Hitotsubashi Journal of Law and Politics 51 (2023), pp.1-12. © Hitotsubashi University
https://doi.org/10.15057/hjlp.2022001

AUTONOMY OF THE EUROPEAN UNION LEGAL ORDER AND AUTONOMOUS INTERPRETATION

Yumiko Nakanishi*

Abstract

I have written several case notes, such as Opinion 1/91 *EEA*, Opinion 1/09 *Community patent*, Opinion 2/13 *ECHR*, the case of *Achmea*, Opinion 1/17 *CETA* and others regarding the autonomy of the European Union (EU) legal order. Recently, I wrote a case report on the *Dumitru-Tudor Dorobantu* case. Then, a simple question came to my mind: Why did the Court of Justice of the European Union (CJEU) borrow criteria from the European Court of Human Rights (ECtHR) instead of establishing its own criteria? On the one hand, the CJEU has insisted on the importance of the autonomy of the EU legal order and has refused to commit to international agreements. On the other hand, the CJEU not only referenced the case law of the ECtHR but also used the criteria established by the ECtHR. To address this question, this article aims to discuss whether the CJEU can and should construct the fundamental rights criteria of the Charter of the EU fundamental rights.

Content

I. *Introduction*

The dialogue between the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and national courts has been discussed in the context of the multilevel guarantee of fundamental rights, and has been highly valued. Dialogues between judges have been considered useful and important to guarantee fundamental or human rights. The case of *Dumitru-Tudor Dorobantu*[1] presents a dialogue of this kind. In this case, the CJEU considered the European Convention on Human Rights, although it did not just refer to the case law of the ECtHR, but made use of the criteria established by the ECtHR.

* Professor of EU law, Graduate School of Law, Hitotsubashi University, Tokyo, Japan
E-mail:yumiko.nakanishi@r.hit-u.ac.jp

[1] Case C-128/18, *Dumitru-Tudor Dorobantu*, Judgment of 15 October 2019, ECLI:EU:C:2019:857.

Observing this judgment, I wondered why the CJEU did not establish its own criteria. I conceived this question because I had observed the case law of the CJEU, in which the importance of autonomy of the EU legal order was emphasised. This implies that it tends not to accept conclusions of agreements of international organisations such as ECHR. Could this be a contradictory attitude of the CJEU? Or is the CJEU simply not allowed to establish criteria in the field of guarantee of fundamental rights because of Article 52 (3) of the Charter of Fundamental Rights (Charter) of the European Union? What do national courts and the ECtHR think about the autonomous interpretation of the CJEU? This article aims to discuss whether the CJEU can and should construct the fundamental rights criteria of the Charter when answering these questions. First, I outline the judicial dialogue between the CJEU, national courts, and the ECtHR regarding the European Arrest Warrant (EAW) mechanism and the nature of the concerned judgment that moved me to write this article. Second, I show how the CJEU has dealt with the autonomy of the Union's legal order. Third, I discuss autonomous interpretation and examine whether Article 52 (3) of the Charter forbids the CJEU from establishing its own criteria. Fourth, I show that Member State courts, in particular the German Federal Constitutional Court (GFCC), do not hinder the CJEU from establishing its own criteria based on the Charter and rather, the GFCC expects the CJEU to do so.

II. *Dialogue between judges*

In this section, I discuss the dialogue between the CJEU, national courts, and the ECtHR regarding the EAW mechanism. The EAW mechanism was established by the Council Framework Decision 2002/584.[2] This mechanism affects both fundamental rights and human rights. Thus, not only the CJEU but national courts as well have dealt with the EAW. In this regard the ECtHR case law has been referred to by them.

