Convergence, Compatibility or Decoration: The Luxembourg Court's References to Strasbourg Case Law in its Final Judgments[1]

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Although the EU is not a Contracting Party to the European Convention yet, the ECHR and its Strasbourg case-law do have an impact on the EU legal order. Before the Lisbon Treaty came into effect, the Court of Justice of the EU and the drafters of the Maastricht Treaty recognized that the ECHR and the ECtHR case law had a special significance for the EU legal order and regarded them as one part of the general principle of EU law. The Lisbon Treaty entitles the EU Charter on Fundamental Rights the primary legislation from which the Court could start in its deliberation. According to Art.53(3) and the relevant Official Explanation, the Court of Justice should take the Strasbourg jurisprudence into account when it needs to define the scope and meaning of fundamental rights borrowed from the ECHR and its case-law. Although the CJEU still lacks a set of uniform rules on references to Strasbourg case-law, and even the European judges' motivations for Strasbourg case-law references are varied, this method can be regarded as a kind of solution to the jurisprudential conflicts between the two European courts. From a functional perspective, the function of the Strasbourg case-law reference can be divided into four categories: authoritative guidance, legitimate guidance, reference "by analogy", and decorative reference. In particular, the function of legitimate guidance can even be re-divided into three sub-functions: guidance, conformation to legitimacy, and warning the member states against the undermining of the Strasbourg jurisprudence as well as a comparative analysis of similarity and difference between EU law and ECHR.

Keywords: case-law reference, Luxembourg judgments, fundamental rights, comparative law, Strasbourg case law.

1. Introduction

Many scholars have referred to the judicial and legislative interactions between the EU Charter on Fundamental Rights and the European Convention on Human Rights (ECHR). These two instruments, combined with the national constitutions, constitute the consolidated multilevel protection of fundamental rights in most European states. In this triangular structure, the formal intertwined mechanism for judicial dialogue has already been embedded in the hierarchical relationship between the

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EU and the national judiciaries, which is the preliminary reference mechanism. Apart from this, a new transnational judicial dialogue will be established by the advisory opinion mechanism in the Strasbourg legal order that will work to guarantee that the national courts correctly apply or interpret the ECHR.

However, these two mechanisms for dialogue show the different motivations of lawyers and judges. The first of them aims to guarantee the EU's authority in the process of European integration, through the Luxembourg Court's uniform interpretation, and examination of compliance, of national measures implementing EU law, whereas the Strasbourg Court's aim is to "ensure the observance of the commitments entered into by the Contracting Parties" under the European Convention, which is designed to "operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the national level".[2] These formal mechanisms may have an impact on the evolution of the domestic legal order, given that the supranational opinions will probably be adopted by the national courts as the authoritative criteria for the assessment of the conventionality of domestic law. The consequences are easily perceived from the supranational legal orders:

(1) The domestic (constitutional) provision must be set aside if it conflicts with an EU ruling that has direct effect.[3] If the EU provision has indirect effect, the national court must reconcile the legal conflict through a consistent interpretation. Since the preliminary decision has a binding effect on the domestic court, the domestic court must apply domestic measures by relying on the Luxembourg opinion.

(2) The Strasbourg regime does not adopt the EU model of a preliminary ruling that grants binding effect to an advisory opinion, because this would be incompatible with the principle of subsidiarity in relation to the exhaustion of domestic judicial remedies, but the Strasbourg advisory opinion still has a potential impact on the interpretation of the domestic rules in the light of the Convention rights. By means of an advisory opinion, the Strasbourg judges do not have to follow a previous legal decision. The Grand Chamber in a leading case may deliver an opinion *erga omnes*; the effect of such an opinion is to block the admissibility of similar cases submitted by the courts of other states. Pursuant to Art.2, paragraph 1 of Protocol No.16 to the ECHR, the referring court must inform the Strasbourg Court of the Convention rights to be applied and the domestic law to be reviewed. Accordingly, the Court may, after a ruling that the domestic law is incompatible with the Convention rules, suggest that the legislators of the referring state revise the relevant legal provisions or may teach the domestic judicial organs a new measure or technique for balancing competing rights and interests. This might be sufficient to allow the Strasbourg advisory opinion to diffuse into the legal systems of all the Contracting States. The domestic court can determine the case at hand under the guidance of the Strasbourg decision, within the scope of the margin of appreciation. Despite the fact that the advisory opinion will not formally bind the domestic interpretation of the ECHR, it would be hard for an individual complaint, once the domestic remedies have been exhausted, to be admitted if the domestic court has properly taken the Strasbourg opinion into account. Instead of the vertical interaction between the national and the supranational courts, the present essay specifically focuses on the Luxembourg Court's references to Strasbourg case law in its final judgments. As is well-known, the Luxembourg judges have cited a number of Strasbourg decisions in their final judgments. However, very few of the Luxembourg judges have revealed the motivations for the Luxembourg Court's citations of Strasbourg case law or the function of such citations, and very few

[2] Opinion of Advocate General Maduro in the *Kadi* case. See *Case 402/05 P, Yassin Abdullah Kadi v. Council of European Union and Commission of European Community* [2008], para.37.

[3] The preliminary decision in the *Melloni* case forced the Spanish Constitutional Court to overrule its previous constitutional decision. Moreover, the Spanish Constitutional Court had to reformulate the meaning of the constitutional provision of Art.94 of the Spanish Constitution.

have comprehensively analysed the Strasbourg case law to which they have referred.[4] These deficiencies inevitably give rise to some general questions as to why and how the Luxembourg judges refer to Strasbourg case law in their judgments. Given the fact that the Luxembourg judges rarely invoke argumentation or use discursive methods when elaborating the comparative law,[5] we need to examine the references to Strasbourg case law in the Luxembourg judgments, in order to discern the functions of and motivations for such references, twenty years after the judgment in *P. v. S.*[6] in which the Luxembourg judges cited a Strasbourg decision for the first time in history.

Before a thorough analysis of the functions and motivations of Luxembourg's references to Strasbourg jurisprudence, it is necessary to rethink the legal status of the European Convention and the Strasbourg case law in the EU legal order. Art.6(3) of the Treaty of EU (TEU) requires that the EU institutions and Member States regard Convention rights as general principles of EU law. Theoretically, it is by no means the case that the European Convention should be regarded as primary law; nor did it have external binding power on the EU institutions before the EU's accession to the ECHR. Instead, the Luxembourg Court is likely to interpret the Convention rights autonomously if the appellants or domestic courts require them to start a judicial review of an EU statute that is being challenged, or to interpret a provision in compliance with the relevant fundamental rights. Although the EU Charter was endowed with a binding force after the entry into force of the Lisbon Treaty, the European Convention and Strasbourg case law are still regarded as special parameters in the areas of the protection of minor's rights and in the area of freedom, security and justice.

My research, based on the *Curia* database, shows that around 50 Luxembourg judgments between 1997 and 2015 explicitly referred to Strasbourg case law. About 35 of these were delivered before the adoption of the Lisbon Treaty, while the other 15 judgments were given in the post-Lisbon Treaty era. The effects of the citation of Strasbourg case law are various and unsystematic. Peers divides them into three categories: relevant citations, irrelevant citations and questionable citations.[7] De Witte describes the Luxembourg references to Strasbourg case law as "eclectic and unsystematic".[8] Douglas-Scott also criticizes the Luxembourg judges for usually citing Strasbourg case law in a vague manner[9] and for not using consistent and articulate comparative methods.[10] The Luxembourg judges quite often publicly

[4] G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, Maastricht Journal of European and Comparative Law, Vol.20, No.2, 2013, pp.176-178. The author points out several reasons why the Luxembourg Court does not like referring to international or comparative legal sources in its judgments. The Luxembourg Court adopts the French continental judicial approach to drafting a final judgment. Unlike the Strasbourg Court, which models its judgments on the discursive and full style of reasoning, the Luxembourg judges have largely continued with their original approach. Moreover, in order to protect themselves from the disputes and challenges that might follow from providing more fully reasoned judgments, the Luxembourg judgments avoid showing any analyses of international or comparative law. Last but not least, a frequent response of the Luxembourg judges in defence of their style of reasoning and their practice of not citing international or comparative law is that these foreign legal sources are considered or read by the Luxembourg judges or the Advocates General.

[5] S. Douglas-Scott: *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights* Acquis, Common Market Law Review, Vol.43, No.3, 2006, pp.657-658.

[6] *Case 13/94, P v. S*, [1996] ECR 2143.

[7] S. Peers, *The European Court of Justice and the European Court of Human Rights: Comparative Approach*, in E. Örücü (ed.): *Judicial Comparativism in Human Rights Cases*, United Kingdom National Committee of Comparative Law, London, 2003, pp.113-127.

[8] B. de Witte: *The Use of the ECHR and Convention Case Law by the European Court of Justice*, in P. Popelier & C. Van de Heyning & P. Van Nuffel (eds.): Human Rights Protection in the EU Legal Order: The Interaction between European and National Courts, Intersentia, Antwerp, 2011, p. 24.

[9] Douglas-Scott 2006, p. 646.

[10] Douglas-Scott 2006, p. 656; see also K. Lenaerts: *Interlocking Legal Orders in the EU and Comparative Law*, The International and Comparative Law Quarterly, Vol.52, No.4, October 2003, p. 873. Lenaerts argues that the Court of Justice often bases its judgments on Strasbourg case decisions, but that this is rarely translated directly into its reasoning.

claim that they refer to Strasbourg cases "by analogy", rather than regarding them as a binding legal source.[11] In this sense, Strasbourg case law seems to be treated as no more than a source of which Luxembourg must take note but with no binding power in relation to the protection of fundamental rights in Europe, so that the Luxembourg Court can interpret the fundamental rights in any way that is compatible with the Strasbourg jurisprudence.[12]

Unfortunately, very few EU legal scholars take the systematic case law study approach when they analyse the various roles of the Strasbourg decisions in the Luxembourg judgments. Concrete case law studies can pave the way to revealing those judgments in which the Court substantively relies on Strasbourg case law, and those in which the Court refers to Strasbourg case law in passing. On the other hand, research founded on concrete case studies can effectively reveal the Luxembourg Court's motivation and the function of the Strasbourg citations. This approach allows us to examine effectively whether a reference to Strasbourg case law actually enhances the legitimacy of a Luxembourg judgment[13] and effectively promotes harmonization between the two Courts.[14]

Given that it is unnecessary and impossible to carry out a detailed analysis of all fifty of the Luxembourg judgments that I have collected, I will divide them into four types according to my functional categories, and then select typical examples to examine the function of the reference and revealing the motivations of the Luxembourg judges. The four types are as follows:

- **Substantive following of Strasbourg jurisprudence**: the Luxembourg judges decide the case by relying on Strasbourg jurisprudence. This usually occurs in circumstances in which the Luxembourg Court lacks the relevant precedents or there is an absence of EU legislation. Thus, Strasbourg jurisprudence becomes the source of legitimacy with regard to the interpretation of fundamental rights. At other times, it is likely that the Luxembourg judges will prefer to follow the Strasbourg jurisprudence when the official Explanation Relating to the Charter of Fundamental Rights (hereiafter: Official Explanation)[15] explicitly indicates that the standard of fundamental rights protection derives from the Strasbourg jurisprudence.
- **Decorative citations**: the Strasbourg case provides no help but only serve as a decoration. In examples in this category, the Luxembourg Court may find the Strasbourg case law irrelevant to the Luxembourg case at hand, or it might be that the Strasbourg case law referred to by the Court does not have an impact on the final decision.
- **Reference to Strasbourg case law "by analogy"**: the Luxembourg Court refers to Strasbourg jurisprudence under comparable but not identical circumstances. Not only do the Luxembourg judges generously follow the Strasbourg case law to which they refer, but they also may extend the applicability of the Strasbourg case law into new areas.

[11] L. Scheeck, *Solving Europe's Binary Human Rights Puzzle: The Interaction between Supranational Courts as a Parameter of the European Governance*, Questions de Recherche, No.15, 2005, p. 21.

[12] Joint Communication from Presidents Costa and Skouris, 24 January 2014, para.1.

[13] G. Harpaz, *The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy*, Common Market Law Review, Vol.46, No.1, 2009, p.121. The author argues that, "The ECJ should therefore ensure that its reliance on the Strasbourg Regime and on the verdicts of the Strasbourg Court are made explicit. Placing the EU's human rights regime under the external (and therefore more objective) normative supervision of the Strasbourg Regime may further advance the ECJ's legitimacy".

[14] S. Morano-Foadi: *Fundamental Rights in Europe: "Constitutional" Dialogue between the Court of Justice of the EU and the European Court of Human Rights*, Oñati Journal of Emergent Socio-Legal Studies, Vol.5, No.1, 2013, p.79; Harpaz 2009, p. 119.

[15] Explanation Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF (4 November 2016).

- **Citation for legitimate guidance**: most Strasbourg case law is used as a parameter to provide legitimate guidance in the Luxembourg Court's deliberations. The Court usually ascertains the definition of a specific legal term or the scope of rights in line with the relevant Strasbourg case law. In addition, the Court usually confirms whether the domestic court's or the General Court's decision is justified on the basis of the Strasbourg jurisprudence. Sometimes it outlines the relevant case law, warning the domestic court not to undermine the fundamental rights established by the Strasbourg case law. In addition, the Court may rely on the comparative method to reveal the characteristics of the Convention system.

