Article

European Pluralism on the Protection of Fundamental Rights: The European Convention on Human Rights *vis-à-vis* the EU Legal Order

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ABSTRACT

This article focuses on the EU legal order vis-à-vis *the European Convention on Human Rights (thereafter ECHR) in the context of European multilevel mechanism on the protection of fundamental rights. Though the EU Opinion 2/13 has temporarily suspended the process of EU accession to the ECHR, these two European regimes still have to accommodate each other in order not to confuse their common member states. As to fill the EU's gaps in the aspects of the lack of competence regarding the protection of fundamental human rights, the Court of Justice of the European Union (thereafter CJEU) has to regard the ECHR as one of the lawful criteria for examining the conventionality of EU Regulations and Directives in the specific field of human rights after the judgment of Rutili delivered in 1975. In the 1980s, the European Convention was not only treated as one source of general principle of the EU law provided by the several Luxembourg decisions, but it was the only "special significance" for the European Community law. This Luxembourg jurisprudence was then recognized by the authors of Maastricht Treaty in 1992 and Lisbon Treaty in 2009. Apart from those, the drafters of the European Charter on Fundamental rights (thereafter EU Charter) borrowed almost all the*

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Convention rights by five technical approaches. Moreover, the Luxembourg judges also referred to Strasbourg case-law under multiple motivations in its dozens of decisions. Ever since the Strasbourg Court defined the European Convention as "the constitutional document in the European public order" in the field of human rights, the Strasbourg judges have been slowly extending its jurisdictional competence to the EU jurisdiction. The Strasbourg Court quite often substantively scrutinizes whether the EU law application by the member states has been compatible with national duty under the European Convention. On the other side, Strasbourg judges usually identify the scope of consensus on the reliance of comparative and international law. Thus, the EU Directives, Luxembourg case-law and the EU Charter have always been invoked as relevant resources or evidence by the Strasbourg Court for interpreting Convention rights and shaping the European Convention in line with the development of human rights legislation in the external legal territory.

Keywords: *EU Opinion 2/13, Case Law Borrowing, The Transplantation of Fundamental Rights, Indirect Jurisdiction, European Convention on Human Rights, EU Charter of Fundamental Rights*

CONTENTS

I. AN OVERVIEW OF THE RELATIONSHIP BETWEEN EU LAW AND THE ECHR AFTER LUXEMBOURG OPINION 2/13

The CJEU Opinion 2/13 reiterates the fundamental principle that the supreme role of the Luxembourg Court is exclusively prohibited to be undermined by any international agreement under the EU legal order.[1] In its final Opinion on the Draft Agreement of EU Accession to the ECHR (Opinion 2/13),[2] the Luxembourg words implicitly reveal their willingness

1. In order to guarantee the autonomy of the CJEU, the Luxembourg judges explicitly clarify the EU law autonomy in the ECJ Opinion 1/00. This doctrine entails two external meanings: (1) the essential competence provided by the EU Treaties remains integrity; (2) it requires that the procedure for ensuring uniformity of interpretation of the rules provided by the international agreements and for resolving the disputes will not have a binding effect to the Community and its institutions. The Luxembourg Court refers the Opinion in the judgment of *Mox Plant* for stressing a fact that the other international bodies have not been granted the power to interpret EU law with a binding effect. *See* Tobias Lock, *Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MKT. L. REV. 1025, 1030 (2011).

2. Opinion 2/13, *In Re*: the EU Accession to the ECHR, 2014 E.C.R. 2454 "Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms", http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CV0002. The Luxembourg Court points out seven objections to the Draft Agreement: (1) While the Strasbourg regime allows the contracting parties to set the higher standard of protection than those guaranteed by the European Convention, the Luxembourg Court, in order to maintain the primacy, unity and effectiveness of EU law, requires its member states to primarily apply EU law, unless the EU provisions explicitly allow them to apply national law; (2) the EU could not be simply treated as a normal contracting state subjected to the subsidiary supervision by the Strasbourg regime. According to the relevant EU Treaties and Luxembourg case-law, all the member states are obliged to accept that the relations between EU members are exclusively governed by EU law. For instance, the doctrine "mutual trust" among the member states has been one of basic principles reflected in some EU regulations. Unfortunately, the Draft Agreement has not taken serious account of this fact. The Strasbourg regime requires each member state to check whether the other member states have observed the obligation under the European Convention, even though the "mutual trust" doctrine has been enshrined by the EU regulations and recognized by the Luxembourg case-law. Thus, the accession may break the EU judicial doctrine and undermine the EU law autonomy; (3) The mechanism, provided by Protocol No. 16 to the ECHR, that domestic tribunals could ask for an advisory opinion to the Strasbourg Court on the questions relating to interpretation or application of the ECHR, could affect the autonomy and effectiveness of EU preliminary rulings procedure. It cannot rule out the risk that the Strasbourg Court may involve into an interpretation of fundamental rights secured both by the ECHR and the EU Charter earlier than the Luxembourg Court does. This may lead to the circumvention of Luxembourg preliminary rulings procedure; (4) The Treaty on the Functioning of the European Union (thereafter TFEU) provides that EU member states and EU institutions undertake not to submit a dispute concerning the interpretation or the application of the EU Treaties to any method of the settlement other than provided by law. However, the Draft Agreement still allows the possibility that EU member states or institutions might submit to the Strasbourg Court an application concerning an alleged violation of the European Convention by a member state or an EU institution related to EU law. This envisaged possibility may undermine the EU legal order provided by TFEU, unless the Strasbourg jurisdiction has been expressly excluded to adjudicate the disputes of the competence between EU member states, and EU institutions and member states, in the application of the ECHR in EU law context; (5) In the co-respondent mechanism provided by the Draft Agreement, EU member states or institutions could request to leave to intervene as a co-respondent party in a case before the Strasbourg Court. In this circumstance, the Strasbourg Court undertakes the obligation to assess the request to the participation to the case according to the relevant EU legal provisions governing the division between the EU and member states as well as the criteria for the

that the EU subjection to the Human Rights Court is unacceptable, implying that the efforts to establish a *vis-à-vis* relationship based on the Accession Draft can hardly be compatible with the EU judicial autonomy defined by the Luxembourg Court. The European legal scholars expressed their diverse attitudes towards this result. Judge Spielmann - the former President of the Strasbourg Court - called this Luxembourg decision a "disappointment" and "unexpected".[3] Some depressed European scholars even condemned the CJEU concerning the maintenance of EU autonomous power more than fundamental rights protection,[4] regarding the fact that EU would still be free from external supervision. On the contrary, some few European Scholars stood in a favor position with the EU decision arguing that the EU autonomy was a very fundamental legal order provided by the TEU and Luxembourg case-law. The Luxembourg decision can be justified under Art. 6(2) TEU that the EU Accession to the ECHR should not undermine the powers of EU institutions.[5]

However, it is unnecessary to view this Luxembourg Opinion as a scene indicating that the Luxembourg Court plans to absolutely defend its

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attribution of their acts and omission. Obviously, the Strasbourg Court may possibly replace the EU court in making a decision on the issue of division of power between EU and national level; (6) The procedure of the prior involvement of Luxembourg Court, provided by the Draft Agreement, seems to be incapable of ensuring that the Strasbourg Court knows all the given rulings on the same question of law before the proceedings of the Strasbourg Court. The Luxembourg Court wishes to set up a complementary procedure to be completely and fully informed before the case admissible by the Strasbourg Court so that the Luxembourg judges are able to assess whether the Luxembourg Court has given determination on the relevant issues in question. The Draft Agreement excludes the possibility of bringing a matter for ruling on a question of the secondary law before the Luxembourg Court by the procedure of prior involvement. Limiting the scope solely to the question of validity will undermine the competence of EU institutions; (7) Luxembourg Court seems hardly to accept that the Strasbourg Court, as a non EU institution, will be granted the judicial powers to review the matters of the common foreign and security policy, while the present EU Treaties exclude the Luxembourg court undertaking this competence in the above issues.

3. EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2014 OF THE EUROPEAN COURT OF HUMAN RIGHTS 6 (2015).

4. Sionaidh Douglas-Scott, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from European Court of Justice*, U.K. CONST. L. BLOG (Dec. 24, 2014), http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/; Steve Peers, *The CJEU and EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU LAW ANALYSIS BLOG (Aug. 20, 2016), http://eulawanalysis.blogspot.nl/2014/12/the-cjeu-and-eus-accession-to-echr.html; Tobias Lock, *Oops! We Did It Again - The CJEU's Opinion on EU Accession to ECHR*, VERFASSUNGSBLOG.DE (Dec. 18, 2014), http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VRAvDPnF-xl.

5. Daniel Halberstam, "It is Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to ECHR, and the Way Forward (University of Michigan, Public Law and Legal Theory Research Paper No. 432, 2015); Daniel Halberstam, A Constitutional Defense of CJEU Opinion 2/13 on EU accession to ECHR, VERFBLOG (Mar. 12, 2015), http://www.verfassungsblog.de/en/a-constitutional-defense-of-cjeu-opinion-213-on-eu-accession-to-the-echr-and-the-way-forward/#.VRA1-vnF-xk.

autonomy at the cost of sacrificing its close friendship and intimate cooperation with the European Court of Human Rights (thereafter ECtHR), it has little possibility for the Luxembourg judges to oppose the Strasbourg decision publicly, even in some occasions that the Strasbourg jurisprudence has actually conflicted with the EU legal order. In the *M.S.S*[6] decision, the Strasbourg judges determine that the Belgian decision on deporting Afghan refugees to Greece constituted a breach of national duty provided by Art.3 ECHR without granting a presumed comparable status of "mutual trust" laid down in the Dublin Regulation. However, the Luxembourg judges do not guarantee this unique EU doctrine in the judgments of *NS*[7] and *ME & Others*.[8] Instead, the Luxembourg Court interpreted asylum regulation 343/2003 in compliance with the Strasbourg jurisprudence.[9]

The fact that the converging trend in fundamental rights protection between the two transnational courts is not the exclusive channel for the revelation that the Luxembourg judges have taken due to the account of Strasbourg jurisprudence. More than one Luxembourg judge have recognized that they are keen on reading and considering similar Strasbourg case decisions before providing their opinions. An interviewed Luxembourg judge has ever expressed that it is a compulsory task, even in the post-Lisbon era, for him to consider the relevant Strasbourg case-law before making his final determinations.[10] It is persuasively worth to highlight that although the two transnational Courts have different functions in the European supranational framework,[11] they jointly involved into the program to

6. M.S.S v. Belgium, 2011-I Eur. Ct. H.R. 255.

7. Joined Cases C-411/10, N.S. v. Sec'y of state for the Home Dep't, 2011 E.C.R. I-13905.

8. Case C-493/10, M.E. v. Refugee Applications Comm'n, 2011 E.C.R. I-13905.

9. The Court stated that ". . . Member States, including the national courts, may not transfer an asylum seeker to the 'member state responsible' within the meaning of Regulation No. 343/2003 where they cannot be unaware that systematic deficiencies in the asylum procedure and in the reception condition of the asylum seekers in that the member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter".

10. Sonia Morano-Foadi & Stelios Andreadakis, *Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights*, 17 EUR. L.J. 595, 601 (2011). One interviewed judge revealed to the author that "[O]verall, we start with the Charter, provided that the right is recognised there, then the Convention becomes important, if the right is the same there as well".

11. *See* Leonard F. M. Besselink, *The ECJ as the European "Supreme Court": Setting aside the Citizens' Rights for EU Law Supremacy*, VERfBLOG (Aug. 18, 2014), http://www.verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/#.VeljI_mqqko. The President of ECJ, Skouris, states that "The Court of Justice is the supreme court of the European Union". These words implicitly reveal that the Luxembourg Court is not a specific human rights court, but its underlying function falls to guarantee the supremacy of EU legal authority within the EU jurisdiction. Actually, the *Melloni* case confirmed Skouris's opinion in the light of fact that the Luxembourg judges gave a negative answer to the preliminary question whether the Member State can disapply the EU law whenever the national Constitution sets a higher standard of fundamental rights protection than EU Directives do. The Luxembourg judges often justifies the interference of fundamental rights by virtue of EU public interest. In the judgment of *Wachauf*,

accelerate European integration and are dedicated to shaping a new European pluralism constitutional order.[12] The two European Courts are fully aware that an informal cooperation may be a better approach in any formal mechanism with respect to the reconciliation of European multilevel legal orders.[13] Meanwhile, the integrity of EU autonomy can possibly be well maintained by the inform method of judicial dialogue. On the other side, individuals would be the potential victims if a domestic court is forced to follow Luxembourg decisions inconsistent with fundamental rights. Yet, the supremacy of EU law may also be potentially undermined and questioned by the national courts in the occasions that the Luxembourg decision breaches the European Convention because the latter instrument has been commonly regarded as the minimum standard of protection on human rights.[14]

However, this cooperation is not unilateral. The Strasbourg Court usually refers to EU law and Luxembourg decisions in its judgments, and gives them the value as the relevant legal sources for the interpretation for the European Convention. Apart from this cross-fertilization, with the ECHR evolving into a "constitutional instrument in European public order" in the

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Luxembourg Court states that "[T]he fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions, in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to an aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights". *See also* A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491, 499 (1997). The two Courts interpret their constitutive documents in accordance to their own objectives, while the objectives do not necessarily coincide. The aim of the Strasbourg Court is to protect the individual as a human being, while the main function of Luxembourg Court is to promote economic and social integration.

12. Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629, 652-53 (2006). Human rights law is the least autonomous part of European law and because of the informal and *ad hoc* relationships between these two supranational courts, they have to cope with overlapped jurisdiction. Apart from that, the two European Courts undertake the task to search for the common norms of European human rights law. *See also* Guy Harpaz, *The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy*, 46 COMMON MKT. L. REV. 105, 126 (2009). The two regimes should not be perceived as self-contained, but rather as mutually complementary, similar human rights regimes. *See also* Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 298 (1997). The ECJ and ECHR have become a part of larger European "Community of Law": a network of legal actors self-consciously interacting with one of the other on the basis of self-interest and shared values in a nominally apolitical context.

13. Laurent Scheeck, *Competition, Conflict and Cooperation between the European Courts and Diplomacy of Supranational Judicial Networks* 6 (GARNET, Working Paper No. 23/07, 2007), http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/2307.pdf. Scheeck argues that their courts' cooperation emerged for two reasons: (1) Each court hung a Damocles sword over head of the other Court; (2) They uphold their respective work and increasingly depend on the others.

14. Harpaz, *supra* note 12, at 115-16.

area of human rights, the application of EU law by member states is not seen as an area of exemption from Strasbourg jurisdiction. On the contrary, the Strasbourg's intensive scrutiny of EU member states gradually became an indirect judicial review of the EU Directives in the ECHR context.

In the nearly 20 years between *Nold*[15] decision and the adoption of Maastricht Treaty, Strasbourg jurisprudence was consistently taken by the Luxembourg Court as the inspired source forming the general principle of EU law.[16] Despite Luxembourg's continuous resistance against the formal Convention "external binding effect" towards the EU legal order,[17] the ECHR provisions are often cited by the Luxembourg judges for ensuring those measures interfering to the EU fundamental rights in compatible with the European Convention.[18]

After the incorporation of the ECHR to the Maastricht Treaty, the inspirational words have not been intensively stated by Luxembourg judges into Luxembourg judgments any longer[19] on the ground that Art. 6(2) of the Maastricht Treaty provides that the EU "*shall respect the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 as the general principle of EU law*". Different from the *Rutili*[20] decision, where the Luxembourg Court generously treated all the international human rights treaties as the general principle of EU law, the Maastricht Treaty only refers to the ECHR as the EU general principle. However, the purpose of the drafters seems not to overrule the *Rutili* decision at all, but it aims to stress the special significance of the ECHR in the EU legal order.[21] The binding effect of the Lisbon Treaty goes strengthening the status of the European Convention in a further step. Art. 6(3) TEU reiterates that fundamental rights, guaranteed by the European Convention, constitute the general principle of EU law. In order to control the expanding power of European Union in compliance with the Convention requirements and guarantee the

15. Case C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission, 1974 E.C.R. I-491.

16. PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 383 (4th ed. 2008).

17. The Luxembourg Court refers to the Convention in many judgments with the "special significance". *See*, *e.g.*, Case C-260/89, Elliniki Radiophonia Tileorassi Anonimi Etairia v. Dimotiki Etairia Pliroforissis, 1991 E.C.R. I-2925, ¶ 41; Opinion 2/94, Accession by the Community to the ECHR, 1996 E.C.R. I-1759, ¶ 33; Case C-299/95, Kremzow v. Austria, 1997 E.C.R. I-2629, ¶ 14.

