltungsgericht). The German Federal Administrative Court is subject to the German Federal Constitutional Court (GFCC) (das Bundesverfassungsgericht). This is the result of a hierarchy of national legal order. National inferior courts are not subject to the Court of Justice of the European Union (CJEU) because the latter does not belong to the hierarchy. However, national inferior courts challenge the decisions of national superior courts (supreme courts or constitutional courts), using the preliminary ruling procedure of Article 267 of the Treaty on the Functioning of the European Union (TFEU). In other words, the preliminary ruling procedure enables national inferior courts not to follow the decisions of national superior courts when they could be incompatible with EU law. Demaret indicated that the Court of Justice found the most fervent interlocutors among certain national inferior courts and EU law found the most ardent proselytes among them.[2]

This role of national inferior courts could already be seen in 1996 as Demaret noted. Now, a new reaction from one of the most stubborn national courts, the GFCC, can be found. The GFCC changed its attitude towards the Charter of Fundamental Rights of the EU (the Charter) in the so-called Recht auf Vergessen II (the right to be forgotten II) case. The background of this change lies in the growth of the role of national inferior courts and the weak influence of the GFCC.

This article describes the trilateral relations between national inferior courts, supreme courts or constitutional courts and the CJEU. Concretely, this article discusses how national inferior courts have used the preliminary ruling procedure, how the Court of Justice has reacted to them and how national superior courts changed their attitude, facing weak influence by them. This article does not deal with traditional bilateral relations between the CJEU and national superior courts,[3] but concentrates on trilateral relations and deals with bilateral relations between the CJEU and national superior courts as far as national inferior courts are concerned.

II. *The Preliminary Ruling Procedure*

1. Relevant Provisions

According to the principle of sincere cooperation the Member States must take appropriate measures to ensure fulfilment of EU law and must refrain from any measures which could hinder the attainment of the Union's objective (Article 4 para. 3 TEU). National courts as

[1] This article does not distinguish between courts and tribunals. Therefore, the concept of national inferior courts includes national courts and tribunals.

[2] Paul Demaret, 'Le juge et le jugement dans l'Europe d'aujourd'hui: la Cour de Justice des Communautés Européennes', in Robert Jacob (dir.), *Le juge et le jugement dans les traditions juridiques européennes*, 1996, L.G.D.J, pp.313–314.

[3] For example, Laurence Burgorgue-Larsen, 'Les résistances des États de droit', in J. Rideau (dir.), *De la Communauté de droit à l'Union de droit*, 2000, L.G.D.J, pp.423–458.

organs of the Member States are obliged not only to comply with EU law, but also to ensure the effectivity of EU law (Article 19 para. 1 subpara. 2). EU regulations are directly applicable and EU directives are transformed into national measures. As national courts apply EU law, they function as 'EU courts'.

National inferior courts may seek a preliminary ruling before the Court of Justice of the EU based on Article 267 TFEU. This preliminary ruling procedure is a keystone of the EU's judicial system and sets up 'a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States'.[4] The procedure has 'the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy'.[5] Using this preliminary ruling procedure, national courts have contributed to guaranteeing the effectiveness of EU law.

2. Win-win Relation between National Inferior Courts and the CJEU

The preliminary ruling brings a win-win relation between national inferior courts and the CJEU.[6] National inferior courts are inferior to national supreme courts or constitutional courts. However, those courts can make use of the preliminary ruling as a means to review the hierarchy of national legal order and to object to national superior courts.[7] National inferior courts seek a preliminary ruling before the Court of Justice so that they condemn national superior courts.[8] The latter sometimes hesitates to comply with EU law, instead relying on their own interpretation of national law. In that case national inferior courts use the preliminary ruling procedure in order to correct this interpretation. As a result, the preliminary ruling procedure changes the hierarchy of national judicial systems to some extent. The preliminary ruling procedure confers national inferior courts an autonomy towards national superior courts in the field of EU law.[9] The preliminary ruling procedure has advantages for the Court of Justice, too. National inferior courts support the Court of Justice, playing the role of 'EU courts' and protecting the effectivity of EU law.

3. Supreme Courts or Constitutional Courts

On the one hand, national inferior courts may seek a preliminary ruling before the Court of Justice according to Article 267 TFEU. On the other hand, national courts or tribunals against whose decisions there is no judicial remedy under national law are obliged to seek a preliminary ruling in order to guarantee unified interpretation of EU law. In other words, supreme courts or constitutional courts must seek a preliminary ruling before the Court of Justice. However, they tend or at least tended to hesitate to do so, relying on the CILFIT[10] case

[4] Case Opinion 2/13, Accession to ECHR, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 176.

[5] *Ibid*.

[6] Laurent Coutron, 'Le renvoi préjudiciel à la Cour de justice de l'Union européenne, facteur de perturbation des hiérarchies juridictionnelles nationales?', in *Mélanges en l'honneur du Professeur Dominique Rousseau*, 2020, p.66.

[7] Coutron, note (6), p.66.

[8] *Ibid.*

[9] Demaret, note (2), p.314.