2. Strasbourg Case Law in the System for the Protection of Fundamental Rights in the EU

2.1. The European Convention as a General Principle of EU Law in the EU Legal Order

In its early days the Court of Justice did not regard itself as a legitimate tribunal with competence in relation to the protection of fundamental rights.[16] In the 1950s the Rome Treaty merely embodied some economic rights to promote internal economic integration among the member states of the ECSC and the EEC. Given the fact that the EEC's founders sought to build an innovative international economic identity by transferring sovereign power from the states to a supranational organization, the Court of Justice developed direct effect[17] and the doctrine of primacy[18] of Community law, so that the national judges were obliged to apply Community law even when their national law conflicted with it. Thus, the EC became a supranational entity that could autonomously fulfil its legitimate mandates without being subjected to any external supervision. This worried the national courts and some Luxembourg judges, because they felt that the absence of a mandate for the protection of fundamental rights in the EC might gradually encroach on the EC's legitimacy and deepen the distrust between Brussels and the Member States. Pierre Pescatore, an outstanding European judge, even questioned whether the Luxembourg case law could be adequate for the protection of fundamental rights in the EU legal order.[19]

The Luxembourg Court recognized, in the decision of *Stauder*[20], that the fundamental rights, as part of the general principles of EU law, were embedded in the common constitutional traditions to the member states. The judgment in *Nold*[21] explicitly linked EU legal order to the European Convention on Human Rights. The Luxembourg judges claimed that the international (human rights) treaties, particularly the ECHR, together with the identified common constitutional traditions, were two sources of inspiration of fundamental rights protection. The Court then specifically claimed, in the *Rutili* judgment, that the ECHR established "the guideline that the EC member states should observe in the Community legal order".[22] With their frequently automatic interpretation of the ECHR, the Luxembourg judges regarded

[16] J. H. H. Weiler: *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Community*, Washington Law Review, Vol.61, No.3, July 1986, p.1110.

[17] *Case 26/62, en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 2, p.7.

[18] *Case 6/64, Flaminio Costa v E.N.E.L* [1964] ECR 585, p.594.

[19] P. Pescatore: *Les Droits de l'homme et I'intégration Européenne*, Cahiers de Droits Européenne, No.4, 1968, p. 657.

[20] *Case 29/69, Erich Stauder v City of Ulm*, [1969] ECR I-419.

[21] *Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] ECR I-491.

[22] *Case 36/75, Roland Rutili v Ministre de l'intérieur*, [1975] ECR I-1219, p. 1232.

the European Convention as having "special significance" in the Community legal order.[23]

The drafters of the Maastricht Treaty reaffirmed that the European Convention constituted a part of the general principles of Community (Union) law.[24] Although it was by no means clear that the legal effect of other international human rights treaties would be denied before the Luxembourg Court, the Treaty authors emphasized the dominant status of the ECHR, in particular, in laying down general principles of Community law. Because the ECHR had been widely regarded as the "European minimum standard for fundamental rights", even before the Lisbon Treaty came into effect the domestic courts and appellants had always required the Luxembourg Court to interpret or examine secondary EU law on the grounds of the ECHR.

2.2. The Status of Strasbourg Case Law in Art. 52 (3) of the EU Charter on Fundamental Rights

Now that the Lisbon Treaty has come into effect, the Luxembourg judges can directly start from the Charter whenever they need to review the compliance (legality) of secondary EU legislation or whether concrete domestic measures correctly implement EU law with fundamental rights contained by the EU Charter or general principles of EU Law. In order to ensure that the EU Charter gives protection on fundamental rights that is equivalent to the ECHR standards, Art.52(3) provides that "... *rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*".

In fact, the drafters of the EU Charter borrowed nearly all the Convention rights; Douglas-Scott argues that "more than half of the Charter rights are borrowed from the European Convention".[25] However, the drafters did not simply adopt a cut-and-paste method for transplanting these Convention rights into the EU Charter. Rather, they adopted four other approaches as well[26] in order to make the judicial protection

[23] A. Arnull, *The European Union and Its Court of Justice*, 2nd edn, Oxford University Press, Oxford, 2006, pp.339-340.

[24] Art.6(2) of the Maastricht Treaty provides that the Union shall respect the fundamental rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ... as general principles of Community law". Art.6(3) of the Lisbon Treaty states that fundamental rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... shall constitute general principles of the Union's law".

[25] S. Douglas-Scott: *The Court of Justice of the European Union and the European Court of Human Rights after the Lisbon Treaty*, Legal Research Paper Series, Oxford University, 2012, p.8.

[26] P. Lemmens: *The Relation between the Charter of Fundamental Rights of the European Union and European Convention on Human Rights: Substantive Aspects*, Maastricht Journal of European and Comparative Law, Vol.8, No.1, 2001, p.50. Also see 范继增：《欧洲多层级框架下人权保障机制——欧盟法与"欧洲人权公约"的交互性影响》，载《中山大学法律评论》，第13卷第3期，2015, 第33-35页 (Jizeng Fan, The European Multilevel Protection of Fundamental Rights — The Interactive Relationship between the EU Law and the European Convention on Human Rights, *Sun Yat-sen University Law Review* (2015), vol.13, pp.33-35). In total, the drafters of the EU Charter adopted five different approaches to the transplantation of European fundamental rights from the ECHR to the EU Charter: (a) a cut-and-paste model: the drafters literally copied the words of the European Convention's provisions into the EU Charter without making any significant modification. For instance, Art.4 of the EU Charter, prohibiting torture and degrading treatment, copies Art.3 ECHR almost word for word. The wording of the first two paragraphs of Art.4 of the ECHR, concerning the prohibition of slavery, servitude and forced and compulsory labour, are transferred into the first two paragraphs of Art.5 of the EU Charter; (b) the transplantation of Convention rights into the EU Charter with general expressions: the drafters of the EU Charter have not given the detailed meaning and scope of the fundamental rights borrowed from the European Convention, but these fundamental rights are transferred to the EU Charter using brief and abstract words. For instance, the EU Charter has borrowed the right to life and the right to the abolition of the death penalty (Art.2), rights to liberty and security (Art.6) and the right of defence in a fair trial (Art.48(2)); (c) the borrowing of rights for the Charter from the corresponding Convention provisions, but with a higher standard of protection being granted than in the ECHR. For instance, the Charter's rights to marry and have a family correspond to the Convention rights embodied in Art.12 of the ECHR. The Charter's definition of

of fundamental rights visible and compatible with the EU context, and to ensure that the Charter standard of protection was not lower than the standard of their counterparts embodied in the European Convention.

A controversial question is whether the Court of Justice could be considered bound by Strasbourg case law in light of the fact that the European Convention is a "living instrument".[27] The Strasbourg judges dynamically define the meaning and scope of the fundamental rights through the "consensus" approach. The margin of appreciation is narrowed if the Strasbourg Court can find a consensus among the Contracting States concerning the protection of fundamental rights.[28] Otherwise, the Contracting States enjoy quite a large margin of discretion on restrictions of fundamental rights. The dynamic approach to the interpretation of fundamental rights converts the Convention into a document applicable to all the Contracting States that can never be out of date. Strasbourg case law, before Protocol No.16 to the ECHR[29] comes into effect, must be seen as one of the fundamental sources setting the European standard on fundamental rights. Even though the binding effect of a Strasbourg decision is mainly confined to *inter partes* disputes,[30] Strasbourg jurisprudence provides *de facto* orientation to the Luxembourg judges for their deliberations and interpretations of fundamental rights when the circumstances are similar or comparable to those of the relevant Strasbourg decisions.[31] Thus, it is reasonable to expect that the

family cuts the link to couples of opposite sexes. Moreover, the family foundation is no longer correlated to an officially registered marriage. In this sense, same-sex marriage is recognized by the EU Charter; (d) the transplantation of EU Charter rights from the Convention Protocols: for instance, the right to education, provided by Art.14 of the EU Charter, not only imposes on EU institutions and Member States the obligation to provide compulsory as well as other types of education to EU citizens, but also adds respect for parents' rights, providing in its third paragraph "to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions". The protection of the right to property in the EU Charter goes further than European Convention Protocol No.1 does. Protocol No.1 is silent on the right to compensation if the competent authorities expropriate private property, while the EU Charter explicitly prescribes that any expropriation is subject to "a fair compensation, being paid in a good time for loss"; and (e) the borrowing of EU fundamental rights from the Strasbourg case law. In line with the Strasbourg judgment in *Soering*, the drafters of the EU Charter incorporate the words "no one shall be removed, expelled and extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other degrading treatment or punishment" into Art.19(2) of the EU Charter.

[27] G. Letsas: *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in A. Follesdal & B. Peters & G. Ulfstein (eds.): *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge, 2013, p.109. In the judgment in *Tyere*, the Strasbourg Court denied the legitimacy of corporal punishment and added that, "The Court must also recall that the Convention is a living standard which, as the Commission rightly stressed, must be interpreted in the light of the present-day conditions. In the case now before it the Court cannot be influenced by the development and commonly accepted standard in the penal policy of the member states of the Council of Europe in this field".

[28] F. Parras: *From Strasbourg to Luxembourg? Transposing the Margin of Appreciation Concept into EU Law*, Working Paper, Centre Perelman de Philosophie du Droit, No.7, 2015, p.4.

[29] N. Posenato: *Il Protocollo n.16 alla CEDU e il rafforzamento della giurisprudenza sui diritti umani in Europa*, Diritto Pubblico Comparato ed Europeo, No.3, 2014, p.1442. The author argues that the new mechanism may contribute to a decrease in the number of cases appealed to the Strasbourg Court. Moreover, the Court could provide different types of guidance or orientation to the referring national courts, which must take these Strasbourg opinions into account in their domestic judgments.

[30] The legal effect of Strasbourg case law in the domestic legal order is completely regulated by national law. Moreover, unlike the common law, where deliberations on later cases must follow precedents, the Strasbourg judges do not have to be bound by the Court's precedents.

[31] H. Keller & A. S. Sweet: *The Reception of the ECHR in National Legal Orders*, in H. Keller &A. S. Sweet (eds.:, A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford University Press, Oxford, 2008, p.14. Using the Strasbourg precedents, the Court seeks to structure the arguments of the applicants and the defendant states, to ground its rulings, and to persuade states to comply when it finds violations. The Court also relies heavily on precedent-based rationales to develop Convention rights and to manage a complex environment protectively. The Court does this in the name of "legal certainty and the orderly development of its case law". Convention rights, like the rights provisions of national constitutions, have been judicially constructed, and precedent both enables and constrains the Court's creativity. The Court will abandon a line of case law in order to correct an earlier error, or "ensure that the interpretation of the Convention reflects societal change and remains in line with the present day conditions". The idea of the "living instrument" and the evolutionary approach to interpretation may, to some extent, set barriers to whether the Court is to be bound by the Strasbourg precedents.

Luxembourg Court may develop its interpretation of fundamental rights by referring to Strasbourg case law.

Koen Lenaerts, the current President of the CJEU, argues that the Luxembourg judges are obliged to follow Strasbourg case law because the Strasbourg decisions have evolved into a crucial part of the Convention with respect to the European standard of fundamental rights.[32] Francis Jacobs, a former Advocate General, even argued boldly, in the Opinion in the *Bosphorus* case, that "the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts".[33] The argument that Strasbourg case law has a binding effect seems to be solidified by the Official Explanation to Art.52 (3) of the EU Charter, which states that "*the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and of the Court of Justice of the European Union*".[34]

However, it cannot easily be accepted by the Luxembourg judges that subjection to the Strasbourg decision is compatible with the Luxembourg legal order, because it actually undermines the Luxembourg Court's autonomy if the interpretation of the EU Charter gives a binding effect in the EU legal order to a Strasbourg decision. This would imply that an international judicial decision automatically transfers into EU law, but EU law also constitutes a two-layer legal hierarchical structure in which the Luxembourg Court is definitely at the bottom.[35] In this sense, the authors of the EU Charter may have intentionally excluded "Strasbourg case law" from the wording of Art.52(3) of the EU Charter.[36] Pursuant to Art.52(7) of the EU Charter, the Official Explanation providing guidance on the interpretation of the EU fundamental rights shall be "given due regard by the courts of the Union and of the Member States". The phrase "due regard" sounds as if the Luxembourg judges do not need to follow the Strasbourg interpretation strictly. Therefore, the Official Explanation of Art.52(3) of the EU Charter becomes a confirmation of the fact that the Luxembourg judges can take Strasbourg case law into account in certain circumstances. The legislators intentionally leave it to the discretion of the Luxembourg judges as to whether or not they observe Strasbourg decisions.

3. The Methodology of the Luxembourg Using Strasbourg Jurisprudence

Since the CJEU has adopted the French style of writing judgments, its forms of legal reasoning and judicial deliberations seem simple and formalistic.[37] Unlike the Strasbourg judges, the Luxembourg

Thus Judge Nicolas warned his colleagues in his dissenting opinion on *Scoppola II* that "... we, as a minority, do not call into question the [precedence of Strasbourg], to which the majority refer, either on reversing previous decisions, where necessary, or of adapting to changing conditions and responding to some emerging consensus on new standards, since the Convention is a living instrument ... But no judicial interpretation, however creative, can be entirely free of constraint".