In the case of *Melloni*, the Spanish Constitutional Court sought a preliminary ruling before the CJEU and asked whether Article 53 of the Charter must be interpreted as allowing the executing Member State not to surrender a person convicted *in absentia* to guarantee the right to a fair trial and the rights of the defence laid down by the Spanish Constitution.[3] In this case, the CJEU held that the EAW measure has primacy over the national constitution, and that Member States must adhere to it. Subsequently, a constitutional complaint was brought before the GFCC.[4] The national Constitutional Court held that the surrender of a person convicted *in absentia* violated the 'principle of individual guilt (Schuldprinzip)', which is a matter of human dignity laid down in Article 1 Sec. 2 of the German Basic Law (GG, German constitution). Furthermore, the GFCC stated that the EAW mechanism did not relieve German authorities of their obligation to ensure compliance with the German constitution. While the CJEU gave more weight to the implementation of the EAW mechanism than to fundamental rights, the GFCC gave more weight to the latter than the former. Facing this judgment, the CJEU changed its

[2] OJ of the EU 2002 L190/1, Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

[3] Case C-399/11, *Melloni v Ministerio Fiscal*, Judgment of 26 February 2013, ECLI:EU:C:2013:107.

[4] BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514.

approach towards the EAW mechanism, taking into account the guarantee of fundamental rights in the *Aranyosi and Căldăraru* cases.[5] The referring court in the cases, the Regional Court of Bremen, Germany, pointed out that the conditions of detention in issuing states, Hungary and Romania, might violate the ECHR and the Charter. In these cases, the CJEU recognised the possibility of derogation from the EAW mechanism to protect fundamental rights, considering the conditions of detention, which differ from the judgment of the *Melloni* case. Thus, judicial dialogue enabled the CJEU to raise the level of protection of fundamental rights.

Finally, the case of *Dumitru-Tudor Dorobantu* gives us an opportunity to think about the autonomy of interpretation of the EU legal order. At first, the Romanian Court of first instance issued an EAW regarding Mr. Dorobantu towards the higher Regional Court of Hamburg, Germany. The Regional Court examined whether there was a real risk of inhuman or degrading treatment in detention and concluded that the person concerned should be surrendered to Romania to comply with the EAW mechanism because there had been improvements in the detention conditions there. However, Dorobantu lodged a constitutional complaint with the GFCC against this decision. The German Constitutional Court then held that the decision should be set aside because the right to be heard by a court laid down in Article 101 (1) GG was violated.[6] This violation was derived from the fact that the Higher Regional Court had not sought a preliminary ruling before the CJEU, although the latter had not yet clarified certain criteria regarding detention conditions. Receiving this judgment, the higher Regional Court decided to request a preliminary ruling from the CJEU; This *Dumitru-Tudor Dorobantu* case[7] moved me to write this article. The referring court inquired into the minimum standards for custodial conditions required under Article 4 of the Charter and the standards to assess whether custodial conditions complied with the fundamental rights guaranteed by EU law. The CJEU dealt with the question regarding 'the assessment of the conditions of detention having regard to the personal space available to the detainee'. To determine the minimum requirements with regard to incarceration in a multi-occupancy cell, the CJEU not only referred to the case law of the ECtHR, but to the standards established by the ECtHR, as well. As a preliminary point, the Court recalled that the meaning and scope of the right set out in Article 4 of the Charter are to be the same as those laid down in Article 3 of the ECHR, according to Article 52 (3) of the Charter. First, the CJEU confirmed that it relied on the case law of the ECtHR in relation to Article 3 of the ECHR and, more specifically, on the *Muršić v. Croatia* judgment.[8] Second, the CJEU stated that it had ruled that a strong presumption of a violation of Article 3 of the ECHR would arise when the personal space available to a detainee was less than 3 m^2 in multi-occupancy accommodation.[9] Furthermore, the Court held that it was apparent from ECtHR case law that the space factor remained 'an important factor in the assessment of the adequacy of conditions of detention'.[10] Then, the Court, in reference to the case law of the ECtHR in the *Muršić v. Croatia* case, stated: 'In cases where a detainee disposes of more than 4 m^2 of

[5] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016, ECLI:EU:C:2016: 198; cf. 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, p.13, pp.18-19.

[6] BVerfG, Beschluss des Zweiten Senats vom 19. Dezember 2017, 2 BvR 424/17.

[7] Case C-128/18, *Dumitru-Tudor Dorobantu*, Judgment of 15 October 2019, ECLI:EU:C:2019:857.

[8] Case C-128/18, ibid., para.71.

[9] Ibid., para.73.