[10] Case 283/81, CILFIT, Judgment of 6 October 1982, ECLI:EU:C:1982:235; para. 21, '...that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community

law or even without referring to it. For example, the GFCC has sought a preliminary ruling only twice regarding the OMT case[11] and PSPP case.[12] In the case of the European Arrest Warrant (Europäischer Haftbefehl)[13] the GFCC did not accept the transfer of the American person concerned to Italy although an Italian court had issued a European arrest warrant regarding him, applying the so-called Verfassungsidentitätskontrolle (constitutional identity review) which the GFCC had established in its Lisbon case.[14] Although the GFCC derogated from an obligation of the implementation of a framework decision regarding the European Arrest Warrant, the GFCC did not seek a preliminary ruling, relying on the CILFIT case law.[15]

III. *Trilateral Relations between National Inferior Courts, National Superior Courts and the Court of Justice*

1. General

(1) Jurisdiction of National Courts and the Court of Justice

National courts are responsible for interpreting national law while the Court of Justice is responsible for interpreting EU law. In particular, regarding an annulment of an EU measure, only the Court of Justice has jurisdiction to interpret the concerned measure and, if necessary, to annul it.[16] It means that national courts cannot interpret EU law by themselves. They apply EU law and, if they have some doubts about an interpretation of an EU measure, they seek a preliminary ruling before the Court of Justice and then apply it based on the interpretation by the Court of Justice. National courts have jurisdiction to interpret national law. However, EU law precludes national law if the latter is not compatible with the former.

2. Forms of Trilateral Relations

(1) A Lower Ordinary Court, a Higher Ordinary Court and the Court of Justice

Case 166/73 Rheinmühlen-Düsseldorf[17] is a good example of the trilateral relations between a national inferior court, a national superior court and the Court of Justice. Specifically, the trilateral relations are between the Hessisches Finanzgericht as a national inferior court, the Bundesfinanzhof as a national superior court and the Court of Justice. The Hessiches Finanzgericht considered that the decision by the Bundesfinanzhof was not compatible with EU law and sought a preliminary ruling before the Court of Justice. Facing

law is so obvious as to leave no scope for any reasonable doubt...'.

[11] BVerfG, (OMT-Vorlage), Beschluss des Zweiten Senats vom 14. Januar 2014, 2 BvE 13/13, 2 BvR 2728/13.

[12] BVerfG, (PSPP-Vorlage), Beschluss des Zweiten Senats vom 18. Juli 2017, 2 BvR 859/15.

[13] BVerfG, (Europäischer Haftbefehl), Beschluss des Zweiten Senats vom 15. Dezember 2015, 2 BvR 2735/14.

[14] BVerfG, (Lissabon), Urteil des Zweiten Senats vom 30. Juni 2009, 2 BvR 2/08.

[15] BVerfG, (Europäischer Haftbefehl), Beschluss des Zweiten Senats vom 15. Dezember 2015, 2 BvR 2735/14, Rn. 125.

[16] Case 314/85, Foto-Frost, Judgment of 22 October 1987, ECLI:EU:C:1987:452.

[17] Case 166/73, Rheinmühlen-Düsseldorf, Judgment of 16 January 1974, ECLI:EU:C:1974:3.

this, the Bundesfinanzhof itself sought a preliminary ruling before the Court of Justice. This is the case. The Bundesfinanzhof asked a question to the Court regarding whether the preliminary ruling procedure gives a national inferior court an unfettered right to refer questions to the Court of Justice, or it leaves unaffected rules of domestic law to the contrary whereby a national inferior court is bound on points of law by the judgments of a national superior court. The national inferior court tried to make use of the Court of Justice in order to derogate from a decision of the national superior court, insisting that the decision of the latter was incompatible with EU law. In this Case 166/73 Rheinmühlen-Düsseldorf the Bundesfinanzhof tried to hinder such an action by the national inferior court. However, the Court of Justice did not support its view of the Bundesfinanzhof and rather gave the national inferior court an unfettered right to refer the matter to the Court for preliminary ruling.

In Case C-581/14 Naderhirn[18] the trilateral relations between the Verwaltungsgericht des Landes Oberösterreich as a national inferior court, the Verwaltungsgerichtshof as a national superior court and the Court of Justice are relevant. The Verwaltungsgerichtshof in Austria did not comply with a decision by the Court of Justice, interpreting national law. Nevertheless, it held that the Verwaltungsgericht des Landes Oberösterreich was bound by the decision of the Verwaltungsgerichtshof. Therefore, the Verwaltungsgericht des Landes Oberösterreich sought a preliminary ruling before the Court of Justice regarding the interpretation of Article 267 TFEU and the principle of primacy of EU law. The Court of Justice backed the view of the national inferior court, stating that the national legal situation is not compatible with EU law, so far as national law obliges national inferior courts to be bound by the interpretation by the national superior court, which hinders guaranteeing that the principle of primacy of EU law is ensured.