[32] Koen Lenaerts & Eddy de Smijter: *The Charter and Role of the European Courts*, Maastricht Journal of European and Comparative Law, Vol.8, No.1, 2001, p.99. The two authors argue that "since the Strasbourg case law has formed a constituent part of the protection standard of the European Convention, it is reasonable to hold that the Luxembourg decision should be subjected to the Strasbourg case law". Lord Goldsmith,

[33] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Advocate General's Opinion, para.53.

[34] Tobias Lock: *The ECJ and ECtHR: The Future Relationship between the Two European Courts*, The Law and Practice in the International Courts and Tribunals, Vol.8, No.3, June 2009, p.384.

[35] Lock 2009, p. 383.

[36] S. Douglas-Scott: *The European Union and Human Rights after the Lisbon Treaty*, Human Rights Law Review, Vol.11, No.4, December 2011, p.655.

[37] Christopher McCrudden: *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, in C. Barnard & A. A. Llorens & M. Gehring & R. Schütze (eds.): *Cambridge Yearbook of European Studies*, Vol.15, 2012-2013, p.403.

judges seldom refer to foreign law or international treaties, and they never present their dissenting opinions, fearing that any minimal divergence may lead people to question the reasonableness of the judgment. The European Convention has a special significance for EU law because the ECHR and ECtHR case law have been repeatedly cited by the Court, as general principles of EU law, or as analogical inspiration for the Luxembourg judges, or as guidance (orientation) in the deliberations in Luxembourg. Some scholars have noted that the Luxembourg Court sometimes regards the Strasbourg jurisprudence as its own set of precedents.[38] The Luxembourg judges seem to be a little timid about explicitly giving accurate answers about the role of Strasbourg case law through Luxembourg's interpretation of Art.52(3) EU Charter. They are wise to avoid answering this general but sensitive question without giving it due consideration, because the Luxembourg Court must defend its autonomy. On the other hand, the Luxembourg Court cannot ignore the influence of the ECHR in the complicated question of the multilevel protection of fundamental rights in Europe. Recognized as the "constitutional instrument of the European public order"[39] in the field of human rights, the European Convention and ECtHR case law have become parameters for measuring the domestic protection of human rights. Thus, although the legal status of Strasbourg case law in the domestic legal order varies according to the national constitutional rules,[40] it should be regarded as a persuasive constitutional or *de facto* supra-legislative instrument.[41] Thus, the national courts of the EU Member States are accustomed to submitting their preliminary references to the Luxembourg Court to require the Court to examine the EU provisions, domestic provisions or measures on the implementation of EU law that have been challenged, to confirm whether they are in line with the ECHR and the relevant Strasbourg case law.[42] Even though the

[38] De Witte 2011, p. 23.

[39] *Loizidou vs. Turkey* (Appl. no. 15318/89) ECtHR (1996).

[40] G. Martinico: *Is the European Convention Going to Be 'Supreme'? A Comparative Constitutional Overview of ECHR and EU Law before National Courts*, The European Journal of International Law, Vol.23, No.2, 2012, p.404. The ECHR in the domestic legal order might be summarized as follows: (a) Some constitutions attribute constitutional standing to the ECHR; this is the case in Austria and the Netherlands (monist states); (b) In some states (e.g. France, Belgium, Spain and Portugal), the ECHR has a super-legislative standing; (c) Finally, in other states (such as the UK), the ECHR has a legislative standing. Countries such as Italy and Germany apparently belong in the third group (if one reads their constitutions), but the local constitutional courts have clarified that the ECHR has a special force that exceeds the normal constitutional discipline of international norms. See also Douglas-Scott 2011, p. 657. Section 2 of the UK Human Rights Act only requires the UK Court to "take into account" Strasbourg jurisprudence, denying it any binding status. In Germany, the Constitutional Court has not required the strict application of ECHR case law, even in cases brought against Germany directly; see also G. Martinico & O. Pollicino: *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, Cheltenham, 2012, p.92. The Italian Constitutional Court made two fundamental decisions (Nos.348 & 349/2007) in 2007 clarifying the position of the ECHR in the domestic legal system in Italy. These can be summarized as follows: (a) The ECHR has a super-primary value; (b) In some cases, the ECHR can stand as an 'interposed parameter' for assessing the validity of primary laws, since any conflict between them and the ECHR can result in an indirect violation of the Constitution; (c) This does not imply that the ECHR has a constitutional value; on the contrary, the ECHR has to respect the Constitution; (d) The constitutional status accorded to the ECHR implies that there is a need to interpret national law in the light of the provisions of the ECHR. Strasbourg case law has been perceived as a hermeneutical tool to interpret the Conventional provisions. Subsequently, it has been understood as a supra-legislative instrument to ensure closeness between the wording of its provisions and the language of the Constitution.

[41] Martinico 2012, p. 411. In May 2011, the German Constitutional Court held preventive detention to be unconstitutional, basing its expansive interpretation of the German Constitution on Strasbourg case law. Also see M. Amos: *Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act*, Human Rights Quarterly, Vol.35, No.2, May2013, pp.389-390 & 403-404. Although the 1998 UK Human Rights Act does not grant Strasbourg jurisprudence a binding effect, the UK courts have consistently held that a national court should not "without strong reason dilute or weaken the effect of the Strasbourg case law". Even though the House of Lords and the Supreme Court have held that the Strasbourg decisions are inconsistent with some fundamental substantive and procedural aspects of UK law and are not "directly binding as a matter of our law", the UK courts will eventually adopt the Strasbourg jurisprudence in a complete about-face on what was previously decided.

[42] Jasper Krommendijk: *The Use of ECtHR Case Law by the CJEU after Lisbon: The View of Luxembourg Insiders*, Maastricht Working Paper, No.6, 2015, p.20. One interviewee noted that 90 to 95% of the arguments (on Strasbourg case law) in a case are usually brought up by the parties or by the agents of the intervening Member States. Another interviewee had the supplementary view that if a certain ECtHR-inspired argument or ECtHR-specific judgment is not put forward, the

Luxembourg judges could directly use the Charter rights as their departure point, they sometimes have to take the Strasbourg jurisprudence seriously if there are no relevant Luxembourg precedents or if the Court wishes to modify the Luxembourg jurisprudence to match the development of Strasbourg case law. In the judgment in *Hoechst*, the Luxembourg Court even refused to treat the premises of an undertaking as part of the private sphere under Art. 8 ECHR because it noted that "there is no case-law of the European Court of Human Rights on the subject"[43] and argued that the European Convention did not explicitly protect this right to legal person privacy in the judgment in *Roquette*.[44] The Strasbourg Court then criticized this Luxembourg decision in the judgment in *Niemietz*,[45] taking the view that business premises having a strong relationship to private life should also be regarded as a "home" and be free from inappropriate interference. Thus, the Luxembourg Court had to modify its case law, stressing, in particular, that "[The Luxembourg Court] must regard the case law of the European Court of Human Rights subsequent to the judgment of Hoechst". The Court particularly stressed the point that "*the protection of home provided for in Art.8 of the European Convention may in certain circumstances be extended to cover such a premise*" as decided in the *Société Colas Est*[46] case, and recognized that the *Niemietz* decision "*might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case*".[47] Although the Luxembourg Court has consistently insisted that the relevant Strasbourg decisions are used "by analogy", when it wishes to circumvent their influence, it actually made this decision in line with the Strasbourg case law that is referred to. In this sense, the protection of fundamental rights may be the least autonomous field in the Luxembourg regime.

In contrast with the Luxembourg judges who show this great prudence, the Advocates General are usually bolder in expressing their personal views on the role of Strasbourg case law in the EU legal system. In the *Connolly* case, AG Colomer asserted that Strasbourg case law had "*cardinal importance as a source for defining fundamental rights recognized by the ECJ*". In the *Van der Wal* case, AG Cosmas stated that "*since the EU is not a signatory to the ECHR, while it may be logical and legitimate to refer by way of analogy to rulings of the European Court and Commission of Human Rights, it cannot be accepted that the ECJ and CFI are formally bound by the rulings*". In the *Roquette* case, AG Mischo stated that "*the ECJ attaches the greatest importance to the case-law of the Court of Human Rights*". In *Kaba*, AG Colomer said "the ECJ pays the greatest heed to the European Court of Human Rights" and in the *SGL Carbon* case, AG Geelhoed stated that "*the Court of Justice attaches great value to the case law of the European Court of Human Rights*". The attitudes of the AGs towards the status of Strasbourg jurisprudence still lack consensus after the Lisbon Treaty. In the Opinion in *Fransson*[48], AG Villalon argued that, because not all the Member States of the EU had ratified Protocol No.4 to the ECHR, the Luxembourg judges should not take into account Strasbourg case law concerning the principle of *ne bis in idem*. However, the final judgment was silent on this issue. Conversely, AG Kokott took the opposite position from her colleague in the Opinion in *Bonda*[49]. She argued that even though not all the Member States had ratified this Protocol, the Luxembourg Court should respect the principle of *ne bis in idem*

chances are high that this argument is wrong or irrelevant, especially when an ECtHR argument is repeated by the Court as a message that it must be closely studied.

[43] *Joined Cases 46/87 and 227/88, Hoechst AG v Commission of the European Communities* [1989] ECR 2859, p. 2924.

[44] *Case C-94/00 ,Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, [2002] ECR I-9011.

[45] *Niemietz vs. Germany* (Appl. no.13710/88) ECtHR (1992).

[46] *Société Colas Est vs. France* (Appl. No. 37971/97) ECtHR (2004).

[47] *Niemietz* 1992, para.31.

[48] *Case C-617/10, Åklagaren v Hans Åkerberg Fransson*, judgment 26 February 2013.

[49] *Case C-489/10, Lukasz Marcin Bonda*, judgment 5 June 2012.

enshrined in Protocol No. 4 to the ECHR.

The final judgments from Strasbourg reveal very few personal opinions of the judges on the role of Strasbourg case law. This is not only because dissenting opinions cannot be officially attached to the final Luxembourg judgment, but also because the procedure for drafting judgments probably prevents some Strasbourg citations being considered in the Luxembourg Court. The Luxembourg final judgments are based on consensus. The more foreign law that is discussed and cited in the final judgment, the greater the risk of dissent among the Luxembourg judges. Each sentence and word is examined by many eyes and can potentially lead to disagreement.[50] Thus, the Luxembourg judges favour concise decisions, and limit the legal reasoning to the subject matter that is absolutely essential.[51] This may imply that an original reference to Strasbourg case law used by the Luxembourg rapporteurs at the initial stage of deliberation may ultimately be removed if the ECtHR case law is not particularly necessary or the reference to Strasbourg case law may excessively lengthen the judgment.[52] For instance, the number of Strasbourg case law citations in the final judgment in *Pupino*[53] is smaller than the number in the initial draft.[54] Apart from that, many other factors may also influence the (number of) citations of Strasbourg case law in the stages of the initial drafts and the final judgment.[55] The writing style of the judges and the judges' professional backgrounds are regarded as the two fundamental factors here. Judges who have working experience in the European Court of Human Rights are likely to take Strasbourg case law into account in their deliberations in relation to fundamental rights. These judges know the Strasbourg jurisprudence very well, so they may individually rely on Strasbourg case law to define the scope and meaning of fundamental rights. The judges who are keen on academic research present their legal reasoning having considered Strasbourg case law. However, not all the judges are interested in the Strasbourg jurisprudence. Some of them are even reluctant to attend the annual meeting with the Strasbourg judges. Hence, this group of judges may just start from the Luxembourg instruments, without considering the Strasbourg jurisprudence in detail. However, these Luxembourg judges must take the Strasbourg jurisprudence seriously whenever the Luxembourg instruments are not self-evident with regard to concrete jurisprudential criteria for the protection of fundamental rights.[56] The Luxembourg Court cites a number of Strasbourg case law decisions in the judgment in *Kadi I*,[57] with the Court following the Strasbourg jurisprudence from *Jokela*[58] to demonstrate that a correct procedure must afford the person concerned a reasonable opportunity of accessing justice. In the judgment in *Kadi II*[59], the Court explicitly referred to the Strasbourg judgment in *Nada*[60] (where the Strasbourg judges, in turn,

[50] Konrad Schiemann: *A Response to the Judge as a Comparativist*, Tulane Law Review, Vol.80, No.2, 2005, p.290.

[51] K. Lenaerts: *How the ECJ Thinks: A Study on Judicial Legitimacy*, Fordham International Law Journal, vol.36, No.1, 2013, p.1351.

[52] Krommendijk 2015, p. 28.

[53] *Case 105/03, Maria Pupino*, [2005] ECR I-5285.

[54] L. Scheeck: *Competition, Conflict and Cooperation between the European Courts and the Diplomacy of Supranational Judicial Networks*, GARNET Working Paper, No.23, 2007, p.17. The author said that "although the initial draft of the judgments extensively quotes the Strasbourg jurisprudence in a very precise manner, the final judgment still relies heavily on the Convention and its Court's work to justify its groundbreaking decisions."

[55] Krommendijk 2015, pp. 24-35.

[56] S. I. Sanchez: *The Court and the Charter: The Impact of the Entry into the Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, Common Market Law Review, Vol.49, No.5, 2012, p.1604.

[57] *Joined Cases 402/05 and C-415/05, Kadi*, [2008] ECR 6351.

[58] *Jokela vs. Finland* (Appl. no.28856/95) ECtHR (2002).