18. *See* Advocate General in Case C-49/88, Al-Jubail Fertilizer Co. v. Council of the European Cmty., 1991 E.C.R. I-3187, 3230-31.

19. Leonard F. M. Besselink, *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and the National Constitutions* 3 (2012), http://www.fide2012.eu/index.php?doc_id=94.

20. Case C-36/75, Rutili v. The Minister for the Interior, 1975 E.C.R. I-1219.

21. Besselink, *supra* note 19, at 11. Professor Besselink argues that "'the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950' as meaning for 'all human rights treaties to which member states are a party'".

Union's basic values enshrined by Art. 6(2) TEU and the Amsterdam Treaty, the authors of the TEU take accession to the ECHR as a constitutional task for the EU.[22] Subjection to the external tribunal's review may contribute to transfer EU into an accountable human rights regime. Thus, the Opinion 2/13 should not be regarded as a terminal point for EU accession to the ECHR. Quite on the contrary, the Luxembourg judges kindly leaves the door open for the CoE and EU negotiators because these seven objections points could hardly regarded as something fatal, whereas the Luxembourg Court needs a promise from the Strasbourg Court for not circumstancing CJEU's authority when EU would be subjected to the ECtHR jurisdiction. The Luxembourg Court worries particularly reflect in the Objections (3), (4) and (6) presented in the EU Opinion 2/13. However, these problems could be solved through setting up the informal mechanism of judicial communication before the Strasbourg Court will have admitted the application. The CJEU can be added a new mandates of prior involvement before one National Highest Court submits the Strasbourg Court a case concerning the application of EU law under the ECHR Protocol No. 16. Moreover, the future new Accession Draft may grant the EU a privilege in the proceeding of Strasbourg deliberation with respect to clarify the meaning of EU law which should be generally respected by the ECtHR, unless it will be "manifestly unreasonable". Naturally, the Objection (5) is a procedural problems barring the CJEU from accepting the Accession Draft. According to EU Treaty and Art. 244 TFEU, the Luxembourg Court handled the exclusive competence to interpret the EU law and determined the responsibilities attributed among the co-respondent parties. Since the Accession Draft ignored the maintenance of the CJEU power in this aspect, the Strasbourg Court may be involved into the interpretation of EU law, which will then undermine the CJEU's authority. However, the Strasbourg Court has no intention to carry the Luxembourg exclusive power away in the sense the Strasbourg Court is an only subsidiary judicial actors under the European architecture of human rights. Therefore, both Luxembourg and Strasbourg can accept that the ECtHR opinion on the interpretation of EU has an advisory status, while the Luxembourg still holds the final power. The Objection (1) concerns the distribution of judicial power between Contracting States and the Strasbourg Court under Art. 53 ECHR. Art. 53 ECHR sets the European Convention as a floor on the fundamental rights protection, while Art. 53 EU Charter sometimes invoked as a ceiling standard in the EU legal order. However, these two Articles are compatible in the sense that Art. 53 ECHR has never blocked to set a ceiling standard of

22. DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 232 (2010).

fundamental rights protection, unless it will undermine the ECHR. The purpose of Objection (2) aims to protect the EU unique legal order - the doctrine of mutual trust. It means that one EU member state should give another member a presumption of equivalent standard on the implementation of EU law in the fields of EU refugee law, the Brussels Convention and the EAW Framework Decision. However, the Luxembourg Court has determined in the judgment of *N.S* that all the EU provisions must be interpreted in compliance with the fundamental rights compatible with the ECHR and ECtHR case-law. Therefore, this conflict has been reconciled by this decision. The Objection (7) somehow reflects the Luxembourg envies towards the Strasbourg competence granted by the Draft Accession. The Luxembourg Court has no judicial power to review the validity of EU Policies concerning common foreign and security affairs in the EU legal order, so the Strasbourg supervision to the EU powers in this field could be regarded by the Luxembourg Court as a competence *ultra vires*. However, the Strasbourg competence is justifiable in the sense that all the public power should be supervised by a tribunal no matter internally or externally.

II. LEGAL TRANSPLANTATION: THE EU CHARTER BORROWS FUNDAMENTAL RIGHTS FROM THE ECHR

A. *The Transplantation of Fundamental Rights by the Legislative Techniques*

The EU Charter enlists the most extensive fundamental rights which range from liberal rights to social and economic rights. The European Convention, commonly recognized as the most influential document for the Charter drafters,[23] is almost transposed into the EU Charter.[24] Generally speaking, these Convention rights have been incorporated through five codification models:[25]

1. The cut-and-paste model: the drafters almost literally copy the

23. Paul Lemmens, *The Relations between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights-Substantive Aspects*, 8 MAASTRICHT J. EUR. & COMP. L. 49, 50 (2001).

24. Sionaidh Douglas-Scott, *The Court of Justice of the European Union and the European Court of Human Rights after Lisbon* 8 (Oxford Law Faculty, Oxford Legal Studies Research Paper No. 43/2014, 2012), http://ssrn.com/abstract=2458696. Actually, the authors of the EU Charter were also inspired by the UN human rights treaties. *See* Sejal Parmar, *International Human Rights and the EU Charter*, 8 MAASTRICHT J. EUR. & COMP. L. 351, 351-70 (2001).

25. Fan Ji-Zeng (范继增), *Ouzhou Duocengji Kuangjia Xia Renquan Baozhang Jizhi-Oumengfa Yu "Ouzhou Renquan Gongyue" Jian De Jiaohuxing Yingxiang (欧洲多层级框架下人权保障机制—欧盟法与《欧洲人权公约》间的交互性影响)* [*The European Multilevel Protection on Human Rights-The Interactive Influence between the ECHR and the EU Law*], 13 ZHONGSHAN DAXUE FALU PINGLUN (中山大学法律评论) [SUN YAT-SEN U. L. REV.] 17, 20-21 (2015).

conventional words and phrases into the EU Charter. Art. 4 EU Charter prohibiting torture and degrading treatment almost has the same wordings with Art. 5 ECHR. The wordings, provided by the first two paragraphs of Art. 5 of the EU Charter concerning the prohibition of slavery, servitude and forced and compulsory labor, are transposed into the first two paragraphs of Art. 5 ECHR. The words laid down in Art. 9 ECHR which grants freedom of religion, thought and conscience, are incorporated into Art. 10(1) EU Charter. The Charter's provision on the right to effective remedy shares the same wordings with Art. 13 ECHR. The doctrine of "presumption of innocence" enshrined in Art. 47(1) of the EU Charter shares the same definition with Art. 6(2) ECHR. The doctrines of "*nullum crimen sine lege*" and "*nulla poena sina lege*" in the EU legal context have the same scope provided by Art. 7(1) ECHR. The prohibition of abusing rights based on Art. 54(1) EU Charter is simply borrowed from Art. 17 ECHR. Noticeably, the fundamental rights borrowing does not migrate in a one-way street. In fact, the Strasbourg regime also make effort to push the development of Strasbourg case-law through the Charter rules and Luxembourg case-law. This method effectively promote fundamental rights protection under the Strasbourg regime to the same level of the Luxembourg Court. For instance, the EU definition of anti-discrimination proscribed in Art. 27 EU Charter is obviously wider than the corresponding regulation laid down in Art. 14 ECHR. In order to fill the gap between the two European instruments, the Council of Europe extends the scope of protection against the discrimination into the same scope of protection through the ECHR Protocol No. 4.