In Case C-173/09 Elchinov[19] the trilateral relations between an administrative court, a supreme administrative court in Bulgaria and the Court of Justice are discussed. The administrative court referred several questions to the Court of Justice for a preliminary ruling. One of the questions was whether the administrative court was obliged to take account of binding directions given to it by a higher court, i.e. the supreme administrative court, when its decision was set aside and the case referred back for reconsideration if there was reason to assume that such directions were inconsistent with EU law. Referring to Case 166/73 Rheinmühlen-Düsseldorf and other relevant cases in its reasoning,[20] the Court of Justice held that the national court was bound by the interpretation of the provisions at issue given by the Court of Justice and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with EU law.[21]

(2) A National Inferior Court, a Constitutional Court and the Court of Justice

It is noteworthy that national inferior courts have made use of the preliminary ruling procedures in order to strengthen their power, penetrate their will or carry through the role of 'EU courts' recently.

1) Case C-188/10 and C-189/10 Melki and Abdeli

In France, the three highest courts are: the Cour de cassation, the Conseil d'État and the

[18] Case C-581/14, Naderhirn, Order of 15 October 2015, ECLI:EU:C:2015:707.
[19] Case C-173/09, Elchinov, Judgment of 5 October 2010, ECLI:EU:C:2010:581.
[20] Case C-173/09, *ibid*., para. 27.
[21] Case C-173/09, *ibid*., para. 30.

Conseil Constitutionnel. The Conseil Constitutionnel has the final say on the constitutionality.[22] In Case C-188/10 and C-189/10 Melki and Abdeli[23] the trilateral relations between the Cour de Cassation as a national inferior court, the Cour constitutionnel as a national superior court and the Court of Justice are discussed. Mr. Melki and Abdeli, who were unlawfully present in France, were controlled by the police near the border with Belgium. They disputed the lawfulness of this check control and raised the issue of the constitutionality of Article 78–2 of the Code of Criminal Procedure, insisting that that provision prejudices the rights and freedom guaranteed by the Constitution. A court submitted the question on constitutionality to the Cour de cassation. They also maintained that that relevant provision was contrary to the principle of freedom of movement for persons laid down in Article 67 (2) TFEU. The Cour de cassation first doubted whether Article 78–2 of the Code of Criminal Procedure was compatible with EU law. Second, the Cour de cassation infers from the relevant provisions on the procedural mechanism of the priority question on constitutionality (le mécanisme procedural de 'question prioritaire de constitutionnalité', QPC)[24] that courts are denied the opportunity to refer a question to the Court of Justice for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel. Therefore, the Cour de cassation sought a preliminary ruling before the Court of Justice. The Cour de cassation asked whether Article 267 TFEU precluded legislation regarding the constitutionality review procedure in so far as the relevant provisions require national courts to rule as a matter of priority on the submission to the Conseil constitutional of the question on constitutionality referred to them. More simply put, the Cour de cassation doubted whether the procedural mechanism of the priority question on constitutionality (QPC) was compatible with EU law. The Cour de cassation considered that national courts could be deprived of their possibility to seek a preliminary ruling before the Court of Justice by the QPC mechanism as the decisions of the Conseil constitutionnel would not be subject to any appeals and national courts would be obliged to comply with its decisions.

The Court of Justice held that the mechanism on QPC was compatible with the preliminary ruling procedure, if three conditions were fulfilled: national courts may refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary; they may take any measure necessary to ensure

[22] According to Order No 58–1067 of 7 November 1958 on the organic law governing the Conseil constitutionnel, as amended by French Organic Law No 2009–1523 of 10 December 2009, the procedural mechanism on constitutionality is regulated in a following way: Where pleas are made before the court or tribunal challenging whether a legislative provision is consistent with the rights and freedoms guaranteed by the Constitution and it must rule as a matter of priority on whether to submit the question on constitutionality to the Conseil d'État or the Cour de cassation. Then, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent with the rights and freedoms guaranteed by the Constitution and it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel. The Conseil d'État or the Cour de cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality must be referred to the Conseil constitutionnel where the conditions laid down in Article 23–2(1) and (2) are met and the question is new or of substance. Where a reference has been made to the Conseil constitutional, the Conseil d'État or the Cour de cassation must stay proceedings until it has made its ruling. The Conseil constitutionnel must issue a ruling within three months of the date on which the matter was referred to it.

[23] Case C-188/10 and C-189/10, Melki and Abdeli, Judgment of 22 June 2010, ECLI:EU:C:2010:363.

[24] Since 1 March 2010 the procedure of the QPC entered into force.

provisional judicial protection of the rights under EU law; they may disapply the national legislative provision concerned if they consider it to be contrary to EU law.[25] The Cour de cassation sought the preliminary ruling at the introduction of the QPC procedure before the Court of Justice. Then, the Cour de cassation won an endorsement from the Court of Justice. The QPC procedure is consistent with EU law only if national inferior courts are ensured to conduct the three measures mentioned above. The Cour de casssation succeeded in driving a wedge into the power of the Conseil constitutionnel regarding the QPC procedure.