[59] *Joined Cases 584/10 P, C-593/10 P and C-595/10 P, European Commission and Others v Yassin Abdullah Kadi*, judgment 18 July 2013.

[60] *Nada vs. Switzerland* (Appl. No.10593/08) ECtHR (2012).

had obtained inspiration from the Luxembourg decision in *Kadi I)*[61] and argued that since there were no effective measures provided to the applicant to enable him to remove his name from the UN blacklist, he should be given the opportunity to apply to the domestic court to request the removal of his name from the list through judicial review, which was the essence of the right to fair trial.[62] The mutual references to case law between the judgments in *Nada* and *Kadi* reflected an interesting phenomenon of "reciprocal cross-fertilization" in the field of fundamental rights protection, indicating that the two European courts each rely on the other's reasoning as a source of legitimate guidance.

The statistics collected by European scholars seem to indicate that the tendency of the Luxembourg Court to refer to Strasbourg case law became weaker after the Lisbon Treaty,[63] but that in certain cases the Strasbourg jurisprudence still exerts its influence on the Luxembourg judges. In the decision in *McB.*,[64] the Luxembourg Court explicitly held that "It is clear that the said Art. 7 contains rights corresponding to those guaranteed by Art. 8(1) of the ECHR. Art. 7 of the Charter must be therefor given the same meaning and the same scope as Art. 8(1) of the ECHR ". The Court also noticed that the circumstances in *Guichard*,[65] in which an unmarried mother removed her child to a third country, were similar to those in the *McB.* case. The national law of both states provided that an unmarried mother was the only parent responsible for the child. The Strasbourg Court determined that a national law granting parental responsibility to the child's mother did not violate the European Convention, provided that "it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility". The Court then found another Strasbourg decision – that in *Z v. Germany*[66] – in which it was determined that national legislation constituted an unjustified discrimination against the unmarried father because it actually deprived him of any chance to obtain a right to custody in the absence of the mother's agreement. The Court's interpretation of the Brussels II-bis Regulation substantively relied on the two Strasbourg decisions, stating that the right to request custody from a competent court before the removal of a child constituted "the very essence of the right of a natural father to a private and family life".[67] The Luxembourg reasoning in *DEB*[68] reflected the

[61] Nada 2012, para.122. The Strasbourg Court quoted the Luxembourg judgment (from Kadi I, para.86) to show that the UN was not capable of providing certain procedural remedies (a judicial review) to the applicant. The opinions of both the European courts seem to say that the domestic courts are obliged to enforce the domestic human rights guarantee even if this will lead to non-compliance with the resolution of the UN Security Council. Marko Milanovic, *European Court Decides Nada vs. Switzerland*, available at: http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/., last visited 13-02-2016.

[62] ,*Joined Cases 584/10 P, C-593/10 P and C-595/10 P, Kadi II,* paras.133-134.

[63] De Búrca 2013, p.174. The Luxembourg Court has made reference to provisions of the EU Charter in at least 122 judgments. In 27 of these 122 judgments, the Court engaged with the matter in some detail and substance, with arguments based on one or more provisions of the Charter. Among the 27 cases in which the Luxembourg Court engaged substantively with a Charter provision, the case law of the Strasbourg Court was referred to in just ten. See also M. Safjan, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, Lecture at King's College London, 09-02-2014, p.9. Judge Safjan points out that "only in 16 of the roughly 60 cases relating to effective judicial protection since the Charter became binding, did the Court refer to the European Court of Human Rights' case law"; see also Krommendijk 2015, p.23. The author has interviewed present and former Luxembourg judges, *référendaire* and AGs to discuss the frequency of references to Strasbourg case law. Eight of nine interviewees noted the tendency, after the Lisbon Treaty, to refer less often to the ECHR and the case law of the ECtHR, while only one argued that there had been an increase in the number of references to ECtHR case law.

[64] *Case 400/10 PPU, J. McB v. L. E.*, judgment 4 December 2010.

[65] *Guichard vs. France*, (Appl. no.56838/00) ECtHR (2003).

[66] *Zaunegger vs. Germany*, (Appl. no.22028/04), ECtHR (2009).

[67] *Case 400/10, McB,* para.56.

[68] *Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, judgment 22 December 2010.

Court's immediate use of the relevant ECtHR case law as a point of departure when it found that the secondary EU law was not self-evident.[69] According to German domestic law, the appellant had to pay the preliminary costs before starting legal proceedings because legal aid was not available to the legal person. The Luxembourg Court relied on the Strasbourg decisions in *McVicar*[70] and *Steel & Morris*[71] in determining that the right of access to a court constitutes an element that is inherent in the right to a fair trial under Art.6(1) ECHR. In this regard, it is important for a litigant not to be denied the opportunity to present his or her case before a court. Moreover, the court of the respondent state must take the financial situation of litigants into account, in line with the Strasbourg decision in *Steel & Morris*. Using the substantive guidance of the Strasbourg case law, the Luxembourg Court warned the German court that the limitation of the right of access to a court undermines the very core of the right to a fair trial, on the basis that the domestic court would not examine all the circumstances or make a fair balance among the competing interests, and particularly taking into account the fact that funds approved by private associations and companies for the legal representation of undertaking came from funds accepted, approved and paid by the Member States, in accordance with the Strasbourg decision in *O'Limov.*[72] In addition, the Luxembourg Court suggested that the German court should adopt the Strasbourg decision in the *VP Diffusion Sari* case,[73] where the payment for the cost of proceedings could be deducted from taxable profits and carried over as a loss to subsequent tax years. In the Luxembourg judgment, in the case of *NS*,[74] the Luxembourg Court even interpreted the EU refugee law partially in compliance with the Strasbourg jurisprudence to the detriment of the EU doctrine of "mutual trust".

Within the framework of the multilevel protection of fundamental rights, the Luxembourg Court treats the preliminary questions referred to it by Constitutional Courts more prudently than those submitted by the ordinary courts.[75] Consequently, Strasbourg case law may be cited to demonstrate the fact that the Luxembourg Court has taken due regard of Strasbourg jurisprudence in the deliberation phase. In the case of *Jeremy F.*,[76] the French *Conseil Constitutionnel* asked the Luxembourg Court whether the absence of any possible recourse against the ruling of the investigating judges was a direct requirement of the author of the EU Framework Decision or was derived from the choice made by the domestic legislators.[77] The Court compared the Strasbourg decision in *Khodzhamberdiyev*[78] to reveal the relevant Strasbourg standard of the right to fair trial, concluding that "*when the decision depriving a person of his liberty is made by a court at the close of judicial proceedings, the supervision required by Article 5(4) of the Convention is incorporated in the decision*".[79] When the Luxembourg Court noted that both

[69] T. Ahmed: *The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?*, in J. A. Green & C.P.M. Waters (eds.), Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi, Martinus Nijhoff Publisher, The Hague, 2014, p.111. The German Court did not require the Luxembourg Court to make a decision under Art.47(3) of the EU Charter, but only asked whether in the context of EU law the legal person should enjoy the rights to legal aid (effective protection) enshrined in Arts.6 and 13 of the ECHR. However, the Court departed from the Explanation of Art.43 of the EU Charter when it assessed the case, and relied on the aforementioned Strasbourg case law in *Airey*.

[70] *McVicar vs. The UK* (Appl. no.46311/99) ECtHR (2002).

[71] *Steel & Morris vs. UK* (Appl. no.68416/01) ECtHR (2005).

[72] *CMVMC O'Limov vs. Spain*, ECtHR (2009).

[73] *VP Diffusion Sari vs. France* (Appl. no.14564/04) ECtHR (2008).

[74] *Case 411/10, N.S v. Secretary of State for the Home Department*, judgment 21 December 2011.

[75] B. J. Fan: *The Judicial Dialogue between the Luxembourg and National Courts in the European Framework of Multilevel Protection of Fundamental Rights*, International Journal of Human Rights and Constitutional Studies, Vol.4, No.2, July 2016, p.97.

[76] *Case 168/13 PPU, Jeremy F. v Premier ministre*, judgment 30 May 2013.

[77] F.-X. Millet & N. Perla: *The First Preliminary Reference of the French Constitutional Court to the CJEU:* Révolution de Palais *or Revolution in French Constitutional Law*, German Law Journal, Vol.16, No.6 (special issue), December 2015, p.1477.

[78] *Khodzhamberdiyev vs. Russia* (Appl. no.64809/10) ECtHR (2012).

[79] *Case C-168/13 PPU, Jeremy F.*, para.43.

the instruments had left a certain margin of appreciation to the Member States, it quoted the Strasbourg decision that "*[the Strasbourg Court did not] compel the Contracting Parties to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing application of the suspension of the extradition*". In the case of *Melloni*,[80] the Spanish Constitutional Court asked the Luxembourg Court whether Arts.47 and 48(2) of the EU Charter could provide the surrendered person *in absentia* with an opportunity to be reheard in a Spanish court under the EAW Framework Decision.[81] The answer depended on the interpretation of the Charter rights. On the basis that the final Luxembourg interpretation might have potentially undermined the Spanish constitutional order with respect to the protection of fundamental rights, it might have triggered the counter-limits mechanism established by the Spanish Constitutional Declaration 1/2004.[82] Given this possibility, the Luxembourg Court had to persuade the Spanish Constitutional Court that its interpretation was compatible with the Strasbourg jurisprudence. Therefore, it referred to several Strasbourg decisions to demonstrate that the person concerned, who had been clearly informed of the time and place of the legal proceedings and was represented by an employed lawyer, actually waived his rights to defend himself when he intentionally did not present himself before the court.[83] The Spanish authorities was to execute the issued EAW warrant provided that the minimum standard of fundamental rights had been respected and that the execution was not in conflict with the public interest. When the preliminary decision returned to the Spanish Constitutional Court, the Spanish judges argued that international human rights treaties must be taken into account in the phase of the interpretation of fundamental rights. The Constitutional Court particularly mentioned the two European fundamental rights instruments and the relevant fundamental rights case law as among the most authoritative guides to the interpretation of constitutional rights. In this sense, the Spanish Constitutional Court explicitly affirmed that the circumstances of the Strasbourg case of *Sejdovic*,[84] which was also one of the Strasbourg cases cited in the Luxembourg preliminary rulings, were similar to those of the present case. As a result, the Spanish court overruled the previous constitutional precedent, a decision that proceedings related to a Romanian citizen, who had been charged by a Romanian Court *in absentia* under the EAW Framework Decision, and where this was held to having constituted an infringement of the Spanish Constitution. In the present case, the Strasbourg jurisprudence was substantially turned into a "hermeneutic criterion" under Art.94 of the Spanish Constitution, implying that the Spanish Constitutional Court regarded the international jurisprudence as a legitimate source that outweighed its constitutional precedents.[85]

The Luxembourg Court seldom repeats references to Strasbourg case law if the cases have been referred to in a Luxembourg judgment a short time earlier.[86] For instance, the Luxembourg Court only referred

[80] *Case C-399/11, Stefano Melloni v Ministerio Fiscal*, judgment 26 February 2013.

[81] M. R. Serrano, *The Spanish Constitutional Court and Fundamental Rights Adjudication after the First Preliminary Reference*, German Law Journal, Vol.16, No.6 (special issue), December 2015, p.1518.

[82] Declaración 1/2004. The Spanish Constitutional Declaration 1/2004 has raise some ultimate barriers against the penetration of EU law with the famous distinction between primacy and supremacy. The Constitutional Tribunal claims that "Supramacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to consequent invalidity of the latter if they contravene the provision set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons".

[83] *Case 399/11, Melloni*, paras.49-50.

[84] *Sejdovic vs. Italy* (Appl. no.56581/00) ECtHR (2006).

[85] A. T. Pérez: *Melloni in Three Acts: From Dialogue to Monologue*, European Constitutional Law Review, Vol.10, No.2, September 2014, p.321.

[86] Krommendijk 2015, p.30. According to a series of empirical comparative studies, it is a common legal phenomenon that newly emerging states or international organizations cite fewer foreign provisions or instances of case law in their domestic

to its own case of *N.S*[87]. in the judgment in *Kaveh Puid*,[88] and did not mention the landmark Strasbourg decision in *M.S.S*[89]. In the judgment in *Trade Agency*, the Court relied on the Luxembourg precedent in *DEB* without citing any Strasbourg decisions. On the other hand, it may happen that the Strasbourg case law develops too fast for the Luxembourg judges to cite the most recent jurisprudence. Thus, the Luxembourg Court may cite outdated Strasbourg case judgments, which may allow a legitimate challenge to a Luxembourg decision. The aforementioned *Roquette* case provides us with a good example.

Given that the Luxembourg Court is not a specific regional human rights court, it is not necessary for the Luxembourg judges to refer to the Convention and the Strasbourg case law in cases in which fundamental rights are not the central issue. Even in the cases concerning fundamental rights, the Court does not need to cite Strasbourg case law if the EU secondary legislation is self-evident, or if the Court is able to strike a balance among the competing interests. The Strasbourg precedents may not be considered by the Luxembourg Court if they cannot provide relevant help in the Court's decisions. For instance, the Luxembourg Court did not cite a Strasbourg decision in the judgment in *Google Spain*[90] because the case did not concern the right to access to information in a political sense, nor did it relate to the activity of an ordinary news agency. Similarly, in the judgment in *Radu*,[91] the Court focused only on the interpretation of the Framework Decision under the principle of mutual trust, without needing to pay attention to Strasbourg case law.