[10] Ibid., para.75.

personal space in multi-occupancy prison accommodation and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention, as referred to in the preceding paragraph, remain relevant for the assessment of adequacy of an individual's conditions of detention under Article 3 of the ECHR'.[11] Eventually, the Court held that it was necessary, in the absence of minimum standards under EU law, 'to take account of the criteria laid down by the ECtHR in the light of Article 3 of the ECHR'. This means that the CJEU not only referred to the case law of the ECtHR, but also used standards established by the ECtHR.

I wonder whether this use of standards contradicts the autonomy of the EU legal order emphasised by the CJEU.

III. *Importance of autonomy of the Union legal order*

The CJEU has emphasised the importance of autonomy in the EU legal order. In the case of *Van Gend en Loos* in 1963, it stated that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[12] In the case of *Costa v ENEL* in 1964, the Court held that 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'[13] Thus, in 60', the Court established that the EEC Treaty (currently the TEU and the TFEU) created its own legal order.

The Court has given opinions according to which the envisaged international agreements were not compatible with EU law, because they could affect the autonomy of EU law.[14] For example, when the EC concluded a European Economic Area (EEA) Agreement with the EFTA states, the Court opined that the draft of the EEA Agreement was not compatible with European Community (EU) law;[15] the reason was that the EEA Court could affect the autonomy of the Community legal order, because it would have jurisdiction regarding the interpretation and application of the agreement and would have to rule on the respective competences of the Community and the Member States.[16] In the case of opinion 1/09 regarding the European and Community Patents Court, referring to the settled case law of the CJEU, such as the *Van Gend en Loos* case, the *Costa v ENEL* case and Opinion 1/91, the Court confirmed that it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties.[17] The Court held that the envisaged patent court would deprive national courts of their powers in relation to the interpretation and application of EU law and

[11] Ibid., para.75.

[12] Case 26/62, *Van Gend & Loos*, Judgment of 5 February 1963, ECLI:EU:C:1963:1, p.12.

[13] Case 6/64, *Costa v ENEL*, Judgment of 15 July 1964, ECLI:EU:C:1964:66, p.593.

[14] Ex., Christina Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back', *CMLRev.* 54, 2017, p.1627.

[15] Opinion 1/91, *EEA*, opinion of 14 December 1991, ECLI:EU:C:1991:490.

[16] Opinion 1/91, ibid., para.35.

[17] Opinion 1/09, *Creation of a unified patent litigation system*, Opinion of 8 March 2011, ECLI:EU:C:2011:123, paras.65-67.

the CJEU of its powers to reply, by preliminary ruling, to questions referred to by those courts. This would consequently alter the essential character of the powers that the Treaties confer on the EU institutions and Member States, which are indispensable to the preservation of the very nature of European Union law.[18] Following the Treaty of Lisbon, Article 6 explicitly stated that the EU accedes to the ECHR. Consequently, the European Commission negotiated to accede to the ECHR. However, in Opinion 2/13, the Court opined that the draft of the accession to the ECHR was not compatible with EU Law.[19] The Court stated that 'the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU'.[20] The Court also stated that the judicial system as conceived has its keystone; the preliminary ruling procedure has the object of securing a uniform interpretation of EU law, thereby serving to ensure its consistency, full effect, and autonomy, as well as the particular nature of the law established by the Treaties.[21] This has been demonstrated in several successive cases.[22] Furthermore, in opinion 1/17 regarding the Comprehensive Economic and Trade Agreement (CETA), which explicitly lays down the establishment of the investment court,[23] the Court held that 'the autonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law' and 'EU law is characterized by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions that are applicable to their nationals and to the Member States themselves'.[24] In the case of *Achmea* where the compatibility of an arbitral tribunal set up by a bilateral agreement between the Member States with EU law was discussed, the Court emphasised the importance of the autonomy of the EU legal system. It stated that an international agreement cannot affect the autonomy of the EU legal system, observance of which is ensured by the Court and the autonomy of EU law with respect to both national laws and international law, which is 'justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law'.[25] Furthermore, in the same case, the Court stated that to ensure the autonomy of the EU legal order, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.[26] In the case of *Komstroy* regarding the Energy Charter Treaty (ECT), which provides for arbitral tribunal, while confirming its settled case law, the Court stated that the autonomy of EU law with respect to both national and international law was justified by the essential characteristics of the EU and its law and that autonomy flowed from 'the fact that the European Union

[18] Opinion 1/09, ibid., para.89.