2) Case C-416/10 Križan

In Case C-416/10 Križan[26] the trilateral relations between a supreme court as a national inferior court, a constitutional court as a national superior court, and the Court of Justice are discussed. According to a Slovakian legal order the Constitutional Court of the Slovak Republic is superior to the Supreme Court. The Supreme Court ruled that relevant competent authorities had failed to observe concerned rules governing the participation of the public in a procedure and had not sufficiently assessed the environmental impact of the construction of a landfill site. The Constitutional Court held that the Supreme Court had violated a fundamental right to legal protection of a company, a fundamental right to property and a fight to peaceful enjoyment of its property. It annulled an order and set aside a judgment by the Supreme Court, referring the case back to the latter so that it could give a fresh ruling. However, the Supreme Court had doubts regarding the compatibility of the decisions by the Constitutional Court with EU law. Therefore, the Supreme Court sought a preliminary ruling before the Court of Justice.

The Court of Justice held that 'a rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings'.[27] It also ruled that a national inferior court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to EU law, to seek a preliminary ruling before the Court of Justice.[28] Furthermore, the Court of Justice clarified that a national court is obliged to submit, of its own motion, a request for a preliminary ruling to the Court of Justice even if it is ruling on a referral back to it after its first decision was set aside by the national constitutional court concerned and even if a national rule obliges it to resolve the dispute by following the decision of the latter court.[29] The Court of Justice enabled and guaranteed the Supreme Court to seek a preliminary ruling before the Court of Justice even against the national rule and the will of the Constitutional Court.

3) Case C-5/14 Kernkraftwerke Lippe-Ems

In Case C-5/14 Kernkraftwerke Lippe-Ems[30] a German administrative court, the Finanzgericht Hamburg, referred a question to the German Federal Constitutional Court (GFCC) and, in a parallel procedure, to the Court of Justice. According to Paragraph 100 (1) of the GG (German Basic Law) national courts are prohibited from adjudicating on the substance until the GFCC has given its decision, but not from referring to the Court for preliminary

[25] Case C-188/10 and C-189/10, Melki and Abdeli, note (23), para. 57.
[26] Case C-416/10, Križan, Judgment of 15 January 2013, ECLI:EU:C:2013:8.
[27] Case C-416/10, Križan, Judgment of 15 January 2013, ECLI:EU:C:2013:8, para. 68.
[28] *Ibid.*
[29] *Ibid*., para. 73.
[30] Case C-5/14, Kernkraftwerke, Judgment of 4 June 2015, ECLI:EU:C:2015:354.

ruling. The Finanzgericht Hamburg stated that if an interpretation of EU law by means of a reference for a preliminary ruling could be sought only after the GFCC had given a decision, the total duration of the proceedings could extend over several years. Therefore, the Finanzgericht Hamburg sought a preliminary ruling before the Court of Justice.

The Court of Justice held that the national court must be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate even at the end of an interlocutory procedure for the review of constitutionality.[31] The Court of Justice reconfirmed the decision of Case C-188/10 and C-189/10 Melki and Abdeli. Furthermore, the Court of Justice ruled that as for the fact that Paragraph 100 (1) of GG imposed a stay of proceedings on a national inferior court, it should be recalled that the existence of a national procedural rule cannot question the discretion enjoyed by national inferior courts to make a reference to the Court of Justice for a preliminary ruling.[32] Finally, the Court of Justice held that Article 267 TFEU must be interpreted as meaning that a national court neither loses the right nor is exempt from the obligations to submit to the Court of Justice, on the grounds that an interlocutory procedure for the review of constitutionality of the national legislation concerned is pending before the national court responsible for carrying out such review.[33] This case is not a direct conflict between a national inferior court and a national superior court. However, the Court of Justice limits the application of a provision of a national constitution and thus the power of the GFCC, supporting the national inferior court in this case.

4) Case C-414/16 Egenberger

In Case C-414/16 Egenberger[34] the indirect trilateral relations between the German Federal labour Court (GFLC), the GFCC and the Court of Justice are discussed. Article 4 (2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation was transposed into German law in Paragraph 9 of the Allgemeines Gleichbehandlungsgesetz (AGG) (General Law on equal treatment). German legislature did so in the light of the case-law of the GFCC. The GFLC considered that the interpretation of Paragraph 9 (1) of the AGG[35] was not compatible with EU law. Therefore, the GFLC sought a preliminary ruling before the Court of Justice.

The Court of Justice held that the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law and as a result a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law.[36] Thus, the Court of Justice

[31] Case C-5/14, Kernkraftwerke Lippe-Emas, note (30), para. 35.

[32] Case C-5/14, note (30), para. 37.

[33] Case C-5/14, note (30), para. 39.

[34] Case C-414/16, Egenberger, Judgment of 17 April 2018, ECLI:EU:C:2018:257.

[35] Paragraph 9 (1) of the AGG is following: 'Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious communities, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination, or the nature of the activities engaged in.'

[36] Case C-414/16, Egenberger, note (34), paras. 72 and 73.

supported the GFLC by disallowing deference to the case-law of the GFCC.

3. Treatment of National Law and National Case Law by the Court of Justice

The Court of Justice has judged how to deal with national law or national case law. In judging the Court of Justice has indicated consistently that it would not compromise in giving the full effectiveness of EU law on the one hand and in ensuring the preliminary ruling procedure for national courts on the other.

(1) Full Effectiveness of EU Law

The Court of Justice has developed obligations to ensure the full effectiveness of EU law from a duty of consistent interpretation including a duty of change of case-law and a duty of disapplication of national law.