Interviews with the Luxembourg judges reveal that Strasbourg decisions are considered and discussed in detail among the judges in the deliberation phase.[92] One judge expressed his (her) deliberative methods in relation to the fundamental rights as follows: "*overall, we may start with the Charter, provided that the right is recognized there, then the Convention becomes important, if the right is the same there as well. Then, to a certain extent, we can follow our earlier case law, general principles of law or other international conventions as sources of inspiration*"[93]. This interviewee seems to use the Strasbourg jurisprudence on each possible occasion to guarantee the compatibility of the jurisprudence of the two European courts. Another Luxembourg judge states that the coming into effect of the EU Charter will not change the judicial methodology in relation to the application of the European Convention.[94]

As mentioned above, the EU legal system lacks a consensus about the use of ECtHR case law. Some interviewees assert that ECtHR case law is not discussed at length in the deliberation stage. Occasionally,

judgments after a period of intensive citations of foreign law in their early years. Examples can easily be found among states with common law traditions. See the following chapters from T. Groppi & M-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013: I. Spigno, *Namibia: The Supreme Court as a Foreign Law Importer*, p.171; C. Rautenbach, *South Africa: Teaching an "Old Dog" New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)*, p.194; V. R. Scott, *India: A "Critical" Use of Foreign Precedents in Constitutional Adjudication*, p.86.

[87] *Case 411/10, N.S*, [2011] ECR 13905.

[88] *Case 4/11, Bundesrepublik Deutschland v Kaveh Puid*, judgment 14 November 2013.

[89] *M.S.S vs. Greece & Belgium* (Appl no. 30696/09) ECtHR (2011).

[90] *Case 131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, judgment 13 May 2014.

[91] *Case 369/11, European Commission v. Italian Republic*, judgment 29 January 2013.

[92] Krommendijk 2015, p.14.

[93] S. Morano-Foadi & S. Andreadakis: *Reflection on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights*, European Law Journal, Vol.17, No.5, September 2011, p.601.

[94] Morano-Foadi & Andreadakis 2011, p. 600. The interviewed judge said that, "it is a document set up by the people looking at the Convention and the ECtHR's jurisprudence, putting things in a slightly different language, but not with a view to changing the values which underline the provisions of the Charter. It does not aim at undermining the role of the Convention. It is a new reference point for the same overall substance".

Strasbourg case law may be examined if a Luxembourg judge warns that the final decision is likely to conflict with the ECHR. In the deliberation phase in *Akzo Nobel*,[95] the judges discussed Strasbourg case law under Art.6 ECHR extensively.[96] This process effectively guaranteed that the Strasbourg case law would be taken into account in the final decision.[97]

The motivations for the Luxembourg Court's references to Strasbourg case law are various, but they include looking for the "greatest coherence",[98] "searching for convergence"[99] and the Court being "extremely careful not to distance itself from the Strasbourg Court".[100] If the Luxembourg Court does not refer to Strasbourg case law, the courts of the Member States will be confused as to which supranational decision they should follow.[101] The citation of Strasbourg case law becomes a good way to prevent an open conflict between the two European courts.[102] However, it is difficult for this method to eliminate all possibility of jurisprudential conflicts between the two European courts. As is well-known, the Luxembourg decision in *Emesa Sugar*[103] actually conflicts with the Strasbourg interpretation of Art.6 ECHR in the judgment in *Mantovanelli*,[104] and the two courts recently showed a new divergence with regard to the interpretation of the right to association,[105] not to mention the sticky problem that is often complained about by the Luxembourg judges – that limited time and few channels have become the biggest obstacle for accessing the Strasbourg judgments. Consequently, the door is still open to the possibility of citing outdated Strasbourg case law.[106]

A common theme in these interviews is that the Luxembourg judges, to some extent, share a consensus on the role of Strasbourg case law in the deliberation phase for the CJEU. Usually, the Strasbourg case law is not extensively discussed by the Luxembourg judges, unless particular judges warn that the Luxembourg decision may conflict with Strasbourg jurisprudence. Although the motivations for the citation of Strasbourg case law are diverse, the Luxembourg judges regard this measure as an effective

[95] *Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, judgment 14 September 2010.

[96] Krommendijk 2015, p.17.

[97] Krommendijk 2015, p.15.

[98] Joint Communication, idib n.11, para.1.

[99] S. Prechal & K. Cath: *The European Acquis of Civil Procedure: Constitutional Aspects*, Uniform Law Review, Vol.19, No.2, June 2014, p.191.

[100] Scheeck 2005, p.45.

[101] F. Jacobs, *The European Convention of Human Rights, The EU Charter of Fundamental Rights and The European Court of Justice*, available at: http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf (4 November 2016) at p. 293.

[102] Scheeck 2005, p.20.

[103] *Case 17/98, Emesa Sugar (Free Zone) NV v Aruba*, [2000] ECR I-668. The Luxembourg Court refuses to recognize the right to reply to the opinion of the Advocate General.

[104] F. Korenica: *The EU Accession to the ECHR. Between the Luxembourg Search for Autonomy and Strasbourg Credibility on Human Rights Protection*, Springer, 2015, p.369.

[105] N. Busby & R. Zahn: *The EU's Accession to the ECHR: Conflict or Convergence of Social Rights*, Paper presented at the Labor Law Research Network's Inaugural Conference, Barcelona, 13-15th June 2013. See also A. Ludlow, T*he Right to Strike: A Jurisprudential Gulf between the CJEU and ECtHR*, in K. Dzehtsiarou, T. Konstadinides, T. Lock & N. O'Meara (eds.): *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, Abingdon, 2014, p.133. Under the EU legal order the right to strike is recognized as a fundamental right to collective action. The Luxembourg Court treats the right to strike as a limitation on the right to movement, but holds that the protection of some economic rights comes prior to the protection of non-economic rights. Relying on the proportionality test, the Court stresses that the essence of the right to movement cannot be undermined by being balanced with the right to strike. However, the Strasbourg Court seems to depart from the common consensus under the ILO Conventions. Thus, a strike, though not for the furtherance of collective bargaining, will be protected if it will enhance the workers' position in their negotiations with the employers. See also J. Callewaet: *The European Convention on Human Rights and European Union Law*, European Human Rights Law Review, No.6, 2009, pp.777-782. The author offers the reminder that the legislative standard for fundamental rights protection under the EU law is lower than the Convention rules.

[106] Krommendijk 2015, pp. 20-21.

way of minimizing conflicts between the two European courts. Besides, a reference to Strasbourg case law in a Luxembourg judgment can enhance the legitimacy of its legal reasoning in relation to fundamental rights and make it more convincing. This means that the domestic (constitutional) court is less likely to trigger the counter-limit mechanism even if the Court decision, to some extent, undermines the domestic constitutional order, as it probably will. Given that the Strasbourg case law has no external binding power on the EU legal order, the Luxembourg Court can refer to the Strasbourg Court for various reasons. To correspond with this, the Strasbourg case law may fulfil multiple functions in Luxembourg judgments.

4. The Categories of Functions Fulfilled by Strasbourg Case Law Citations in Luxembourg Judgments

Until now, very few scholars have systematically researched the functions served by the Strasbourg decisions in Luxembourg judgments.[107] In this part, I would like to use a functional perspective to divide the Luxembourg references to Strasbourg case law into four types: (1) references used for substantively following the Strasbourg jurisprudence; (2) references used for legitimate guidance; (3) references to Strasbourg case law "by analogy"; and (4) decorative references.

4.1. References Used for Substantively Following the Strasbourg Jurisprudence

It is not very common for the EU judges to refer to the Strasbourg jurisprudence in order to follow it substantively and determine the case in reliance on the Strasbourg case law. Around nine of the 50 Luxembourg judgments (fewer than 20%) belong to this category. The Luxembourg judges are normally reluctant to give the impression that they are subject to the Strasbourg jurisprudence. However, given that the Luxembourg Court lacks experience in deliberations on fundamental rights, it should take the Strasbourg case law into account substantively in some fields relating to the protection of fundamental rights. Moreover, the national courts, appellants and AGs usually refer to Strasbourg case law as evidence to support their arguments, or they require the Luxembourg court to interpret EU law in line with Strasbourg jurisprudence. Correspondingly, the Court may substantively observe Strasbourg jurisprudence in certain circumstances under Art.52(3) of the EU Charter.

Most of the nine Luxembourg decisions that substantively follow the Strasbourg jurisprudence concern the right to a fair trial (Art.6 ECHR) and the right to private life (Art.8 ECHR). The subjects of the others are scattered among the right not to be discriminated against, provided by Art.14 ECHR, the doctrine of *ne bis in idem* enshrined in Protocol No.4 to the ECHR, and the right to marriage enshrined in Art.12 of the ECHR.

[107] Very few scholars have systematically referred to this issue. Steve Peers has made a particular study of the role of Strasbourg jurisprudence in the Luxembourg judgments. He began his research from the perspective of the function of the reference to Strasbourg case law by the Luxembourg judges. He divided these functions into three categories: "relevant", "irrelevant" and "questionable". He then looked at the actual Strasbourg cases used by the Luxembourg Court under Arts.6, 8, and 11 of the ECHR. See Peers 2003, pp. 113-127. Professor Douglas-Scott is another scholar who has preferred to study the relationship between the two European courts through the perspective of the Luxembourg Court's references to Strasbourg decisions before and after the Lisbon Treaty. See Douglas-Scott 2006, pp. 644-652; Douglas-Scott 2011, pp. 655-658; Douglas-Scott, The Court of Justice of the European Union and the Court of Human Rights after Lisbon Treaty, at 5-9. Some Luxembourg judges have also focused their research on this field. G. Arestis: *Fundamental Rights in the EU: Three Years after Lisbon, the Luxembourg Perspective*, Cooperative Research Paper, College of Europe, No.3, 2013, pp.10-13.

4.1.1. The Right to Privacy

The first Luxembourg decision that substantively relied on Strasbourg jurisprudence occurred in the case of *Grant*[108] and concerned the equal treatment of men and women. The appellant was a woman who complained that the Commission's Directive had not provided for equal treatment as it only made reference to married couples of opposite sexes. In order to justify the Directive's compatibility with the European Convention, the Luxembourg Court cited several Strasbourg cases on the definition of marriage. Given that the Commission's Directive aimed to provide benefits to "family" members, including opposite-sex partners who were unmarried but in stable relationships, the Luxembourg Court cited Strasbourg case law to demonstrate that at that time homosexual partners were beyond the concept of "family members" under Art.8 ECHR.[109] Subsequently, the Luxembourg Court relied on the Strasbourg decisions in *Rees*[110] and *Cossey*[111] to affirm that the partners in a "marriage" had to be heterosexual persons. Given that the subject matter of the two cases adjudicated by the two European courts was the same, the Luxembourg citation of the Strasbourg case law as authoritative guidance can be seen as a persuasive indication that the Luxembourg judges substantively observed Strasbourg jurisprudence.

The aforementioned Luxembourg decision in *Roquette* is a landmark case decision because the Luxembourg judges not only cited Strasbourg case law but also substantively made their decision in line with Strasbourg jurisprudence. In its judgment in *Hoechst,* the Luxembourg Court determined that a legal person cannot be treated as being equal to a natural person in the sense of having the right to privacy enshrined by Art.8 ECHR, because the European judges noted that a legal person's right to privacy was not explicitly recognized by the European Convention or the Strasbourg case law, so that a legal person's rights could not be protected under the general principles of EU law. However, the *Cour de Cassation* reminded the Court of Justice to note the development of Strasbourg case law in this area. In particular, the judgment in *Niemietz* affirmed that the right to privacy might apply to certain professional and business activities or premises. Accordingly, the Luxembourg Court had to make a choice between following or denying the Strasbourg case law. It is sometimes hard for the dual functions of the Luxembourg Court to coexist, in the light of the fact that on the one hand it is obliged to defend its autonomy *vis-à-vis* the interpretation of EU law and, on the other hand, the ECtHR case law cited here dynamically set the minimum standard of fundamental rights in Europe that was quite often observed by the domestic authorities. Any decision taken without due consideration might lead the domestic court to question whether the Court was taking the protection of fundamental rights seriously. Thus, the Court strategically adopted legal reasoning following the model of a U-shaped curve in order to demonstrate that the general principles of EU law had granted the right to privacy to all legal persons; this circumvented the influence of the Strasbourg decisions. It is interesting to note that, although the Court consistently argued that the Strasbourg case law was only seen as a "by analogy" source, the Luxembourg judges in this case obviously overruled their previous interpretation on the substantive basis of the Strasbourg judgments in *Société Colas Est* and *Niemietz.* In the former case, the Strasbourg Court explicitly declared that the definition of "home" enshrined by Art.8 ECHR might extend to the premises of a business undertaking. Moreover, the judgment in *Niemietz* took a more important role in the interpretation of the term "home". The Strasbourg judges stated that the French term "*domicile*" had

[108] *Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd*, [1998] ECR I-636.

[109] *X. and Y. vs. The UK* (Appl. no.9369/81); *S. vs. UK* (Appl. no.11716/85) para.2; *Kerkhoven and Hinke vs. Netherlands* (Appl. no.15666/89).

[110] *Rees vs. UK* (Appl. no.9532/81) ECtHR (1986).