2. The model of transplanting Convention rights into the EU Charter with general words: the authors of the EU Charter do not present the detailed meanings and scope of the Charter rights derived from the European Convention, but these borrowed rights are generally described with the simple and general wordings. For instance, the authors of the EU Charter has incorporated the right to life, the abolishment of death penalty (Art. 2), rights to liberty and security (Art. 6) and the right of defense in a fair trial (Art. 48(2)).

3. The model of fundamental rights borrowed from the corresponding Convention provisions, but granted with a higher criterion on protection than the ECHR. For instance, the Charter rights to marry and family have departed from the meaning embodied in Art. 12 ECHR. The definition of family in the Charter context has cut off its link to opposite sex couples. Moreover, the family foundation has no longer been correlated to an officially registered marriage. Thus, the EU Charter may to some extend recognize same-sex marriage. Although there is only one word different between Art. 7 EU Charter and Art. 8(1) ECHR, the term "communication" in the EU law context possesses a larger scope of meaning than the ECHR

term "correspondence". The EU protection of freedom of association and assembly is set in a higher standard than the relevant Convention counterparts in the sense that the European Convention puts only emphasis on the protection of individual freedom, whereas the EU Charter particularly underlines protection in the fields of "political, trade union and civic matters".

4. The model of fundamental rights transplantation from the Convention Protocols. For instance, the right to education provided by Art. 14 EU Charter not only imposes to the EU institutions and member states the obligation of providing compulsory as well as the other types of education to EU citizens, but it also adds respect for the parents' right, stating in the third paragraph that "*ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions*". The protection of property rights in the EU Charter goes further than the Convention does. The ECHR Protocol No. 1 keeps silence on the right to compensation in the case of competent state authorities expropriating private property, while the Charter explicitly provides that the expropriates are "*subjected to a fair compensation, being paid in a good time for loss*". The prohibition of collective expulsion embodied in Art. 19(1) EU Charter is borrowed from Art. 4 ECHR Protocol No. 4. The right to vote proscribed by Art. 39 EU Charter is borrowed from Art. 3 ECHR Protocol No. 1. Compared with the European Convention's definition *ratione personae* that "everyone lawfully in the territory", Art. 45 EU Charter has extended the scope of this right to "every single citizen of the Union" implying its purpose to break national regulations on free transnational immigration. The EU doctrine of *non bis in idem* is migrated from Art. 4 ECHR Protocol No. 7, but the binding effect of the prohibition against double jeopardy extends to the entire EU territory.

5. The model of Charter rights borrowed from Strasbourg case-law: the Strasbourg Court's decision that the rights of personal physical and mental integrity are derived from the right to private life has inspired the Charter's drafters. Consequently, respect for people's integrity is added to Art. 3 EU Charter. Moreover, the Charter drafters also get profitable inspiration from the Strasbourg judgment of *Turkish United Communist Party*,[26] in which the role of political party is regarded as the cornerstone of modern democratic society. Thus, the EU Charter particularly provided a protection to political parties on the basis of fact that they have a special function to express the political will of the citizens. Freedoms of art and science provided by Art. 12 EU Charter are borrowed from the Strasbourg case-law *Müller*[27] and

26. United Communist Party of Turkey v. Turkey, App. No. 19392/92, 26 Eur. H.R. Rep. 121 (1998).

27. Müller v. Switzerland, App. No. 10737/84, 13 Eur. H.R. Rep. 212 (1988).

Hertel.[28] The EU Charter moreover transposes the intellectual property right from the Strasbourg decisions of *Dosier & Fordertechnik*[29] in which the Strasbourg judges clarified that the term "possession" not only referred to physical goods, but also extended to the protection of property rights and interests with attributable value in the context of Art. 1 ECHR Protocol No. 1. In line with the Strasbourg decision of *Soering*,[30] the drafters incorporated "*no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subject to the death penalty, torture or other degrading treatment or punishment*" into the provision of Art. 19(2) EU Charter. The doctrine of the "best interest of children" embodied in Art. 24 EU Charter derives from the Strasbourg judgment of *Johansen* where the Strasbourg judges required all concerned authorities to guarantee the best interest of children in compliance with the state obligation under Art. 8 ECHR.

B. *The Question on the Effectiveness of Formalistic Transplantation*

1. *The Critical Opinion on the Term of "Legal Transplant"*

Many comparative legal scholars have warned that the formalistic transplantation of the rules from one instrument to another is not capable of ensuring the meaning of alien rules in integrity. Professor Legrand who is the very person reminds us that the rules are not equal to the propositional statements; on the contrary, the meaning of rules are ultimately shaped by the judges' interpretation under the influence of the local culture and history.[31] The Watson's envisaged legal transplant can hardly be actually occurred since the vested meaning of rules, which is shaped by the local culture, is impossible to export into an alien legal territory.[32] Essentially, the

28. Hertel v. Switzerland, App. No. 25181/94, 28 Eur. H.R. Rep. 534 (1998).

29. Gasus Dosier- und Fördertechnik GmbH v. Netherlands, App. No. 15375/89, 20 Eur. H.R. Rep. 403 (1995).

30. Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

31. Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 114 (1997). Legrand argued that "the meaning of rules, however, is not entirely supplied by itself; a rule is never completely self-explanatory. To be sure, meaning emerges from the rule, so that it must be assumed to exist, if virtually, within the rule itself even before the interpretative apparatus is engaged. To this extent, the meaning of rules is contextual. But, the meaning is also - and perhaps mostly - a function of the application of the rule by its interpreter, of concretization or instantiation in the events the rules are meant to govern . . . The meaning of rules is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historical and cultural tradition".

32. *Id*. at 116-18. ". . . indeed, of the nucleus of the ruleness, it must follow that there could only occur a meaningful 'legal transplant' when both the propositional statement as such and its vested meaning - which jointly constitute the rule - are transported from one culture to another. Given that the meaning invested into the rule itself is culture-specific, it is difficult to conceive, however, how it could happen". "So, the transplant does not, in effect, happen: a key feature of the rule - its meaning - stay behind so that the rule that was 'there', in effect, is not itself displaced over 'here'. Assuming a

meaning of legal rules, in the Legrand's view, are no other than a type of local-made product. This argument sounds a little conservative with respect to the determinative role of culture in shaping the meanings of legal rules. Meanwhile, Legrand obviously ignored the characteristics of "culture" which will be dynamically altered by the numerous external factors as well as interacted with the imported rules through the radical "legal irritant".[33] Similar to Legrand's argument, Teubner points out that formal rules may be converging to some extent, but "*the deep structure of the law, legal culture, legal mentality, legal epistemologies, and unconscious of the law, as expressed in legal mythologies, remain historically unique and cannot be bridged*".[34] Even for those comparative legal scholars who prefer to the transplantability of legal rules, they commonly argue that the validity of term "legal transplant" is only sensible in the area of private law migration.[35]

2. *The Features of Public Law Transplantation in European States*

The transplantability of private rules is feasible in the sense that the cross-states share the common features in their legal cultures and traditions. However, very few legal scholars notice that domestic legal development links closely to the emergence of supranational organizations and the relevant international treaties. In the modern dynamically global

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common language, the position is as follows: there was one rule (inscribed words a + meaning x), and there is now a second rule (inscribed words a + meaning y). It is not the same rule. Meaning simply does not lend itself to transplantation".

33. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998). "However, when a foreign rule is imposed on a domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. It irritates, of course, the minds of and emotions of tradition bound lawyers; but in the deep sense - and this is the core of my thesis - it irritates law's 'binding arrangements'. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritant' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change".

34. *Id.* at 14.