In Case 14/83 Colson the Court of Justice introduced a duty of consistent interpretation: National courts were required to interpret their national law in light of the wording and the purpose of the directive in order to achieve the result referred to in Article 288 TFEU.[37] In Case C-397-403/01 Pfeiffer the Court of Justice explained the duty of consistent interpretation was inherent in the System of the Treaty: The requirement of national law to be interpreted in conformity with EU law was inherent in the system of the Treaty, since it permits the national court, for matters within its jurisdiction, to ensure the full effectiveness of EU law.[38] In Case C-414/16 Egenberger, the Court of Justice took the decision one step further: The requirement to interpret national law in a manner that is consistent with EU law includes the obligation for national courts to change their established case-law, where necessary.[39] Deference to national case-law established even by a constitutional court is forbidden by the Court of Justice. This Judgment was reconfirmed in Case C-68/17 IR v JQ.[40] Moreover, where it is impossible for a national court to interpret the applicable national law in conformity with EU law, national courts are obliged to ensure within their jurisdiction a judicial protection concerned and to guarantee the full effectiveness of relevant articles by disapplying if need be any country provision of national law.[41]

(2) Guarantee of the Preliminary Ruling Procedure

The Court of Justice is indeed ready to intervene into the autonomy of national procedural law and, if necessary, calls into question the hierarchy of national legal order, as Sarmiento commented regarding Case Melki and Abdeli.[42] Following decisions of the Court of Justice show how the Court has intervened against national superior courts in conflicts between national inferior courts and national superior courts.

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[37] Case 14/83, Colson, Judgment of 10 April 1984, ECLI:EU:C:1984:153, para. 26.

[38] Case C-397/01 to C-403/01, Pfeiffer, Judgment of 5 October 2004, ECLI:EU:C:2004:584, para. 114.

[39] Case C-414/16, Egenberger, note (34), para. 72.

[40] Case C-68/17, IR v JQ, Judgment of 11 September 2018, ECLI:EU:C:2018:696, para. 64.

[41] Case C-414/16, Egenberger, note (34), para. 82; Case C-68/17, IR v JQ, Judgment of 11 September 2018, ECLI:EU:C:2018:696, para. 71; Cf. Case 106/77, Simmenthal, Judgment of 9 March 1978, ECLI:EU:C:1978:49, para. 21; Case C-144/04, Mangold, Judgment of 22 November 2005, ECLI:EU:C:2005:709, para. 78; Case C-555/07, Kücükdeveci, Judgment of 19 January 2010, ECLI:EU:C:2010:21, paras. 53 and 54.

[42] Daniel Sarmiento, 'La question prioritaire de constitutionnalité et le droit européen', *RTD eur.* 2010. p.588.

The Court of Justice held that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court of Justice questions of interpretation of EU law.[43] Furthermore, the Court of Justice ruled that the preliminary ruling procedure cannot be called into question by the application of national rules, which permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.[44] Moreover, the Court of Justice held that the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of primacy of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory for the reviews of constitutionality.[45] Any procedural rules of a national constitution cannot call into question the discretion enjoyed by national courts to seek a preliminary ruling before the Court of Justice.[46]

4. Case C-68/17 IR v JQ: Trilateral Relation between the German Federal Labour Court, the German Federal Constitutional Court and the Court of Justice

Case C-68/17 IR v JQ[47] is important and symbolic for the trilateral relations between a national inferior court, a national superior court and the Court of Justice. It is a pivotal case for the trilateral relation. In Case C-414/16 Egenberger the indirect trilateral relation was discussed, in which the national inferior court doubted the compatibility of the case-law by the GFCC with EU law. Case C-68/17 IR v JQ dealt with the direct trilateral relations between the German Federal Labour Court (GFLC), the GFCC and the Court of Justice. In addition, it is feasible that this case could trigger a change of attitude of the GFCC towards the Court of Justice, as is discussed later.

JQ, a Catholic doctor, was a chief doctor in the Internal Medicine Department of IR, a Catholic hospital. JQ divorced and remarried lawfully, although the marriage was invalid under canon law. IR dismissed him, insisting that he had infringed his duty of loyalty arising under his employment contract. That employment contract referred to the Basic Regulations on employment relationships in the service of the Church, which lay down that the entry by persons in managerial positions into an invalid marriage violates the duty of loyalty. JQ brought an action against his dismissal before a German labour court. This application was accepted by the labour court. Then, IR appealed against the decision before a higher labour court, which did not accept the application. IR then brought an application before the GFLC, which also did not accept the application. Therefore, IR brought an action before the GFCC. The GFCC set aside the decision of the GFLC and referred the case back to the GFLC, attaching a high value to the church's right of self-determination (Selbtbestimmungsrecht) which is guaranteed through Article 140 Grundgesetz (GG) (the German Basic Law).[48] The GFCC considered that it was for

[43] Case 166/73, Rheinmühlen-Düsseldorf, Judgment of 16 January 1974, ECLI:EU:C:1974:3, para. 4.

[44] Case C-210/06, Cartesio, Judgment of 16 December 2008, ECLI:EU:C:2008:723, para. 98.