[111] *Cossey vs. UK* (Appl. no.10843/84) ECtHR (1990).

broader connotations than the word "home" in the English context, and that it might extend to professional premises.[112] This is the reason why the Luxembourg Court described the latter Strasbourg decision as having a "far-reaching impact" on the Luxembourg deliberation.

The *McB.* judgment was another typical case where the Luxembourg Court's reasoning was substantively embedded in the ECtHR case law of *Guichard* and *Balbontin.* Since the decision in *McB.* was delivered after the EU Charter had come into effect, the Court directly started from the EU Charter in its interpretation of the Brussels Convention II. Given that the Official Explanation had recognized that the meaning and scope of the right provided by Art.7 EU Charter was derived from Art.8 ECHR, the Luxembourg judges cited Strasbourg case law to ascertain the definition and scope of the right to parental custody in the context of the Convention. Substantively keeping pace with the Strasbourg jurisprudence, the Court upheld that the father, even though he was not granted the right to responsibility by law, could ask for the custody of his child without the mother's agreement. It is worth mentioning that the Luxembourg judges did not cite even one Luxembourg case in their deliberations on the protection of fathers' rights, implying that the Court, until then, had not produced any relevant precedents relating to the right to parental responsibility.

4.1.2. The Right to Fair Trial

The Court usually defines the right to a fair trial substantively in line with the Strasbourg jurisprudence arising from some hard cases. In the *Köbler* judgment[113], the Luxembourg Court deliberated on whether a Member State had an obligation to pay reparations when the Supreme Court had wrongly interpreted EU law. In the deliberation phase, the Luxembourg Court explicitly referred to the judgment in *Dulaurans*[114] to support the notion that victims should be given a remedy when they were damaged as the result of a judgment made by a national court acting as the court of last resort. The litigation concerned the sensitive legal question of whether the principle of *res judicata* should be regarded as an autonomous question immune from judicial review by the Luxembourg Court's, even if the interpretation given by the court of last instance had actually violated EU law. Several national governments are opposed to liability for states arising from a wrong interpretation by the court of last resort, because this would lead to chaos in the case law system. The UK government delegates, in particular, expressed worries from the perspective of the UK's common law tradition, arguing that it was embedded in the doctrine of *stare decisis*. However, the maintenance of EU authority was the only issue of concern for the Luxembourg Court. The Court of Justice of the European Union therefore adopted a teleological interpretation to clarify that reparation because of a wrong interpretation of EU law would not substantively undermine the principle of *res judicata*, in the sense that the Luxembourg Court did not require the national courts to overturn their precedents. In addition, the state must be liable for the erroneous interpretations of EU law because it is obliged to follow EU rules. The Court's interpretation ignored the diverse legal preconditions to a finding of state liability, which definitely constitutes part of the national identity, among the legal systems of the Member States. On the other side, the Court's interpretation was deficient with respect to its teleological interpretation, because it failed to explain in detail how the doctrine of *res judicata* had been well respected. If the Supreme Court, as the highest judicially domestic competent authority on the application of EU law, was obliged to pay reparation to the individual concerned, which could not be denied, as demanded by the Luxembourg

[112] Nietmietz 1992, para.30-31.

[113] Case 224/01, *Gerhard Köbler v Republik Österreich*, [2003] ECR I-10290.

[114] *Dulaurans vs. France* (Appl. no.34553/97) ECtHR (2001).

Court, by the doctrine of *res judicata*. The Court also did not explicitly answer the Austrian question of why reparations were not applicable in the case of Luxembourg's wrong application of EU law. The Court, moreover, refused to accept the European Commission's proposal that the domestic courts were liable only when they "seriously breached" EU law, since it held more generally that all wrong applications of EU law by domestic tribunals should result in state liability, no matter what the motivation. Thus, the Luxembourg judges selected the Strasbourg decision in *Dulaurans* as a substantive guidance.

In the case of *Stefenssen,*[115] which concerned the right to a second opinion provided by Art.7 of Directive 89/397/EEC, the Luxembourg Court held that as the European Community lacked rules on evidence, the national legislators had wide discretion on which procedure to adopt for taking evidence. In these circumstances, the German court was to examine whether the national rules governing the procedure for taking evidence complied with the principles of equivalence and effectiveness. Any national provision that made it impossible or extremely difficult to protect the right to a second opinion breached EU law. Finally, the Court substantively relied on the Strasbourg decision of *Mantovanelli*[116] to warn the German court that the evidence taken by the administration and the related comments from *Stefenssen* should be treated with care in such a highly technical case.

In the judgment in *KNK,*[117] the Luxembourg Court observed the Strasbourg jurisprudence absolutely with respect to the admissibility of the case. Regarding the fact that the appellant was not on the list linked to Common Position 2001/931, and would consequently be subject to impossibly restrictive measures, the Luxembourg Court relied substantively on the comparable Strasbourg decision in *Gestoras*[118] to argue that the appellant in that case could not easily be regarded as a victim under the Strasbourg regime, and that his appeal would not be admitted by the Court.

4.1.3. Other Convention Rights

The decision in *K.B.*[119] shows the Court of Justice of the European Union relying substantively on the Strasbourg judgment in *Goodwin*[120]. The claimant complained that the national pension scheme was restricted to widowers and widows of members of the scheme and that this constituted discrimination on the grounds of sex, contrary to Art.141 of the EC Treaty and the relevant Community Directive. The challenge was to the NHS Pension Regulation, which laid down that a pension would only be granted to an employee's survivor; a survivor, according to the National Matrimonial Act, could only be the registered opposite-sex married partner. Although the Luxembourg judgment in *P. v. S.*[121] had stated that treating a transsexual person differently from a person with their birth-assigned gender definitely constituted discrimination on the grounds of sex, the domestic authority argued that the national legislation on marriage registration would not apply to heterosexual partnerships where one of the partners was transsexual. This was the crucial reason preventing K.B. from officially registering a marriage with her transsexual partner.

[115] *Case C-276/01, Joachim Steffensen,* [2003] ECR 3756.

[116] *Mantovanelli vs. France* (Appl no.21497/93) ECtHR (1997).

[117] *Case 229/05, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission of the European Communities,* [2007] ECR 470.

[118] *Segi and Others vs. 15 Member States of the EU* (Appl. nos.6422/02 and 9916/02) ECtHR (2002).

[119] *Case 117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health,* [2001] ECR 568.

[120] Goodwin vs. UK (Appl. no.28975/95) ECtHR (2002).

[121] *Case 13/94, P. v.S,* [1996] ECR I-2159.

The domestic court recognized that K.B. and her partner were a heterosexual couple, but it still needed to define whether or not a transsexual person's right to marriage should be respected by European Community law. Thus, the focus of the present case was no longer whether the partner could be paid the pension after K.B.'s death, but whether or not their marriage should be respected by Community law. In the absence of a consensus in the legislation of the Member States, the Court substantively observed the final decision given in the *Goodwin* case. This was that the domestic legislation constituted an infringement of the non-discrimination right if the applicant's new gender identity had not been recognized by law so that it had become impossible by law for the couple to register their marriage. In fact, the reference to the Strasbourg case law in the present case was very persuasive, in that the Community legal system lacked clear Directives provision specifically protecting the civil rights of transsexuals, and there was no consensus on the legal status of transsexuals among the legal systems of the Member States. The Court invoked the previous Strasbourg case law as a common European standard to persuade the British authorities to review their relevant domestic law. This preliminary ruling also indicated that the Court took ECtHR case law as a baseline in this sensitive conflict between conservative religious culture and biological innovation.

The Luxembourg Court also took the Strasbourg decision in *M.S.S.* as authoritative guidance in its judgment in *N.S.*. In the decision in *M.S.S.*, the Strasbourg Court determined that the Belgian government, in removing refugees to Greece under the Dublin II Regulation[122], had infringed the prohibition on torture enshrined by Art.3 ECHR, because Belgium knew, or should have known, as evidenced by numerous NGOs' human rights reports on the Greek situation, that the Greek authorities had consistently treated asylum seekers in an inhumane manner. Although the Belgian government rightly claimed that the EU's doctrine of mutual trust in the application of the Dublin Regulation prevented the Member States from examining the implementation by Greece of the Dublin Regulation, so that under EU law this state's activities were immune from a Strasbourg judicial review, the Strasbourg Court insisted on its jurisdictional competence. It argued that it had competence on the grounds that the state's obligation stemmed from international treaties and that it could not derogate from the duty it derived from the European Convention, which was established in the *Matthews* case.[123] Consequently, this allowed the Strasbourg Court to make a substantive review of whether Belgium's transfer of the refugee applicants was in compliance with the Convention's legal order, rather than granting the particular EU Directive a presumption of equivalent status to the ECHR as established by the Strasbourg judgment in *Bosphorus*.[124]

A UK court submitted nearly the same question concerning the implementation of the Dublin II Regulation to the Luxembourg Court in the *N.S.* case. Given that the deficiency in the execution of the Dublin Regulation was incompatible with the protection of fundamental rights provided by the European Convention, the Luxembourg Court had to reconcile the conflict through the interpretation of EU law in compliance with the fundamental rights. The focal point was whether a Member State had the obligation to examine whether fundamental rights were protected in the receiving state. The UK government claim before the Court of Appeal that the Dublin Regulation entitled the transferring state government to rely on the conclusive presumption that the receiving Member State would comply with its obligations under EU law. The Luxembourg Court disagreed with the British argument, because it did not want to trigger controversies with the European Convention and the EU judges perceived that there was a margin left for the interpretation of this EU Regulation in a way that was compatible with the Convention. The

[122] Council Regulation, No.343/2003.

[123] *Matthews vs. UK* (Appl. no.24833/94) ECtHR (1999).

[124] *Bosphorus vs. Ireland* (Appl. no.45036/98) ECtHR (2005).

Court thus stated that "*an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member States primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with the fundamental rights*".

The conclusive presumption of the compatibility of the Dublin Regulation with fundamental rights was denied by the Luxembourg Court, so that the sending Member State had to check whether there were substantial grounds for believing that the receiving Member State had systematic flaws in the procedures it applied and the reception conditions in which asylum seekers were received. If there were, the sending state conduct would be imposing inhuman or degrading treatment of the asylum seekers, contrary to Art. 4 of the EU Charter, with respect to their transfer to the receiving state. This Luxembourg reasoning obviously borrowed from the judgment in *M.S.S.*, where the Strasbourg Court had noted that the Dublin II Regulation was deficient because the Member States were not given judicial competence to examine the refugee situation in the receiving states. To remedy this flaw, the Court fully agreed with the Strasbourg Court's approved methods for collecting evidence and assessing the situation for refugees in receiving states. The Member States needed to make relevant assessment by reliance on NGO reports and official documents published by the UN Human Rights Commission and the European Commission.

4.2. Legitimate Guidance to Luxembourg Judgments

The Luxembourg Court usually refers to Strasbourg case law as a legitimate source for demonstrating that a Luxembourg judgment is compatible or parallel with the Strasbourg jurisprudence. The motivations for the citations of Strasbourg case law in this category are various. On some occasions, the Court tends to explore a legal definition that is shared between the two courts through passing references. In some cases, the Court demonstrates that the domestic application of EU law is compatible with the protection of fundamental rights, or warns the domestic court not to go against the Convention rights established in particular Strasbourg cases. In some sensitive cases, the Luxembourg Court adds Strasbourg case law at the end of the judgment to enhance the legitimacy of the deliberative result. In other cases, Strasbourg case law is regarded as a general or concrete guide to Luxembourg judicial approaches that explore the boundaries of fundamental rights or balance competing rights. It is by no means true that the Court will take the Strasbourg jurisprudence seriously as an authoritative direction, but the Court often interprets a fundamental right or strikes a balance among competing interests in a parallel manner that is compatible with, but not identical to, Strasbourg case law. Apart from the above instances, some occasional references to Strasbourg case law aim to reveal the nature of the European Convention, or to present the similarities and differences between the Strasbourg and Luxembourg Courts' practice from a comparative point of view. Generally, there may be numerous motivitions behind references to the Strasbourg case law as part of "legitimate guidance" function, but all these references could fall into the sphere of one of three sub-functions: guidance, comparative analysis, and confirmation of a domestic decision.

4.2.1. Guidance

Guidance is the most common function of a reference to Strasbourg case law, particularly in cases concerning the protection of fundamental rights, where the reference demonstrates that the Court's decision is compatible with the Strasbourg jurisprudence. This type of citation can also be divided into two sub-categories: general guidance and concrete jurisprudential guidance.

The main function of a general reference to Strasbourg case law is to show the Luxembourg Court's preference in the deliberation phase for the general approach or method of the Strasbourg Court. This type of reference can often be found in judgments concerning the duration of judicial and administrative procedures. The judgment in *Baustahlgewebe*[125] is a typical example: the Court simply referred to some Strasbourg cases in order to justify the reasonableness of a period of time in the EU law context. By citing the Strasbourg case law, the Luxembourg Court argued that whether or not the duration of legal proceedings is reasonable must be appraised by considering the circumstances specific to the particular case and, in particular, the important factors of the case itself, such as its complexity and the conduct of the applicants and of the competent authority. Similarly, the Court cited almost the same Strasbourg decisions in the judgment in *Z.*,[126] for the same reasons.