35. *See* ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 97-98 (1991). Watson argues that rules are easily transplanted from one state to another due to the fact that they are apolitical. The rulers will take a very indifferent attitude to the legal transplant. *See also* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974). He argues that the rules organizing the political power are "organic" and resistant to successful transplantation. *See also* Frederick Schauer, *The Politics and Incentives of Legal Transplantation* 7 (Ctr. for Int'l Dev. at Harvard Univ., CID Working Paper No. 44, 2000),
https://www.hks.harvard.edu/content/download/69341/1250174/version/1/file/044.pdf. Schauer describes that "political, social and cultural factors are more important in determining the patterns of legal migration for constitutional and human rights laws, ideas, and institutions than they are for business, commercial, and economic laws, ideas, and institutions".

circumstance towards democracy, rule of law and human rights, it is necessary to reconsider the possibility on the legal development in the constitutional or public law field by "legal transplant". Despite the fact that the public law is traditionally described as a particular category shaped by the national identity, most of the contemporary public law systems are actually constituted by the way of *cross-fertilization*. Consequently, the "mixed public law systems"[36] have been created through the reciprocal influence and interactive ideas. Even though we can hardly reach a conclusion that the process of cross-fertilization would finally push the diverse legal systems into the ultimate convergence of the meaning, the wide transportation of legal rules, norms and ideas creates a potential possibility forming *ius commune* to some extent in the certain fields. Meanwhile, the efforts of supranational organizations should be given enough concerns on the construction of a completely new legal order. For instance, EU institutions and the Luxembourg Court jointly engage into the acceleration of European integration. In the field of EU public law, the Luxembourg Court has actively laid down many judicial doctrines in relating to the protection of individuals against public power through case judgments. For instance, the balance test of public and private interest, which had been rejected by the British judges for a long time on ground of the incompatibility with common law tradition, is accepted as a judicial task by the British court after the several decades of the influence of EU legal practice.[37] The institution of EU Ombudsman, though not empowered to supervise the rights of citizens under Community law at the national, regional and municipal levels, effectively promotes the convergence of administrative law among EU member states in aspect of diffusing the European common standards of Good Administrations. The Code of Good Administration Behavior, drafted by the European Ombudsman, provides a long list of the principles contributing to the development of European administrative law. These principles are persuasively treated as the common requirements to all the administrative bodies at national level.

The legal developments in Europe have a specific architectural relationships rooted into the European pluralism legal order. The metaphor "legal transplant" traditionally indicates that the horizontal circulation of rules and institutions from one sovereignty state to another. Generally, the phenomenon of legal circulation implies a voluntary choice by the legislators and lawyers, rather than by the forced external imposition. Yet, EU sovereignty officially derives from the transferring of the individual states power, by which EU member states take the obligation to transpose EU

36. ESIN ÖRÜCÜ, THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY 172 (2004).

37. *Id.* at 176.

directives into domestic law and guarantee the primacy of EU legal authority in national judicial order. Thus, the evolution of domestic legal system is not an exclusive result from autonomous legal integration among the member states, but also influenced by the States substantial adaption to EU law that becomes the irresistible consequence of the circulation of EU law. Apart from that, the Luxembourg interpretation under the mechanism of preliminary ruling can provide decisions with binding effect influencing the national legal order.

III. THE STATUS OF THE ECHR AND STRASBOURG CASE LAW IN THE EU LEGAL FRAMEWORK

A. *The Legal Status of Strasbourg Case Law in the EU Legal Order*

The drafters of the EU Charter seem not to have taken divergent interpretation as a potential threatening to harmonization of the two European regimes. Although some comparative scholars, such as Legrand and Teubner, absolutely deny the possibility to have a convergent interpretation of the same legal rules in the different contexts, the authors of the EU Charter articulately declare that the meaning and scope of rights, correspondingly borrowed from the European Convention, "shall be the same as those laid down by the said Convention". The purpose of this provision obviously reflects the special status of the European Convention in the EU legal order: the European Convention is the document setting the minimum standard of the fundamental rights protection in Europe. The authors of the EU Charter specifically expect that Luxembourg judges should define the scope of fundamental rights not lower than the European Convention. However, this good wish may bring Luxembourg many problems in aspects of guaranteeing the autonomy of EU legal order and challenge the domestic law concerning the ECHR status.

The Strasbourg Court is obliged to review the impugned cases in accordance with the ECHR rules. However, it is by no means true that Strasbourg judges completely regard the ECHR texts as strictly unchangeable golden rules similar to the US Supreme Court Justices that quite often takes the historical approach as the most suitable measure for the interpretation of the US Constitution.[38] On the contrary, the Strasbourg

38. Antonio Scalia, one recent late US Supreme Court justice, pointed out that the originalism-oriented approach might not be perfect, but it can beat other alternatives. He opposed the application of the evolutionary approach to constitutional interpretation, due to the fact that this approach can hardly reveal the original meaning of the constitutional drafters. *Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. SCH. L. (Apr. 20, 2010), http://www.law.virginia.edu/html/news/2010_spr/scalia.htm.

interpretation is based on the evolutionary approach in which the meaning and scope of Convention right keep pace with the development of UN human rights treaties and legislations among the Contracting Parties. Strasbourg case-law thus evolves into a "living" legal source for dynamically laying down the standard of protecting fundamental rights in accordance with the development of human rights instruments. Given these facts, the EU Charter drafters must have had higher ambitions than only observance to a more than sixty-year-old Convention. In this sense, it is reasonable to believe that the Luxembourg Court should follow the Strasbourg jurisprudence as a way to the harmonization of fundamental rights interpretation between these two European Courts. Meanwhile, the Official Explanation seemingly grants Strasbourg case-law a binding effect in the EU legal order. It explicitly provides that meaning and scope of Convention rights are not just referring to text of the European Convention and Protocols, but that the Strasbourg case-law should also be taken into account.[39]

However, the Strasbourg case-law has only been referred as a source of EU fundamental rights in the preamble of EU Charter together with other human rights treaties and Luxembourg case-law. This reference does not indicate that the Luxembourg Court is bounded by Strasbourg decisions, though the drafters of EU Charter have ever deliberately considered the possibilities of granting binding effects to the Strasbourg case-law in the EU legal order as an effective measure to prevent the Luxembourg decisions from deteriorating the Convention rules.[40] However, all their efforts finally came into failure because the autonomy of the EU legal order would be derogated, and there is no consensus on the status of Strasbourg case law among the EU member states.[41]

Firstly, the binding effect of Strasbourg decision is only confined to *inter parties*. The legal status of the Strasbourg case-law is diverse among the Contracting States because it depends on domestic constitutional rules or Constitutional (Supreme) Court jurisprudence. For instance, the UK Human Rights Act explicitly denies the Strasbourg's binding status in the domestic legal order. Similarly, the German Constitutional Court has implicitly ruled

39. *Article 52 - Scope and Interpretation: Explanations Relating to the Charter of Fundamental Rights*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., http://fra.europa.eu/en/charterpedia/article/52-scope-and-interpretation-rights-and-principles (last visited Oct. 27, 2016). The Explanation writes "[T]he reference to the ECHR covers both the Convention and the Protocols to it. 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 by the Court of Justice of the European Union".

40. Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, 8 LAW & PRAC. INT'L CTS. & TRIBUNALS 375, 384 (2009).

41. Marc Fischbach, *Le Conseil de L'Europe et la Charte des droits Fondamentaux de L'union Européenne* [*The Context of the Charter of Fundamental Rights*], 12 REVUE UNIVERSELLE DES DROITS DE l'HOMME [UNIVERSAL REV. HUM. Rts.] 7, 8 (2000) (Fr.).

that the German courts do not have to follow the Strasbourg decision even in the cases where Germany is the defendant.[42] Since EU member states have not yet formed a consensus on this issue, it is inappropriate to make a unilateral decision that the Luxembourg Court is bounded by the Strasbourg decision. On the other hand, even though the European Convention forms a part of the general principle of EU law and the ECHR is regarded to have a special significance to the EU law, the Luxembourg Court provides that the European Convention "*does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law*" in the judgment of *Fransson*.[43] Therefore, the Luxembourg Court does not grant the ECHR a complete effect as other primary EU legislations.

Actually, the EU law autonomy would be seriously undermined if the Luxembourg Court was bounded by the Strasbourg decision. A similar model could be found out in the jurisdiction of common law states where previous decisions (precedence) made by the Supreme Court have binding effects on the following similar cases adjudicated by the courts in inferior level. The Luxembourg Court may lose its autonomous and authoritative status in the condition that it recognized the binding effects of Strasbourg decision.