[45] Case C-5/14, Kernkraftwerke Lippe-Ems, note (30), para. 35; This paragraph is reconfirmed in Case C-322/16, Starnet, Judgment of 20 December 2017, ECLI:EU:C:2017:985, para. 22.

[46] Case C-5/14, Kernkraftwerke Lippe-Ems, note (30), para. 37.

[47] Case C-68/17, IR v JQ, Judgment of 11 September 2018, ECLI:EU:C:2018:696.

the Court of Justice to determine whether JQ's dismissal by IR was lawful under Paragraph 9 (2) of the AGG[49] according to EU law, in particular Article 4 (2) subpara. 2 of the Equal Treatment Directive 2000/78.[50] Therefore, the GFLC sought a preliminary ruling before the Court of Justice. Here, we can see the trilateral relation between the GFLC, GFCC and the Court of Justice.

The Court of Justice held that a church or other organisation, the ethos of which is based on religion or belief, can treat its employees in managerial positions differently, only if, taking into consideration the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief is a genuine, legitimate and justified occupational requirement in light of the ethos concerned.[51] Furthermore, while it ruled that it was for the GFLC to determine whether those conditions are satisfied, the Court of Justice held that it might nevertheless provide guidance, based on the case files and the submitted evidence, in order to enable the GFLC to give judgment in the particular case before it.[52] Then, the Court of Justice held that adherence to the notion of marriage did not appear to be necessary for the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed.[53] Finally, the Court of Justice observed that it did not appear to be a genuine requirement of that occupational activity.[54]

The Court of Justice supported the view of the GFLC in this case, giving an answer that the GFLC had wanted. It means that the Court of Justice refused the decision of the GFCC indirectly. The conflict between JQ and IR regarding the dismissal of JQ was in fact a conflict of power balance between the GFLC and the GFCC. The Court of Justice intervened to the frustration of the GFCC. After receiving this preliminary ruling, the GFLC gave a final decision regarding this case, throwing out the view of the Catholic hospital.[55] The GFLC made use of the preliminary ruling procedure to deviate from the binding by a national superior court, the GFCC and to penetrate its own view. As a result, the GFLC succeeded in it, while this affair would make the GFCC change its mind towards the Court of Justice and the preliminary ruling procedure.

Moreover, as regards the point of individual rights, the Court of Justice held that the GFLC was obliged, where it is not possible for it to interpret the applicable law in a manner that is consistent with Article 4 (2) of Directive 2000/78, to provide the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on the grounds of religion or belief, now enshrined in Article 21 of the EU

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[48] BVerfG, (JQ), Beschluss des Zweiten Senats vom 22. Oktober 2014, 2 BvR 661/12.

[49] Paragraph 9 (2) of the AGG is following: 'The prohibition of a difference of treatment on grounds of religion or belief shall not affect the right of the religious communities mentioned in subparagraph 1, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief, to require their employees to act in good faith and with loyalty in accordance with their self-perception.'

[50] The second subparagraph of Article 4 (2) of Directive 2000/78 is following: 'Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

[51] Case C-68/17, IR v JQ, note (40), para. 55.

[52] Case C-68/17, IR v JQ, note (40), para. 56.

[53] Case C-68/17, note (40), para. 58.

[54] *Ibid.*

[55] Bundesarbeitsgericht, Urteil des 2. Senats vom 20.2.2019, 2 AZR 746/14.

Charter of Fundamental Rights, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.[56] In addition, the Court of Justice judged that the prohibition of all discrimination on grounds of religion or belief, now laid down in Article 21 of the Charter, is a mandatory general principle of EU law and is sufficient to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law.[57] This judgment enables the GFCC to realize the power of the preliminary ruling procedure and EU law, which would lead to the change of attitude of the GFCC towards EU law and the Court of Justice.

IV. *'Conversion' of the German Federal Constitutional Court*

1. Attitudes by the German Federal Constitutional Court before the Right to Be Forgotten Cases

In 1974 the GFCC considered that the EU (at that time the European Community) was immature in guaranteeing fundamental rights and concretising democracy, and showed an attitude that it was ready to review EU measures with the German Basic Law in the so-called Solange I case.[58] About ten years later, the GFCC changed its attitude towards the EU measures in the so-called Solange II case.[59] It declared that it would not review them further as long as fundamental rights were at the EU level adequately guaranteed. The GFCC gave a judgment regarding the Treaty of Lisbon at its ratification.[60] In this Lisbon case the GFCC introduced two controls, the 'Ultra-vires-Kontrolle (ultra-vires review)' and the 'Identitätskontrolle (identity review)'. The GFCC reviewed an implementation of an EU measure in the so-called Solange III, the Framework decision on the European Arrest Warrant, using the constitutional identity review for the first time.[61] The GFCC referred to the identity review in the OMT and PSPP cases.[62] In the Solange I and Solange II cases the guarantee of fundamental rights and democracy were discussed. Since the Treaty of Lisbon, the ultra-vires of the EU competence and the constitutional identity issues have been discussed at the GFCC. They are slow changes with the development of the EU Fundamental rights and EU democracy. The EU is no longer immature even in the eyes of the GFCC. The EU has a binding Charter of fundamental rights with the Treaty of Lisbon. In the field of the protection of personal data, the regulation 2016/679 (General Data Protection Regulation, GDPR) was adopted and entered into force. In cases regarding this field, the Court of Justice has guaranteed high standards protection.[63]

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[56] Case C-68/17, note (40), para. 71.