[19] Opinion 2/13, *ECHR*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454.

[20] Opinion 2/13, ibid., para.170.

[21] Opinion 2/13, ibid., para.176.

[22] Ex. Case C-284/16, *Slovak Republic v Achmea,* Judgment of 6 March 2018, ECLI:EU:C:2018:15, para.37; Case C-561/19, *Consorzio Italian Management v Rete Ferroviaria Italiana SpA*, Judgment of 6 October 2021, ECLI:EU:C:2021:799, para.27; Case C-430/21, *RS*, Judgment of 22 February 2022, ECLI:EU:C:2022:99, para.73.

[23] Opinion 1/17, *CETA*, Opinion of 30 April 2019, ECLI:EU:C:2019:341.

[24] Opinion 1/17, ibid., para.109.

[25] Case C-284/16, *Slovak Republic v Achmea*, Judgment of 6 March 2018, ECLI:EU:C:2018:15, paras.32-33.

[26] Case C-284/16, ibid., para.35.

possesses a constitutional framework that is unique to it'.[27] The Court also confirmed that the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law to ensure the preservation of the autonomy of the EU legal order.[28] Furthermore, the Court held that preservation of the autonomy of EU law precludes obligations under the ECT from being imposed on Member States as between themselves, and Article 26 (2) (c) of the ECT may not be applicable to disputes between a Member State and an investor of another Member State, because such a dispute may be removed from the EU judicial system, which calls into question the preservation of autonomy.[29] Independently from the context of international agreements, the Court confirmed that the specific and essential characteristics of EU law 'stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law'.[30]

Observing the case law of the Court regarding international agreements that entail courts or tribunals, a few observations can be made. The Court has emphasised the significance of the autonomy of the EU legal order and EU law in examining whether international agreements could affect it. The preservation of autonomy is related to the essential characteristics of the EU. Autonomy is particularly important with respect to Member States' laws and international law. In this context, the autonomy of the EU legal order means that EU law must not be interpreted by other international courts or tribunals. Furthermore, the Court has never held that standards established by other international courts or tribunals should not be used. The CJEU has never held that it should establish its own standards in interpreting EU law to ensure the autonomy of the EU legal order.

IV. *Autonomous interpretation*

In the previous section, we noticed that there is no contradiction between the CJEU's case law regarding the autonomy of the EU legal order and using standards established by other international courts. However, the question of whether the CJEU is allowed to establish its own standards of EU law, particularly within the scope of the Charter arises. First, I discuss its autonomous interpretation and the setting of its own definitions. Second, I examine Article 52 (3) of the Charter in the context of its limitations.

1. Autonomous interpretation and own definitions

In his article titled 'The Autonomy of the Community Legal Order',[31] Theodor Schilling notes that autonomy has different meanings.[32] The first is 'original autonomy', which describes a particular legal order that is not derived from any other legal order. The EU legal order is not

[27] Case C-741/19, *Republic of Moldova v Komstroy*, Judgment of 2 September 2021, ECLI:EU:C:2021:655, paras.42-43.

[28] Case C-741/19, ibid., para.45.

[29] Case C-741/19, ibid., paras.62-66.

[30] Case C-791/19, *Commission v Poland*, Judgment of 15 July 2021, ECLI:EU:C:2021:596, para.143.

[31] Theodor Schilling, 'The Autonomy of the Community Legal Order: An analysis of Possible Foundations'. *Harvard International Law Journal* 37, no.2, 1996, pp.389-410.