Secondly, the methods adopted by these two supranational courts in the interpretation of fundamental rights are diverse. The Strasbourg judges rely on the evolutionary approach, by which the definition of rights might dynamically keep pace with the development of fundamental rights rules provided by the national and international instruments. In contrast, the Luxembourg Court could not interpret the fundamental rights in this method. According to the Protocol No. 30, the scope of fundamental rights should not go beyond the original legislative wordings. This implies that Luxembourg judges are prohibited to create a new EU fundamental right through judicial activism, unless EU drafters incorporate them into the EU Charter through the legal amendments act.

Moreover, the relevant interpretation in the Official Explanation have granted the Luxembourg case-law the same legal effect as the Strasbourg case-law which implies that the latter is not the exclusive determinative factor. Regarding the situation that not all the member states have ratified all the sixteen Convention Protocols, the Luxembourg Court has no competence to impose these extra Strasbourg obligations to the EU member states. In the AG's Opinion of the *Fransson* case, Villalon argues that the Luxembourg Court should not take Strasbourg case law relating to *ne bis in idem* provided by the ECHR Protocol No. 4 into account since that some Member States

42. The German Constitutional Court determined that the German courts do not have to strictly observe the Strasbourg decision, and even Germany is the defendant in appeal cases.

43. Case C-617/10, Åklagaren v. Fransson, 2013 E.C.R. 0000.

have not ratified or made reservations on that Protocol.

The Luxembourg Court underlines two influential factors in shaping of its jurisprudence on fundamental rights: (1) the common constitutional tradition of the member states; (2) public interest recognized by the EU. It implies that the Luxembourg Court is likely to make decisions on the basis of synthesizing constitutional traditions among the member states, which is a strategy of maintaining the legitimacy of the Court's decisions. In contrast, Strasbourg's balance between collective goods and individual rights quite often relies on the mathematical or comparative approach for identifying an European consensus in the certain area.[44] For instance, the two Courts' judgments on the right to association are divergent.[45] In the judgments of *Laval*[46] and *Viking*,[47] the Luxembourg Court strictly applies the proportionality test on the balance between the right to association and the EU free economy. The Strasbourg Court generously applies the European consensus approach in favor of the applicant's claim. In the Strasbourg judgment of *Demir & Baykara*,[48] the Court, on the reliance of the relevant international treaties, determines that the Turkish decision has breached the European Convention because the related consensus has been reached among the democratic states through the ILO Treaty, even though Turkey had not yet ratified it. In another Strasbourg judgment of *Enerji Yapi-Yol Sen*,[49] the Court rules that prohibiting public sectors employees from engaging in the "one day demonstration" to secure the rights to collective bargaining breached the Convention's obligation provided by Art. 11 ECHR.

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44. Sabine Gless & Jeannine Martin, *The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?*, 1 BERGEN J. CRIM. L. & CRIM. JUST. 36, 49-50 (2013). The authors argue that "when applying a comparative method, the Strasbourg Court looks for a common denominator, whereas Luxembourg Court seeks a synthesis of national law in order to establish the appropriate solution for EU law, and therefore only seeks the spirit in national law where necessary". The Strasbourg Court mainly concerns the national actions and domestic decision related to fundamental rights - its objective is human rights protection on the basis of case-by-case studies. On the contrary, the Luxembourg Court focuses on European integration. Its authority serves to maintain the EU public interest, indicating that the Court often applies the proportionality test in a strict sense by which public interests and the uniform of the EU order will be theoretically concerned.

45. Nicole Busby & Rebecca Zahn, *The EU Accession to ECHR: Conflict or Convergence of Social Rights* (Paper presented at the LLRN Inaugural Conference in Barcelona, 2013), https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_BusbyxZahn.pdf/09a5f222-2cbc-4698-9cc0-d36640a5e733.

46. Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767.

47. Case C-438/05 Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779.

48. Demir v. Turkey, 2008-V Eur. Ct. H.R. 395. The Court cited the ILO Convention No. 98 and Convention No. 151 on Labor Relations in the Public Service. In para.86 of this judgment, Strasbourg Court states that "it will be sufficient . . . that the instrument denotes a continuous evolution in the norms and in principles applied in international law or in the domestic law of the majority of the Member States . . . and show, in precise areas, that there is a common ground in modern states".

49. Enerji Yapi-Yol Sen v. Turkey, App. No. 68959/01, http://hudoc.echr.coe.int/eng?i=001-92266 (2009).

Although the rights to collective bargaining and striking were not the core of rights in the Convention text,[50] the Strasbourg Court resorts to the ILO Convention No. 87 in which the right to strike has been recognized as an indispensable part of workers' freedom of association. In light of *Demir & Baykara* case decision and the right to strike laid down by the European Social Charter (ESC), the Court rules that right to collective bargaining becomes an essential part of right to association provided by Art. 11 ECHR. Therefore, the Strasbourg Court relies on the European consensus approach, which places the Convention rights in a "weak priority",[51] while the Luxembourg Court balances the competing interest through the proportionality test.

Thirdly, Art. 52(7) EU Charter merely requires Luxembourg judges to duly regard the Official Explanation in their judgments. Luxembourg Court does not necessarily need to follow Strasbourg jurisprudence in a normative sense,[52] considering that the European Union is not a Contracting Party of the ECHR. The exclusive role of the ECHR is nothing than a tool for the ascertainment of general principle of EU law in the protection fundamental rights.[53]

However, the Luxembourg judges face a political dilemma in the adjudication of EU fundamental rights. Even if they are reluctant to follow Strasbourg case-law for guaranteeing the EU autonomy, the drafters of EU Charter have set a waterproof that the EU protection of fundamental rights should not be below the Convention rules under Art. 52(3) EU Charter.[54] The Luxembourg judgment cannot be in contrast with Strasbourg's interpretation of fundamental rights, even though they may be in conflict with the Luxembourg legal order. For instance, the Luxembourg Court intentionally avoids referring to AG's Opinion on not following Strasbourg case-law in the judgment of *Fransson,* while the Court consequently judged the case in line with the Convention rules and stated that "*the Art. 52(3) EU*

50. Albertine Veldman, *The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR*, 9 UTRECHT L. REV. 104, 112 (2013).

51. Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 HUM. RTS. Q. 680, 697 (2008). Greer argues that the Strasbourg regime usually applies the principle of "rights to priority" in their judgments, indicating that the Convention rights "take procedural and evidential, but not conclusive, priority over the democratic pursuit of public interest, according to the terms of the Convention provision". This principle also imposes the burden of proof to the respondent states who must rationalize their meddling with individual persons' rights.

52. PAUL GRAGL, THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 59 (2013).

53. *Id.* at 54.

54. STEVE PEERS & SACHA PRECHAL, *Scope and Interpretation of Rights and Principles*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1455, 1496 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014). The authors hold that the "autonomy" of the EU law is only sensible when the power sets a higher standard, rather than a lower standard.

Charter applies also to the Protocol and to the Strasbourg case law". The drafters of the EU Charter seem prefer to leave a certain latitude of discretion for the Luxembourg judges under Art. 52(7) EU Charter. Meanwhile, the Luxembourg judges would not like to interpret this provision in a rigid way.

B. *The Luxembourg Reference to the ECHR and ECtHR Case-Law in Its Judgments*

The ECHR and the relevant ECtHR case-law have often been cited by the Luxembourg judges into their decisions. Professor Douglas-Scott pointed out that there are four main functions for the Luxembourg references to Strasbourg case-law: decorative, cognitive, legitimating and inspirational.[55] From 1975 to 1998, More than 70 Luxembourg judgments had cited the Convention provisions.[56] From 1998 to 2005, Luxembourg judges and Advocate Generals gradually increased the frequency of ECHR citations in their final judgments and Opinions. According to statistical data collected by Dr. Scheeck, all the branches of EU Courts (including the First Instance Court, Advocate General and the Court of Justice) reached the peak of ECHR citation in 2000. Although the number of citations fell to bottom in 2001, the statistical curve from 2001 to 2005 trended to be up.[57] The Court of Justice and the Court of First Instance reached their common peaks in 2005. The Convention provisions and Strasbourg case law were respectively referred to in 21 and 24 judgments. After the Lisbon Treaty coming into effect, the Luxembourg Court can depart their deliberation from the EU Charter in the cases concerning EU fundamental rights. The European Convention and ECtHR case-law are still invoked as a guidance for Luxembourg judges on their deliberations in the field of EU fundamental rights. According to statistical data collected by Professor de Búrca, the Court of Justice referred to the EU Charter provisions in at least 122 judgments from 2009 to 2012.[58] The Luxembourg Court has substantially engaged in the Charter provisions in 27 out of 122 judgments. Luxembourg Court judgments have referred to Strasbourg case-law in 10 out of 27 judgments.