[57] *Ibid*., para. 69.

[58] BVerfG, (Solange I), Beschluss des Zweiten Senats vom 29. Mai 1974, 2 BvL 52/71.

[59] BVerfG, (Solange II), Beschluss des Zweiten Senats vom 22. Oktober 1986, 2 BvR 197/83.

[60] BVerfG, (Lissabon), Urteil des Zweiten Senats vom 30 Juni 2009, 2 BvR 2/08.

[61] BVerfG, (Europäischer Haftbefehl), Beschluss des Zweiten Senats vom 15. Dezember 2015, 2 BvR 2735/14; Yumiko Nakanishi, 'Completion of EU Measures through Court Decisions: The Example of the European Arrest Warrant', *Hitotsubashi Journal of Law and Politics*, vol. 45, 2017, pp.13–21.

[62] BVerfG, (OMT-Vorlage), Beschluss des Zweiten Senats vom 14. Januar 2014, 2 BvE 13/13, 2 BvR 2728/13; BVerfG, (PSPP-Vorlage), Beschluss des Zweiten Senats vom 18. Juli 2017, 2 BvR 859/15.

[63] Ex. Case C-131/12, *Google Spain*, Judgment of 13 Mat 2014, ECLI:EU:C:2014:317; Case C-362/14, *Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, ECLI:EU:C:2015:650; Joined Cases C-293/12 and C-

2. Toward the Right to Be Forgotten Cases

The decision by the Court of Justice in Case C-144/04 Mangold[64] was criticised in Germany. However, the Court of Justice reconfirmed this decision in Case C-555/07 Kücükdeveci.[65] In the Honeywell Case, the GFCC warned against the Mangold's decision, referring to the ultra-vires review.[66] Furthermore, there are trilateral relations between national inferior courts, the GFCC and the Court of Justice. In Case C-5/14 Kernkraftwerke Lippe-Ems[67] the national inferior court called into question the national procedural rule in Paragraph 100 (1) GG according to which it has to stay proceedings until the GFCC gives a decision and after that it can seek a preliminary ruling before the Court of Justice. In Case C-414/16 Egenberger[68] the national inferior court called into question the interpretation, the case-law by the GFCC. Finally, in Case C-68/17 IR v JQ[69] the GFLC called in to question the decision by the GFCC, which was directed at the GFLC itself. The Court of Justice intervened into each case and supported those national inferior courts. There were certainly several cases such as Case Melki and Abdeli, in which there were direct trilateral relations between the Cour de cassation, the Conseil constitutionnel and the Court of Justice. For the GFCC, Case C-68/17 IR v JQ is the first case to deal with the direct trilateral relations between the national inferior court, the GFCC and the Court of Justice. A slew of decisions of the Court of Justice towards the GFCC and, last of all, Case C-68/17 IR v JQ triggered a change of attitude of the GFCC.

The GFCC gave two decisions on 6 November 2019 regarding the protection of personal data. One is the so-called 'right to be forgotten I' case[70] and the other is the so-called 'right to be forgotten II' case.[71] Both cases are important and related to each other, but they are also different. In the former case relevant issues are not fully harmonised by EU law and the GFCC continues to use German fundamental rights as the primary standard of review. The former case is also related to a decision by the European Court of Human Rights.[72] The latter 'right to be forgotten II' case is more crucial to EU law. The GFCC declared itself to be ready to apply the Charter of Fundamental Rights of the European Union in reviewing national legislation where issues of concern are fully harmonised under EU law. Edenharter considered this change of attitude by the GFCC as a paradigm shift.[73] Thym commented that these right to be forgotten decisions marked a tectonic shift that will profoundly transform German constitutional law.[74]

594/12, *Digital Rights Ireland*, Judgment of 8 April 2014, ECLI:EU:C:2014:238; Case C-311/18, Schrems II, Judgment of 16 July 2020, ECLI:EU:C:2020:559.

[64] Case C-144/04, Mangold, Judgment of 22 November 2005, ECLI:EU:C:2005:709.

[65] Case C-555/07, Kücükdeveci, Judgment of 19 January 2010, ECLI:EU:C:2010:21.

[66] BVerfG, (Honeywell), Beschluss des Zweiten Senats vom 6. Juli 2010, 2 BvR 2661/06.

[67] Case C-5/14, Kernkraftwerke, Judgment of 4 June 2015, ECLI:EU:C:2015:354.

[68] Case C-414/16, Egenberger, Judgment of 17 April 2018, ECLI:EU:C:2018:257.

[69] Case C-68/17, IR v JQ, Judgment of 11 September 2018, ECLI:EU:C:2018:696.

[70] BVerfG, (Recht auf Vergessen I), Beschluss des Ersten Senats vom 6. November 2019, 1 BvR 16/17; Official English translation, BVerfG, Order of the First Senate of 06 November 2019, 1 BvR 16/17.