[32] Schilling, ibid., p.389.

an original autonomy because it is derived from EU treaties. The second kind of autonomy is 'derivative autonomy'. This indicates that a particular legal order is independent of the contents of other legal orders once it has been set up. The CJEU has recognised that the EU legal order has derivative autonomy, emphasising that the autonomy of the EU legal order is independent of the laws of the Member States and international law, as we have seen above. The third is interpretative autonomy, which means that only the institutions of a particular legal order are competent in interpreting its constitutional and legal rules.[33] In this section, I demonstrate that the EU legal order has interpretative autonomy, meaning that only the CJEU is competent to interpret EU law.

The CJEU has clarified that the meaning and scope of EU law terminology are not equal to those of national laws. For example, the definition of 'workers' in EU law differs from that in the laws of the Member States. In the case of *Levin*, the Court clarified that the terms 'worker' and 'activity as an employed person' were not expressly defined in any of the provisions in the (EEC) Treaty.[34] Then, the Court stated that those terms 'may not be defined by reference to the national laws of the Member States but have a community meaning'.[35] Furthermore, it held that the meaning and scope of these terms should be clarified in light of the principles of the EU legal order.[36] Finally, the Court held that the concepts of 'worker' and 'activity as an employed person' must be interpreted as: 'The rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration'.[37] Later, the Court generalised this approach in terms of EU law. It explained that the need for a uniform application of EU law and the principle of equality required that the terms of a provision of EU law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the EU with regard to the context of the provision and the objective pursued by the legislation in question.[38] In the case of *Engie Cartagena*, with respect to the concept of 'public service obligations', the CJEU stated that 'since Article 3 (2) of Directive 2009/72 does not make any reference to national laws concerning the meaning to be given to that concept, that provision must be regarded, for the purposes of the application of that directive, as containing an autonomous concept of EU law which must be interpreted in a uniform manner throughout the territory of the EU'.[39] With regard to the concept of a 'legal person' within the meaning of Article 263 (4) TFEU, the Court also stated that the concept must be regarded as an autonomous concept of EU law which must be interpreted in a uniform manner throughout the territory of the EU.[40] In addition, in the case of Opinion 2/13 regarding

[33] Schilling, ibid., pp.389-390.

[34] Case 53/81, *D.M. Levin v Staatssecretaris van Justitie*, Judgment of 23 March 1982, ECLI:EU:C:1982:105, para.9.

[35] Case 53/81, ibid., para.11.

[36] Case 53/81, ibid., para.12.

[37] Case 53/81, ibid., para.16.

[38] Case C-426/05, *Tele2 Telecommunication GmbH v Telekom-Control-Kommission*, Judgment of 21 February 2008, ECLI:EU:C:2008:103, para.26.

[39] Case C-523/18, *Engie Cartagena S.L. v Ministerio para la Tranción Ecológica*, Judgment of 19 December 2019, ECLI:EU:C:2019:1129, para.34.

[40] Case C-872/19P, *Venezuela v Council*, Judgment of 22 June 2021, ECLI:EU:C:2021:507, para.42.

the ECHR, the Court held that the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law to ensure that the autonomy of the EU legal order is preserved.[41]

Furthermore, in the case of *RS*,[42] where the primacy of EU law with regard to the national constitution was questioned, the CJEU clarified its jurisdiction and the principle of primacy again. It held that the Court has exclusive jurisdiction to provide a definitive interpretation of EU law.[43] The Court stated that national constitutional court cannot 'validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling of the Court.[44] The preliminary ruling procedure aims to secure a uniform interpretation of EU law and ensure its autonomy.[45] In the case of the *PSPP* regarding the competence of the European Central Bank (ECB), the GFCC sought a preliminary ruling from the CJEU. Receiving a decision by the CJEU, the GFCC gave a judgment that the measure of the ECB as well as the decision of the CJEU were ultra vires acts.[46] In light of this judgment, the European Commission initiated infringement proceedings against Germany.[47] Member States are obliged to comply with preliminary rulings of the CJEU.

It is clear from the case law of the CJEU that concepts of EU law are autonomous concepts, which must be interpreted in a uniform manner throughout the territory of the EU, and the CJEU gives interpretation to concepts of EU law that are independent of national laws. This means that autonomous interpretation by the CJEU is necessary to ensure uniform interpretation throughout the EU, and the CJEU is competent to do so. In addition, the Court has exclusive jurisdiction to provide a definitive interpretation of EU law.