However, the phenomenon of decreasing frequency of the Convention citations does not indicate that the ECHR has been consistently losing its

55. Douglas-Scott, *supra* note 12, at 656.

56. THE EUROPEAN COURT OF JUSTICE ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: WHO SAID WHAT, WHEN?, at xiv (Elspeth Guild & Guillaume Lesieur eds., 1998).

57. Scheeck, *supra* note 13, at 13. From 1998 to 2005, ECHR is indeed referred to 7.5 times more than all the other human rights instruments that the Luxembourg Court occasionally relies on.

58. Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168, 174 (2013).

influence on the Luxembourg deliberation around fundamental rights cases. None of other human rights treaties have been comparatively favored as much as the European Convention in the Luxembourg judgments. On the other side, it is a common legal phenomenon that the frequency of citing alien provision or case-law gradually decrease after the home-made bill of fundamental rights comes into effect or several years of intensively citing alien legal source in the home judgments.[59] Apart from these reasons, the Luxembourg Court has also formed its own jurisprudence comparable to the Strasbourg's after the decision of *Rutili* in 1975.

Regarding to the nature of pluralism legal order, the *vis-à-vis* relationships within the European architecture of fundamental rights protection have essentially been an issue of how to distribute jurisdictional mandates among the supranational and national courts. More exactly speaking, the two European transnational courts should guarantee the reconciliation of interpretation of fundamental rights in a comparable way, otherwise the national courts will face a dilemma on the matter of following which European Courts. Therefore, the Strasbourg Court may particularly take into account of unique characteristics rooted into the Union's legal order. In the judgment of *Emesa Sugar*,[60] The Luxembourg Court denied the applicant the right to reply to the Advocate General's opinion on the ground that the applicant were not provided such a right in the EU legal order. The applicant subsequently resorted to accession to the Strasbourg Court due to a previous ruling that the right to reply to the Advocate General's opinion was an essential part of right to fair trial under the ECHR.[61] However, Strasbourg Court declined the applicant's appeal by the reason of inadmissible *rationae materiae*.[62]

59. According to a series of empirical comparative studies, it is a common legal phenomenon that the new emerging states or international organizations cite fewer foreign provisions or case law in their domestic judgments after a period of intensive citation of the foreign law in the beginning years. These examples could be easily found in the states with the common law tradition. *See* Irene Spigno, *Namibia: The Supreme Court as a Foreign Law Importer*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 155, 171 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013); Christa 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)*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES, *supra*, at 185, 194; Valentina Rita Scotti, *India: A 'Critical' Use of Foreign Precedents in Constitutional Adjudication*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES, *supra*, at 69, 86.

60. Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, 2000 E.C.R. I-675.

61. Borgers v. Belgium, App. No. 12005/86, 15 Eur. H.R. Rep. 92 (1991); Vermeulen v. Belgium, App. No. 19075/91, 32 Eur. H.R. Rep. 15 (1996); Kress v. France, 2001-VI Eur. Ct. H.R. 41.

62. Emesa Sugar N.V. v. Netherlands, App. No. 62023/00, http://hudoc.echr.coe.int/eng?i=001-68105 (2005).

C. *The Legal Status of the European Convention in the EU Legal Order*

Some national courts have ever entitled the ECHR as the other EU primary legislations under Art. 6(3) TEU providing that the European Convention constitutes a part of general principle of the EU law. However, neither the Luxembourg Court nor the majority of member states accept this way of interpretation because the delicate balance of European multilevel constitutionalism must be broken if the Luxembourg Court unilaterally imposes EU member states an obligation to observe to Strasbourg case-law regardless of their domestic rules.

One Italian local court has ever submitted a requirement to the CJEU concerning an interpretation of Art. 6(3) TEU in the *Kamberaj* case. The Italian Local Court aims to challenge Italian Constitutional Decisions No. 348 and 349, according to which the ECHR has no primary status in the domestic legal order. Consequently, the ordinary courts and administrative tribunals have no constitutional competence to set aside the domestic laws which are in conflicts with the ECHR. The Italian Constitutional Court (*Corte Costituzionale*) requires regional courts to solve this conflict through the consistent interpretation approach. Whenever local courts perceive that the consistent interpretation is not able to solve this conflict, they are obliged to put the cases at hand in pending and hand over the challenged provision to the Constitutional Court who can review the constitutionality and conventionality under the "double scrutiny". The Italian Constitutional Court initially reviews the conventionality of the domestic ordinary law, it then turns to examine the constitutionality of the European Convention, implying that the Italian Constitution provides the ECHR a super-legislative status.

In the present case, the local court insists that, considering that Art. 6 TEU has explicitly recognized the ECHR is one of general principles of EU law, the ECHR should be granted legal status as the other EU primary legislation despite the fact the EU will not be externally bounded by the European Court of Human Rights. In such a sensitive cases concerning the constitutionalism of member states, the Luxembourg Court must draw a boundary between the effects of ECHR in Luxembourg and national legal orders. The Court articulately clarified the ECHR status in the EU legal order with the statement that "*Article 6(3) TEU does not govern the relationship between the ECHR and the legal system of the member states, and nor does it lay down the consequence to be drawn by a national court in case of conflict between the rights guaranteed by the Convention and a provision of national law*".[63] The Court finally provides that "*the reference*

63. Case C-571/10, Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano, 2012 E.C.R. 0000, ¶ 62.

to ECHR in Art. 6(3) does not require the national courts, in case of conflict between a provision of national law and the ECHR, misapplying the provision of national law incompatible with the Convention".[64]

The Luxembourg preliminary decision reveals a fact that neither the Luxembourg Court regards the ECHR as an external binding international treaty to the EU, nor it may review the constitutionality of the domestic statutes and regulations in accordance with the European Convention. The Court's final decision indicates that Professor De Witte's presumption that the EU institutions are already subjected to the jurisdiction of the Strasbourg regime[65] is nothing than a good will. The fundamental rights in two European regimes are "one but not the same".[66] In fact, the root of *Kamberaj* decision can trace back to the judgment of *Cinetheque*[67] in which the Court provided that the EU was obliged to guarantee fundamental rights in its legal order, but the review on the conventionality of the domestic statutes would be an activity *ultra vires.*

IV. THE INDIRECT JURISDICTION OF THE STRASBOURG COURT TO THE EU

A. *From X to Cantoni: A Long Walk from "No" to "Yes"*

Since the Strasbourg Court provides that the European Convention is a constitutional instrument of European public order in the area of human rights in the *Loizidou* judgment, the Strasbourg Court has been contributing to enhance the Convention' influence through the interpretation of Art. 1 ECHR. Consequently, it silently extends (indirect) jurisdiction to the EU law application in national level, while the Strasbourg Court still lacks of power externally controlling the Union's activities in supranational level.

In the judgment of *X vs. Germany*,[68] the European Commission on Human Rights determined that whenever the Contracting States had transferred their sovereign powers to an international organization, the Convention obligation of Contracting Parties would be terminated if it conflicted with national duties imposed by the international agreements. In

64. *Id.* ¶ 63.

65. Bruno de Witte, *The Use of the ECHR and Convention of Case Law by the European Court of Justice*, *in* HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS 15, 22 (Patricia Popelier, Catherine Van de Heyning & Piet Van Nuffel eds., 2011).