On other occasions, the Luxembourg Court's reference to Strasbourg case law reflects its preference for Strasbourg's jurisprudential approaches or methods. Although this type of reference may not have any substantial impact on the final Luxembourg decision, it usually indicates that the Luxembourg Court found some inspiration in the Strasbourg case law. In the judgment in *Connolly*[127], concerning the restriction on the freedom of expression of a public servant, the Court cited many landmark Strasbourg decisions, such as those in *The Sunday Times*[128] and *Handyside*[129], arguing that the justification for the interference in the fundamental rights in that case could also be judged by the Strasbourg Court. In the Luxembourg judgment in *Tocai*[130], the Court cited the Strasbourg decision in *Jokela* to demonstrate that any restriction on the right to property must be in compliance with the principle of lawfulness and must be proportionate to the legitimate aim. This general Strasbourg guidance was of very limited impact in the final decision, because the Luxembourg Court did not follow the proportionality test established by the Strasbourg case law. In the judgment in *Österreichischer Rundfunk*[131], the Court substantively clarify the methods of proportionality test applied in the domestic court. In order to give the impression that the Luxembourg decision would not be incompatible with Strasbourg jurisprudence under Art.8, the European judges generally stated that the "necessary" measures employed must be "proportionate to the legitimate aim pursued", as established in the Strasbourg decision in *Gillow*. In addition, the Court affirmed that the state enjoyed a certain margin of appreciation, the scope of which "will depend not only on the particular nature of interference involved", following the guidance of the Strasbourg decision in *Leander*.[132]

On the other hand, it seems that most of the Strasbourg case law to which reference is made provides the Luxembourg Court with concrete jurisprudential guidance. The Court may look for the shared definition of legal terms, concrete Strasbourg methods or persuasive legitimacy. In the judgment in *Familiapress*,[133] the Austrian authority complained that a German-based newspaper had violated the domestic rules of fair competition because the total amount of prize value of a newspaper competition had exceeded the maximum limit laid down by Austrian law. The Court noted that the said Austrian law constituted an interference with the right to free movement of goods enshrined in Art. 36 TFEU (ex Art.

[125] *Case 185/95, Baustahlgewebe GmbH v Commission of the European Communities*, [1998] ECR 8485.

[126] *Case 270/99, Z v. European Parliament*, [2001] ECR I-9214.

[127] *Case 274/99 P, Bernard Connolly v Commission of the European Communities*, [2001] ECR I-1638.

[128] *The Sunday Times vs. UK* (Appl. no.6538/74) ECtHR (1979).

[129] *Handyside vs. UK* (Appl. no.5493/72) ECtHR (1976).

[130] *Case 347/03, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestal*i, [2005] ECR I-3820.

[131] *Joined Case 465/00 & Case 138-139/00, Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm (C-138/01) and Joseph Lauermann v Österreichischer Rundfunk*, [2003] ECR I-5041.

[132] *Leander vs. Sweden* (Appl. no.9248/81) ECtHR (1987).

[133] *Case 368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR 3709.

30 TEC). The interference with this economic right needed to be justified by a public interest recognized by the EC Treaty. The purpose of this restriction, claimed the Austrian government, was to protect press diversity under Art.10 ECHR. The Court referred in its judgment to the Strasbourg decision in *Informationsverein Lentia*[134], affirming that the maintenance of press diversity fell within the scope of the Convention's protection of freedom of expression. Moreover, the maintenance of press diversity was a legitimate aim of the law and was necessary in a democratic society. The Court drew inspiration from two Strasbourg decisions, *Wille*[135] and *Glasenapp*,[136] using them as concrete jurisprudential guidance to argue that civil servants assumed a special "duty and responsibility" in the exercise of the freedom of expression.

In the area of the protection of procedural rights, Strasbourg case law also provides Luxembourg judges with concrete jurisprudential guidance regarding procedural rules and legal definitions. In the judgment in *Aalborg Portland*,[137] the Luxembourg Court clarified the meaning of the "adversarial principle", drawing inspiration from the two Strasbourg judgments in *Kerojarvi*[138] and *Mantovanelli*, and concluded that the adversarial principle related "*only to the judicial proceeding before a 'tribunal' and there was no general or abstract principle that the parties in all instances had the opportunity to attend the interview carried out or to receive copies of all the documents taken into account in the case of another person*". In the judgment in *Weiss*,[139] the Strasbourg decisions were cited as a parameter for defining the scope of the right to a defence and the meaning of "indictment". The Luxembourg Court refused to recognize a right not to accept evidence written in a foreign language, following concrete jurisprudential guidance from the Strasbourg case *Kamasinski*.[140] In the judgment in *ASML*,[141] the Court took legitimate guidance from the Strasbourg decision in *Artico*,[142] recognizing that "the rights of the defence, which derive from the right to fair legal process enshrined in [Art.6 ECHR], require specific protection intended to guarantee the effective exercise of the defendant's rights". In the *Krombach* judgment[143], the Court referred to several Strasbourg decisions, arguing that the defendant's right to defence was not respected in the French criminal proceedings because even if the defendant could not himself be present at the hearing, his right to be represented before the Court was one of the inalienable fundamental rights under Art.6 ECHR.

After the Lisbon Treaty, concrete jurisprudential guidance has been regarded as the principal function of a reference to Strasbourg case law. This method is particularly necessary when the Court receives a preliminary reference from a national Constitutional Court. In the well-known Luxembourg judgment in *Melloni*, the Court referred to the Strasbourg case *Sejdovic*, which had similar facts and circumstances to the *Melloni* case, and in which it had been demonstrated that the right to a fair trial as stated by the ECHR would not be undermined if an absent defendant was well informed about the time and place of the legal proceedings and the consequence of his failure to attend court. In the *DEB* judgment, the Luxembourg Court warned the German court that the necessity for a legal hearing depends on particular

[134] *Informationsverein Lentia vs. Austria* (Appl no.37093/97) ECtHR (2002).
[135] *Wille vs. Liechtenstein* (Appl. no.28369/95) ECtHR (1999).
[136] *Glasenapp vs. Germany* (Appl. no.9228/80) ECtHR (1986).
[137] *Case 204/00, Aalborg Portland and Others v Commission,* [2004] ECR I-403.
[138] *Kerojarvi vs. Finland* (Appl. no.17506/90) ECtHR (1995).
[139] *Case 14/07, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin,* judgment 8 May 2008.
[140] *Kamasinski vs. Austria* (Appl. no.9783/82) ECtHR (1989).
[141] *Case 283/05, ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS),* [2006] ECR I-12067.
[142] *Artico vs. Italy* (Appl. no.6694/74) ECtHR (1980).
[143] *Case 7/98, Dieter Krombach v André Bamberski,* [2000] ECR I-1956.

factors and circumstances, in line with Strasbourg case law.

In the field of the right to privacy, Strasbourg case law has become a hermeneutical tool for the Luxembourg judges' interpretation of legal definitions and examinations of the scope of fundamental rights. In the judgment in *Österreichischer Rundfunk*, the Court agreed with the claimant's opinion that the transmission of personal data to the government, even though the data would not be published, constituted an interference with his "private life". On the basis that the Convention rights were concretely defined by the Strasbourg case law, the Court particularly referred to the Strasbourg cases of *Amann* and *Rotaru*, in the second of which the Strasbourg Court had stated that "there is no reason of principle to justify excluding activities of a professional ... nature from the notion of 'private life'". This Strasbourg definition was repeated in the judgment in *Volker und Markus Schecke*[144] as a legitimate reason to prevent government activity in relation to the collection of personal data. In the judgment in *Schwartz*,[145] the Court deferred entirely to the Strasbourg view of the legal nature of fingerprints that had been established in its judgment in *S. and Marper*,[146] holding that "fingerprints constitute personal data, as they objectively contain unique information about individuals which allows those individuals to be identified with precision".

In the case of *European Parliament vs. Council*,[147] the European Parliament sought to annul certain legal provisions in EC Directive 2003/86 on the grounds that the limitation of the right to family reunification for minors over the age of 12 supposely were in breach of relevant international treaties. However, the Council argued that the European Community did not need to follow those international rules since it was not a contracting state to those international treaties. Against this argument, the Luxembourg Court found that the fundamental rights provided by the European Convention formed a general principle of EU law, so that the Court had to take international human rights treaties seriously. Despite the fact that a state government, according to the European Convention, had both positive and negative obligations to respect this right, pursuant to Art.8 ECHR, the state enjoyed a certain margin of appreciation in both types of obligations. The scope of the state obligation to admit to its territory relatives of settled immigrants would vary according to the particular circumstances of the people involved and to other general interests. In this sense, Art.8 ECHR did not impose a general obligation to authorize family reunion in the state's territory. The Court continued by noting that the Strasbourg decisions in *Sen*[148] and *Rodriguez da Silva*[149] provided the concrete jurisprudential guidance that respondent states could take into account the age of the children concerned, their circumstances in the country of origin and the extent to which they depended on their relatives. The Court's decision actually reflected the fact that the Luxembourg Court did not stand on either side of the argument. It cleverly transferred the final power to the domestic authority in line with the two ECtHR cases to which it referred.

Examples of references to Strasbourg case law functioning as concrete jurisprudential guidance can be found not only in the common cases concerning the right to fair trial, the right to privacy and the right to freedom of expression. In the judgment in *Advocaten voor de Wereld*[150], the Court interpreted the principle of the legality of a penalty for a criminal offence in line with the Strasbourg decision in *Coeme*,[151] which had stated that the domestic judges had to let the defendant know which act or omission

[144] *Case 92-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, judgment 9 November 2010.
[145] *Case 291/12, Michael Schwarz v Stadt Bochum*, judgment 17 October 2013.
[146] *S. and Marper vs. UK* (Appl. nos.30562/04 and 30566/04) ECtHR (2008).
[147] *Case 540/03, European Parliament v Council of the European Union*, [2006] ECR I-5809.
[148] *Sen vs. Netherlands* (Appl. no.31465/96) ECtHR (2001).
[149] *Rodriguez da Silva vs. Netherlands* (Appl. no.50435/99) ECtHR (2006).
[150] *Case 303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad*, [2007] ECR I-3672.
[151] *Coeme and Others vs. Belgium* (Appl. no.32492/96) ECtHR (2000).

had resulted in his or her criminal liability, on the basis of the wording of the relevant provisions and their legal interpretation. In the judgment in *Kadi I*, the Court held that the property sanction resulting from the EU Regulation that implemented the UN resolution substantively infringed the defendant's right to property. According to the EU legal order, restrictions on fundamental rights must be subject to judicial review. Thus, the Court referred to the Strasbourg decision in *Jokela*, arguing that the domestic court must take a comprehensive view of the applicant's procedural rights that are inherently assumed by Art.1 of Protocol No.1 to the ECHR. In the case of *M.*,[152] an Italian suspect was charged with committing a sexual offence against a minor (his granddaughter) in both Belgium and Italy. The Belgian pre-trial chamber made the decision of "*non-lieu*". Mr M., however, might have faced a criminal conviction in Italy under the same facts. In these circumstances, he had claimed that the doctrine of *ne bis in idem*, which was stated in both European human rights instruments, would be infringed because the Belgian decision made the case *res judicata*. The Luxembourg Court outlined the elements of the *ne bis in idem* doctrine from the Strasbourg decision in *Zolotukhin*,[153] and held that a particular case could be reopened when new evidence or procedural errors were found. In this sense, *res judicata* doctrine was not a reason to block the continuation of the proceedings in the particular circumstances.

4.2.2. Confirmation of the Legitimacy of a Decision or Warning to the Domestic Court

On some occasions, Strasbourg case law is cited to confirm the legitimacy of the decision or to give a specific warning to the domestic court not to undermine the Convention rights established by concrete Strasbourg case law. In the judgment in *Schindler*[154], there was a dispute between the appellants and the Court as to which Strasbourg case law should be used for the parameters in the EU context. The appellants questioned the correctness of the General Court's reference to the Strasbourg decision in *Jussila*[155] which held that, for certain categories of infringement not forming the core part of the criminal law, the fine need not be determined by a tribunal so long as provision was made for a full review of the legality of the fine decision; this was applied in Cartel proceedings. Moreover, since the fine was large, the appellant opposed the General Court's reference to the Strasbourg decision in *Menarini*[156] where it was held that the amount of the penal fine determined by the administrative authority actually infringed the appellant's right to a fair trial. Arguing against this, the Court stated that the *Menarini* decision was rightly applied, not only because both Courts agreed that Art.6(1) ECHR did not preclude an administrative authority from imposing a "penalty", but also because the appellant still retained the right to a judicial remedy if the administrative authority did not satisfy the requirement of the right to a fair trial. When the appellant complained that a certain provision that left wide discretionary power to the judges might violate the principles of the rule of law and *nulla poena sine lege*, the Court referred to two Strasbourg decisions demonstrating that the provision under challenge would be consistent with fundamental rights. In the decision in *G. vs. France*,[157] the clarity of law was assessed by considering not only the wording of the relevant provision, but also the Court's understanding of the case law. Moreover, the Strasbourg Court also determined, in the case of *Margareta and Roger Andersson*,[158] that the fact that a law had conferred a new discretionary competence on the judiciary was consistent with

[152] *Case 398/12, Criminal proceedings against M*, judgment 5 June 2014.
[153] *Sergey Zolotukhin vs. Russia* (Appl. no. 14939/03) ECtHR (2009).
[154] *Case C-501/11P, Schindler Holding Ltd and Others v European Commission*, judgment 18 July 2013.
[155] *Jussila vs. Finland* (Appl. no.73053/01) ECtHR (2006).
[156] *Menarini vs. Italy* (Appl. no.43509/08) ECtHR (2011).
[157] *G. vs. France* (Appl. no.15312/89) ECtHR (1995).
[158] *Margareta and Roger Andersson vs. Sweden* (Appl. no.12963/87) ECtHR (1992).

the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to give an individual adequate protection against arbitrary interference.