2. Article 52 (3) Charter of the EU fundamental rights

I discuss whether there are inherent limitations in the Charter, that is, whether Article 52 (3) of the Charter hinders the CJEU from autonomously interpreting certain cases. The first sentence in Article 52 (3) of the Charter lays down that the meaning and scope of fundamental rights should be the same as those laid down by the ECHR as far as the Charter contains rights which correspond to rights guaranteed by the ECHR. Explanatory notes on Article 52[48] list articles in which both the meaning and scope are the same as the corresponding articles of the ECHR. The case of *Dumitru-Tudor Dorobantu*[49], which I have dealt with, is related to Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment'. According to the list, Article 4 corresponds to Article 3 of the ECHR. In the case, the CJEU stated that Article 4 has the same meaning and scope as the ECHR article, referring to the first sentence of Article 52 (3) of the Charter, and the explanations of the Charter regarding Article 52.[50] The second sentence of Article 52 (3) of the Charter lays down that the

[41] Case Opinion 2/13, ibid., para.174.
[42] Case C-430/21, *RS*, Judgment of 22 February 2022, ECLI:EU:C:2022:99.
[43] Case C-430/21, ibid., paras.52 and 72.
[44] Case C-430/21, ibid., para.72.
[45] Case C-430/21, ibid., para.73.
[46] BVerfG, Judgement of the Second Senate of 5 May 2020, 2 BvR 859/15.
[47] Later, the Commission stopped the infringement procedure.
[48] 'The explanations relating to the Charter of Fundamental Rights', see OJ 2007 C303/17.
[49] Case C-128/18, *Dumitru-Tudor Dorobantu*, Judgment of 15 October 2019, ECLI:EU:C:2019:857.

first sentence 'shall not prevent Union law providing more extensive protection'. Peers and Prechal commented to this Article that 'since the Explanations to Article 52 (3) ...specify that the Charter's level of protection can "never" be lower than the ECHR, the "autonomy" of EU law can only mean the power to set higher standards...rather than lower standards'.[51] Lenaerts commented that the explanations required coherence between the Charter and the ECHR, and the level of protection afforded by the Charter may not be lower than that of the ECHR.[52] Brittain observed that the explanations concerned imply that, although the jurisprudence of the ECtHR carries great weight, it is not binding in all circumstances.[53] Furthermore, Brittain noted that 'in so far as Charter rights correspond to Convention rights, the Convention provides a minimum standard beneath which the Charter may not fall; however, the text provides no guidance that might enable an interpreter to determine where and to what extent EU law affords greater protection.[54]

Considering the literature on Article 52 (3), the first and second sentences seem to be related mainly to the level of protection (same, higher, or lower). However, my question is not related to the level of the protection, but rather the content of the protection. I ask whether the CJEU can provide autonomous interpretation, that is, establish its own criteria to protect fundamental rights according to the second sentence of Article 52 (3) of the Charter. For example, the GFCC has developed its own standards, criteria, theories or 'Dogmatik' to guarantee fundamental rights for each article of GG, taking pride as a constitutional court in protecting fundamental rights. Is the CJEU allowed to do so like the GFCC? So far as the CJEU guarantees higher protection than the ECtHR, one can argue that the CJEU can do so.

V. *Demand of autonomous interpretation*

In the previous section, I discussed autonomous interpretation and whether the CJEU can provide it or establish its own criteria to protect fundamental rights. I argued that the first sentence of Article 52 (3) of the Charter concerns the level of protection, but not the guarantee of fundamental rights; thus, it does not hinder the CJEU from developing its own criteria. In this session, I would like to show that the CJEU is required to establish its own criteria and develop its own standards regarding the Charter using a decision of the GFCC.

In my article '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',[55] I discussed how the attitude of the GFCC has changed from the so-

[50] Case C-128/18, ibid., paras.4-7.

[51] Steve Peers and Sacha Prechal, Article 52, in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (ed.), *The EU Charter of Fundamental Rights, A Commentary*, Second edition, Hart Publishing, 2021, para.52.121.