[71] BVerfG, (Recht auf Vergessen II), Beschluss des Ersten Senats vom 6. November 2019, 1 BvR 276/17; Official English translation, BVerfG, Order of the First Senate of 06 November 2019, 1 BvR 276/17.

[72] ECtHR, *M.L. and WW. v. Germany*, Judgment of 28 June 2018, nos 60798/10 and 65599/10.

[73] Andrea Edenharter, "Die EU-Grundrechte-Charta als Prüfungsmaßstab des Bundesverfassungsgerichts", *DÖV* 2020, p.349, p.351.

[74] Daniel Thym, 'Friendly Takeover, or: the Power of the "First Word"', *European Constitutional Law Review*, 16,

3. The Attitude of the GECC in the Right to be Forgotten II Case

The GFCC held that regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard review is not based on German fundamental rights, but solely on EU fundamental rights.[75] This is a big shift. Since the so-called Solange II in the 1986 decision, the GFCC had not reviewed EU measures until the so-called Solange III in 2015. Since the so-called Solange II, until now the GFCC has not reviewed EU measures in light of German fundamental rights (except the constitutional identity). In addition, the GFCC does not seek a preliminary ruling before the Court of Justice in principle except in the recent OMT and PSPP cases. On the one side, this stance of the GFCC shows respect towards EU law based on the primacy of EU law. On the other hand, this stance leads to a loss of its influence in the context of the development of EU law and guarantee of EU fundamental rights. In the trilateral relations between national inferior courts, the GFCC and the Court of Justice the GFCC is becoming weaker than before. Burchardt explains that domestic courts have the power and the duty to assess whether acts of domestic authorities are in conformity with EU law, including EU fundamental rights law, and to set aside these acts if they do not comply with EU law, using the preliminary ruling procedure.[76] It leads to the 'disempowerment' of the GFCC. Those situations triggered the change of attitude of the GFCC towards EU law, in particular the EU charter.[77]

The GFCC also held that fundamental rights protection vis-à-vis the ordinary courts and their application of the law (Rechtsanwendung) would remain incomplete if EU fundamental rights were not included in the GFCC's standard of review.[78] Furthermore, it held that fundamental rights protection can only be guaranteed if the GFCC applies EU fundamental rights as its standard when reviewing the application of the law by the ordinary courts.[79] With this judgment the GFCC declared that it would take responsibility for the guarantee of EU fundamental rights. It decided to no longer be a passive observer, but rather a positive actor in developing the EU fundamental rights.[80] For the first time the case made the GFCC a co-curator of the EU Charter, alongside the Court of Justice.[81]

V. *Concluding Remarks*

In the right to be forgotten II case the GFCC seems to have been converted to a positive actor in guaranteeing the EU fundamental rights alongside the Court of Justice, facing its weak

2020, pp.187–188.

[75] BVerfG, (Recht auf Vergessen II), Beschluss des Ersten Senats vom 6. November 2019, 1 BvR 276/17, Rn. 42; Official English translation, BVerfG, Order of the First Senate of 06 November 2019, 1 BvR 276/17, para. 42.

[76] Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudeunce of the German Constitutional Court on EU Fundamental Rights as a Standards of Review', *German Law Journal*, 21, 2020, p.1, p.10.

[77] Cf. Jürgen Kühling, 'Das „Recht auf Vergessenwerden" vor dem BVerfG-November(r)evolution für die Grundrechtsarchitektur im Mehrebenensystem', *NJW* 2020, p.275, p.278.

[78] BVerfG, Order of the First Senate of 06 November 2019, 1 BvR 276/17, para. 60.

[79] *Ibid.*

[80] Cf. Thomas Kleinlein, Neue starke Stimme in der europäischen Grundrechts-Polyphonie ', *Verfassungsblog*, 1 Dezember 2019.

[81] Jud Mathews, 'Some kind of Right', *German Law Journal*, 21, 2020, p.40, p.43.

influence in guaranteeing fundamental rights with the development of the EU fundamental rights and strengthening the power of national inferior courts and the Court of Justice. Trilateral relations between national inferior courts, the GFCC and the Court of Justice, which brought the change of the attitude of the GFCC, have developed through the preliminary ruling procedure.

I conclude that the conversion of the GFCC occurred in the right to be forgotten II case. This concusion has two reservations. First, the judgment in the right to be forgotten II case applies only for the field where relevant issues are fully covered by EU law. Otherwise, the GFCC continues to review the legislation concerned in light of German fundamental rights, even if the EU Charter applies to Germany according to Article 51 of the EU Charter.

Second, the first senate of the GFCC showed the right to forgotten I and II decisions. The Solange I, Solange II, Lisbon, European Warrant Arrest (Solange III), OMT and PSPP cases are decided not by the first senate, but the second senate of the GFCC. In the PSPP case,[82] which was finally decided on 5 May 2020, the GFCC still shows an attitude of a stubborn constitutional court towards the Court of Justice, judging that decisions by the European Central Bank (PSPP) are ultra-vires acts.

[82] BVerfG, (PSPP), Urteil des Zweiten Senats vom 05. Mai 2020, 2 BvR 859/15.