In the preliminary reference in *G.*,[159] the domestic court submitted a question as to whether EU law must be interpreted in such a way as to preclude the delivery of judgment by default against a defendant on whom, the document instituting proceedings was served by a public notice under the national law, as it was impossible to locate the individual in question. The Court noted that there was provision under the German regulations for proceedings to be brought against a person whose domicile was unknown. Thus, considering that the EU law lacked concrete rules on this issue, the domestic regulation seemed to be permissible, provided that it did not undermine the core of the rights to defend oneself enshrined by the EU Charter and the European Convention and provided that the potential restriction on the right to bring a defence did not constitute a disproportionate threat to the public interest. The Court, thus, referred to the Strasbourg decision in *Nunes Dias*[160] as a source of persuasive legitimacy, because the Strasbourg judges did not preclude the use of a "summons by public notice" provided that the rights of the person concerned were properly protected. This reference actually represented a crucial reminder to the domestic judges that they must observe the requirements established by the Strasbourg case law. In the judgment in *El Dridi*[161], the Luxembourg Court referred to the Strasbourg decision in *Saadi*[162] to warn the local Italian authority not to detain a person who would be removed from the state for an unreasonable time; that is, the length of time in detention should not exceed what was required to fulfil the aim of the detention. In the judgment in *Lanigan*[163], the Court referred to the Strasbourg decisions in *Quinn* and *Gallardo Sanchez*[164] that required the Member State to carry out a holding procedure with due care.

The Strasbourg judgment in *N. vs. UK*[165] provided concrete jurisprudential guidance in the Luxembourg decisions in *M'Bodj*[166] and *Abdida.*[167] In the latter judgment, the Court warned the domestic court that it must observe the ruling established by the Strasbourg case law, in particular that in some exceptional cases, the deportation of a non-national who was suffering from a serious illness and could not enjoy equivalent medical treatment in his or her state of origin, might constitute an infringement of the prohibition on inhuman and degrading treatment contained in Art. 3 ECHR. In the former , the Strasbourg Court's interpretation was referred to as a parameter in the argument that the non-national, who was neither a refugee nor on a low income, was not entitled to benefit from subsidized medical treatment under the EU Qualification Directive 2004/83/EC[168]. The national decision to remove him to his state of origin, where the quality of medical treatment was far lower than in his state of residence, was thus not in breach of the ECHR.

[159] *Case 292/10, G v Cornelius de Visser,* judgment 15 September 2012.

[160] *Nunes Dias vs. Portugal* (Appl. no.69829/01) ECtHR (2003).

[161] *Case 11/61 PPU, Hassen El Dridi,* judgment 28 April 2011.

[162] *Saadi vs. Italy* (Appl no. 37201/08) ECtHR (2008).

[163] *Case 237/15 PPU, Minister for Justice and Equality v Francis Lanigan,* judgment 16 July 2015.

[164] Gallardo Sanchez vs. Italy (Appl. no.11620.07) ECtHR (2015).

[165] *N. vs. UK* (Appl. no.26565/05) ECtHR (2008).

[166] *Case 542/13, Mohamed M'Bodj v État belge,* judgment 18 December 2014.

[167] *Case 562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida,* judgment 18 December 2014.

[168] European Council Directive 2004/83/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML (4 November 2016).

4.2.3. Reference to the Strasbourg Decision by way of Comparison

The Luxembourg Court may make a comparison with Strasbourg case law, looking for similarities and differences between the two legal orders. In the judgment in *Jeremy F.*, the French *Conseil Constitutionnel* submitted a question to the Court, inquiring whether the EAW Framework Decision deprived the defendant of the opportunity to appeal against the decision made by the domestic investigating judges. The Luxembourg Court replied that the surrender procedures under the Framework Decision must respect the rights to a defence provided by Art. 47 of the Charter and Art. 13 of the ECHR.

The Court adopted a comparative approach to analyse Strasbourg's judicial remedy procedure for individuals subjected to extradition under Art.5(4) ECHR, which was regarded as a *lex specialis* in relation to the more general requirements of Art.13 ECHR. The Court noted that, according to the judgment in *Khodzhamberdiyev*, when the decision to deprive the individual of his personal liberty is made by a court at the close of the judicial proceedings, the supervision required by the Convention should be incorporated into the decision. Moreover, according to the Strasbourg decision in *Marturana*,[169] the Strasbourg regime did not compel the Contracting Parties to set up a second level of jurisdiction for examining the lawfulness of detentions and for hearing release applications. The comparative analysis of this Strasbourg case law revealed, as a parameter for the Luxembourg Court, the necessary characteristics of the EAW procedural system. As a result, the Luxembourg Court claimed that the Council Directive had the same relevant content as the Strasbourg regime, and that the EU institution required the Member States to respect an individual's right to access justice, but did not impose on the Member States the establishment of a number of levels of jurisdiction. The Court's preliminary ruling implied that the right to appeal against the decision of the investigating judges was an essential part of access to justice, but that the Member States enjoyed a margin of discretion in relation to determine the concrete judicial procedure when protecting the appellant's right to a fair trial within the period of execution of EAW.

Similarly, in the judgment *KNK*, the Court examined the Strasbourg criteria for admissibility as requested by appellants whose arguments to annul EC Decision 2002/334 were dismissed. The Court took the Strasbourg decisions in *Klass*[170] and *Tauira*[171] as guidance to determine the Strasbourg criteria of admissibility. By reference, the Court noted that applicants must be victims whose rights have actually been violated unless, in some highly exceptional circumstances, they could be treated as victims without having suffered any real injury.

4.3. Reference to Strasbourg Case Law "by Analogy"

The Luxembourg Court occasionally uses Strasbourg case law in its judgments to draw "analogies", because the Luxembourg context in which fundamental rights are invoked is somehow different from the Strasbourg one. In the judgments in *Carpenter*[172] and *Akrich*[173] concerning the removal of non-EU citizen family members from a state in which they resided, the Luxembourg Court generously protected the rights in relation to family members by citing Strasbourg case law under Art. 8 ECHR.

[169] *Marturana vs. Italy* (Appl. no.63154/00) ECtHR (2008).
[170] *Klass and Others vs. Germany* (Appl. no.5029/71) ECtHR (1978).
[171] *Tauira and 18 Others vs. France* (Appl. no.28204/95) ECtHR (1995).
[172] *Case 60/00, Mary Carpenter v Secretary of State for the Home Department,* [2002] ECR I-6305.
[173] *Case 109/01, Secretary of State for the Home Department v Hacene Akrich*, [2003] ECR I-9665.

In the former case, Mrs Carpenter, who was from the Philippines, continued to live in the UK after the expiration of her permit to stay. Unfortunately, her husband was working in the Netherlands and. Thus, Mrs Carpenter became the only member of the family who could take care of their children at home. The Luxembourg Court acknowledged that the EC's right to economic freedom could hardly be fulfilled if close family members could not be granted permission to live in other EU states. In the latter case, the Court determined that the deportation of a non-EU citizen, who had married an EU citizen and had been living in the EU Member State in question for a long time, might constitute an infringement to the right to the respect of family life, although, according to domestic law, he no longer was a legal resident. In both cases, the Court pointed out that Art. 8 ECHR did not provide specific right for aliens to enter or live in a particular country. However, the Court followed the Strasbourg jurisprudence that showed that deportation of an alien must be in accordance with Art. 8(2) of the European Convention, namely that any restriction of the right under Art.8(2) ECHR should be motivated by one or more legitimate aims and be necessary in a democratic society. In order to enhance the legitimacy of these two decisions, the Court referred to the Strasbourg decisions *Boultif*[174] and *Amrollahi*[175] for setting the criteria of "necessity". Actually, these Strasbourg cases concerned the deportation of criminals, who were not nationals, from their states of residence where they had been living with their family members for a long period. In contrast, the Luxembourg court was deliberating on two cases concerning the protection of the civil rights of third-country nationals who were spouses of EU nationals.

4.4. Decorative Reference to Strasbourg Case Law

On some occasions, the Luxembourg reference to the Strasbourg case law seems useless or unnecessary. At these times, decoration becomes the main function of the citation of a Strasbourg case. *P. v. S.* is the first judgment in which the Court referred to the Strasbourg decision in *Rees* in order to define the term "transsexual". The explanation of this word had no impact on the Luxembourg Court's final decision. The main function of this reference seems just to have been to record the fact that the Luxembourg Court agreed with the Strasbourg Court's explanation.

Similarly, the Court referred to three Strasbourg cases in the judgment in *Francophones*,[176] arguing that the concept of a fair trial defined by Art.6 ECHR entailed the presence of various elements including, *inter alia*, the right of defence, the principle of equality of arms, the right to access the courts, and the right to have access to a lawyer in both civil and criminal proceedings. However, these were only decorative citations in the final judgment, given that the references were used in the description of an abstract concept that could hardly be taken as legitimate guidance for the Luxembourg judges to follow.

Besides, the Court usually makes references to Strasbourg case law together with Luxembourg precedents. In the judgment in *Schmidberger*,[177] the Court referred to the Strasbourg decision in *Steel* & *Morris*, implying that the Strasbourg Court had adopted the same method as the Luxembourg judges to justify a restriction of fundamental rights that was proportionate to a legitimate aim. The Luxembourg citation of the Strasbourg case in this judgment seems unnecessary because the Luxembourg case law was fully able to provide an appropriate source.

[174] *Boultif vs. Switzerland* (Appl. no.54273/00) ECtHR (2001).

[175] *Amrollahi vs. Denmark* (Appl. no.56811/00) ECtHR (2002).

[176] *Case 305/05, Ordre des barreaux francophones et germanophone and Others v Conseil des ministres,* [2007] ECR I-5335.

[177] *Case 112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5694.

5. Conclusion

Within the framework of the European multilevel protection of fundamental rights, national and supranational legal orders are both intertwined and cooperative. The Luxembourg Court, on the one hand, guarantees the authority of the EU legal order. On the other hand, the protection of fundamental rights in the EU legal order could hardly be an autonomous area free from the influence of the Strasbourg Court. From the Maastricht Treaty to the Lisbon Treaty, the drafters of the Treaities have consistently granted the European Convention the legal status of a general principle of EU law. Before the Lisbon Treaty came into effect, the Court of Justice of the European Union usually mentioned that the European Convention had "special significance". After the Lisbon Treaty came into effect, the Court has often taken the ECHR as a parameter to interpret the EU provisions. Art.52(7) of the EU Charter and the Official Explanation leave a margin of discretion for the Court in relation to the extent to which it takes Strasbourg case law into account. Since more than half of the Charter rights are borrowed from the European Convention, the Court can hardly ignore the relevant Strasbourg interpretations, because the Convention has been widely regarded as a "living instrument" that dynamically reshapes the scope and meaning of the Convention rights.

Although the empirical statistics and the opinions of the majority of CJEU's judges interviewed by some scholars suggest that the frequency with which Strasbourg case law is cited is lower now than it was in the pre-Lisbon Treaty era, it is by no means clear that the Strasbourg jurisprudence is losing its influence over the Luxembourg judgments. Some final judgments published in the *Curia* database might be revised versions of the original drafts, and these drafts may have contained many more references to Strasbourg case law. Because the Luxembourg Court is very concerned about its legitimacy, the European judges tend to delete references to Strasbourg case law from the official judgments. Sometimes, Strasbourg case law will not be cited in Luxembourg judgments because the latter court interprets the fundamental rights in a parallel manner. However, the members in chambers or the Grand Chamber might possibly examine the compatibility of the judgment with the Strasbourg jurisprudence in the final phase if some judges are arguing that the Luxembourg decision may breach the European Convention.

The motivations for the Luxembourg Court's references to Strasbourg case law can be divided into four categories: substantive observance of the Strasbourg jurisprudence; reference to Strasbourg case law as legitimate guidance; reference "by analogy"; and decorative reference. The majority of the Strasbourg judgments that are referred to function as legitimate guidance through which the Luxembourg Court not only ascertains the meaning and scope of the fundamental rights in question, but also implicitly reminds the Member States not to undermine Strasbourg's standard of fundamental rights. Substantive observances of Strasbourg decisions are usually found in cases where the EU lacks concrete procedural rules or regulations on how EU law should be implemented, or cases where developments in Strasbourg case law have modified the Luxembourg Court's previous understanding of the meaning of Convention rights. In these circumstances, the Luxembourg Court prefers to follow the Strasbourg jurisprudence substantively. Apart from that, the Court may rely substantively on Strasbourg's decisions with respect to the protection of fundamental rights that are borrowed from the ECHR and ECtHR case law. Very few Strasbourg cases are cited as "by analogy" or as decoration. These two latter types of citation both make it clear that the Court has considered the Strasbourg jurisprudence. Using the Strasbourg case law "by analogy" indicates that the Court is generously extending the applicability of a Strasbourg decision into a new area, while a decorative reference is nothing but a superficial citation of Strasbourg case law in a Luxembourg judgment.