[52] Koen Lenaerts, 'Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung', *EuR* 2012, p.3, p.11; Juliana Kokott and Christoph Sabotta, 'Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection', *Yearbook of European Law*, Vol.34, No.1, 2015, p.60, p.64.

[53] Stephen Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis', *European Constitutional Law Review*, 11, 2015, p.482, p.499.

[54] Brittain, ibid., p.505; Similar, Kolja Naumann, 'Art. 52 Abs. 3 GrCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionsrechts', *EuR* , 2008, p.424, p.432.

[55] Yumiko Nakanishi, *Hitotsubashi Journal of Law and Politics* 49, 2021, pp.1-15.

called 'Solange I decision' to the 'Right to be forgotten II case decision'. In the case of Solange I in 1974, the GFCC doubted the CJEU's ability to guarantee fundamental rights. The GFCC observed that the EU (formerly, 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.[56] However, 45 years later, in 2019, the GFCC held that regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard review does not derive from German fundamental rights, solely from EU fundamental rights.[57] It also held that it reviews the domestic application of EU law by the German authorities based on EU fundamental rights to the extent that the fundamental rights of the Basic Law are inapplicable due to the primacy of EU law.[58] The Constitutional Court held that complete fundamental rights protection requires that EU fundamental rights be considered.[59] Furthermore, the GFCC held that to the extent that it relied on the fundamental rights of the Charter as the relevant standards of review, it sought close cooperation with the CJEU.[60] The Constitutional Court also noted that the CJEU has the final authority to interpret EU law, which includes interpretation of the fundamental rights guaranteed by the Charter and the development of principles derived from them for their application.[61]

The GFCC pointed out the immaturity of the CJEU as a guardian of fundamental rights, while it prided itself on guaranteeing fundamental rights based on the German Constitution. The GFCC evidently changed its attitude on the review of fundamental rights. It showed a readiness to cooperate with the CJEU and acknowledged explicitly that the CJEU had a final say regarding the interpretation of the Charter. The GFCC is willing to help develop criteria or standards based on EU fundamental rights with the CJEU, while respecting its tasks and jurisdiction.

VI. *Conclusion*

Certainly, the ECtHR has contributed to the guarantee of human rights and has developed its own standards and criteria. These findings are useful and meaningful. Therefore, the CJEU and national courts, including the GFCC, have referenced them. However, the CJEU is allowed to establish its own standards or criteria to guarantee fundamental rights. Even the GFCC which had been critical of the guarantee of fundamental rights by the CJEU and played a decisive role in protecting fundamental rights in Germany, decided to apply the EU fundamental rights where the subject matters are fully harmonised at the EU level, and to cooperate with the CJEU and respect its exclusive jurisdiction regarding the Charter. In the past, the EU (formerly the European Community) did not have a fundamental rights catalogue. However, now, the Charter has the same legal value as the TEU and the TFEU, according to the Treaty of Lisbon, which was enforced in December 2009. The CJEU has dealt with issues related to economic interests

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

[57] 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.

[58] Ibid., para.50.

[59] Ibid., para.60.

[60] Ibid., para.68.

[61] Ibid., para.69.

and integration. However, it also deals with a variety of issues including fundamental rights. Recently, the CJEU developed the right to personal date protection based on Articles 7 and 8 Charter.[62] Now that 12 (one circle of *eto*, animal symbols) years have passed since the Treaty of Lisbon was enforced, it is time for the CJEU to develop its own criteria and standards based on the Charter of the EU fundamental rights.

[62] Ex. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, Judgment of 8 April 2014, ECLI:EU:C:2014:238; Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD)*, Judgment of 13 May 2014, ECLI:EU:C:2014:317; Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, ECLI:EU:C:2015:650; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, Judgment of 21 December 2016, ECLI:EU:C:2016:970; Opinion 1/15, *Draft Agreement between Canada and the EU on the transfer and processing of Passenger Name Record data*, Opinion of 26 July 2017, ECLI:EU:C:2017:592; Case C-136/17, *GC and others v CNIL*, Judgment of 24 September 2019, ECLI:EU:C:2019:773.