66. Fillippo Fontanelli, *National Measures and the Application of the EU Charter of Fundamental Rights - Does curia.eu Know iura.eu?*, 14 HUM. RTS. L. REV. 231, 246 (2014).

67. Case C-60/84, Cinéthèque SA v. Fédération nationale des cinémas français, 1985 E.C.R. 2605.

68. X v. Germany, App. No. 235/56, http://hudoc.echr.coe.int/eng?i=001-148028 (1958) (Commission Decision).

the decision of *CFDT*,[69] the European Commission on Human Rights reiterated that Strasbourg was not granted the jurisdictional power to supervise the actions of Community and its member states applying EU law under the ECHR.

One applicant alleged in the case *M & Co vs. Germany*[70] that the domestic authority breached the right to fair trial provided by Art. 6 ECHR in the course of execution of one Luxembourg judgment. At the present case, the European Commission on Human Rights opened an indirect jurisdiction over the Community act by the reasoning that "*Member States are responsible for all acts and omission of their domestic organs allegedly violating the Convention regardless whether the act or omission in question is a consequence of domestic law or of the necessity in compliance of the Community law*", indicating that the transfer of state power to an international organization would not be a reason to acquit the State's Convention duties. However, it was not an easy task for the Strasbourg judges to exercise this supervisory mandates towards the EU because the latter was still beyond the Strasbourg regime. Given that, the European Commission on Human Rights applied a new doctrine "equivalent standard" to supervise the EU law application at the national level. It indicated that fundamental rights protection in EU legal order was presumed to be equivalent with the ECHR. This ruling actually blocked many appealed cases against the European Community under the Convention in sense that the Strasbourg Court would not be able to substantively review the Community law application under the doctrine of "presumption of equivalent standard".

However, the decision of *M & Co.* is not the whole story because the Strasbourg Court has consistently tried to rebuild the ECHR into an European public order in the area of fundamental rights. In the judgment of *Cantoni*,[71] the Strasbourg Court reviewed a French domestic statute concerning the implementation of an EU Directive. It finally determined that the French authority must observe the Convention obligation even though the French Congress literally transposed this EU Directive into domestic legal system.

B. *Matthews Case: Strasbourg's Review on the Conventionality of an EC Primary Legislation*

With the starting of informal regular dialogue between these two

69. CFDT v. European Communities, App. No. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 236 (1978).

70. M. & Co. v. Germany, App. No. 13258/87, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990).

71. Cantoni v. France, 1996-V Eur. Ct. H.R. 1614.

European Courts, the Strasbourg Court gradually intensify the jurisdiction over the Community law application by EU member states. In *Matthews* case,[72] a young Gibraltarian submitted a complaint to the Strasbourg Court against the UK authority alleging that his right to vote, provided by the Convention Protocol, had been violated given the fact that the British government failed to set up polling places for the European Community Parliament election. However, according to the specific provision laid down in the *Act Concerning the Election of the Representatives of the European Union by the Direct Universal Suffrage and Council Decision 76/787*, Art. 15 provided that Annex II was the integral part of this Act, explicitly stating that "*the United Kingdom will apply the provision of this act only in respect of the United Kingdom*". The subject matter of this case turned to the Act, which belonged to the EU primary legal source. Thus, UK government had not given the unilateral competence to amend or abolish this instrument under the EU legal order. Given the fact that it was an EU rule, the UK delegates suggested the Strasbourg Court defer to the British decision, even though there might be a circumstance in which Britain infringed the Convention duty by fulfilling an EU treaty obligation incompatible with the ECHR requirement, on the ground that the Act *per se* was entitled with the EC primary legislation.

After the Strasbourg ruling that the present case fall to the Strasbourg jurisdiction according to Art. 1 ECHR and Art. 3 ECHR Protocol No. 3,[73] Strasbourg judges faced a dilemma: a choice between substantive scrutiny of the Community Act in accordance to Convention requirements or deference to the domestic decision on the basis that Community was not a Contracting Party to the ECHR. Considering that the ECHR had been defined as an "European constitutional instrument of the public order", the Strasbourg Court partially returned to the decision of *M & Co.* providing that the Convention duty of Contracting States should not be derogated. It implied that UK must fulfill the Convention requirements regardless its duties imposed by other international organizations compatible with Convention rules or not. The Strasbourg Court argued that the Community law had a strong impact on the life of local population when it was approved by the UK Parliament. In this sense, the Gibraltar people suffered a discrimination

72. Matthews v. United Kingdom, 1999-I Eur. Ct. H.R. 251.

73. Actually, the Strasbourg Court noticed that the alleged violation stemmed from Annex to the 1976 Act. This Act could not be challenged before the ECJ because it was not a "normal" document, but an EC primary legislation. The Strasbourg Court ruled that the United Kingdom, together with all other parties to the Maastricht Treaty, was responsible to *ratione materiae* under Article 1 ECHR and, in particular, under Article 3 ECHR Protocol No. 1, for the fulfillment of Treaty obligation. The Strasbourg judges determined that the term "legislature" in Art.3 ECHR Protocol No. 1 was not only confined to national legislative bodies of the Contracting states, but also extended to the supranational legislature.

in the circumstance that they were subjected to UK political sovereign power, but their opportunities of selecting the Community Parliament representatives had been unreasonably deprived, which led to weaken the link between local people and UK legitimate ruling.[74]

Regarding to the Gibraltar Region was ruled by the UK authorities, the Luxembourg Court argued that the residences in this Region were the UK nationals. They were subjected to the Community order as other nationals. The Strasbourg Court did not refer to the doctrine of "presumption of equivalent standard", but warned all the Maastricht states to observe the state duties enshrined by the ECHR, when the EU treaties went freely into their domestic orders.

The *Matthews* decision was a bit unusual because the Strasbourg Court accept the case concerning the EU law application admissibility. However, the Strasbourg Court usually dismissed applicants challenge in other impugned cases. Similarly to the aforementioned *Emesa Sugar* case*,* the Strasbourg Court determined in *Guerin*[75] case that the alleged Community violation of Convention rights did not fall into *rationae materiae* on the ground that Art. 6 and Art. 13 ECHR did not entail the rights claimed by the applicants, but the impugned act was a Community measure. In the later judgment of *Senator Lines*,[76] although the respondent states had confessed that the decision of administrative fine which was imposed to the applicants derived from the Community Act, the Strasbourg Court did not have any intention to review this Act in accordance to the ECHR. On the contrary, it strategically turned down the applicant's claim with the reason that the applicant did not suffer the substantive loss in the light of fact that the administrative fine had been later quashed by the First Instance of Luxembourg Court.

C. *Bosphorus Judgment: A Double Standard Test Approach*

The Strasbourg decision of *Bosphorus*[77] partially returned to the Commission decision of *M & Co.* The applicant leased two airplanes from Yugoslav National Airline and arranged to have them undergo maintenance work in Ireland in 1993. However, the United Nations adopted and the European Community implemented a series of sanctions against the Federal

74. Strasbourg Court cited Art.14 ECHR to express the distinguished treatment between British residents and Gibraltar citizens in this case constituted a violation of discrimination.

75. Guerin Automobiles v. 15 member states of the European Union, App. No. 51717/99, http://hudoc.echr.coe.int/eng?i=001-31286 (2000).

76. Senator Lines GmbH v. 15 Member States of the European Union, 2004-IV Eur. Ct. H.R. 331 (admissible).

77. Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H.R. 107.

Republic of Yugoslav since 1991, aiming to address the arms conflict and human rights violations. Meanwhile, the Bosphorus Company planned to deal with the maintenance work, but the UN Security Council had adopted a Resolution, providing that states should impound all aircraft in their territories "*in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslav*". The UN Resolution was then transferred into a Community Regulation.

However, the Irish High Court argued that the activity of impounding a Yugoslavian aircraft had overstepped the power of Irish authority with a statement that "*as it was not an aircraft in which a majority and controlling interest was held by a person or undertaking in or operating from the former Federal Republic of Yugoslav, and that the decision of the Ministry to impound was therefore* ultra vires." The Irish Ministry of Transport challenged this decision before the Irish Supreme Court for the reason that the Community member states had a rigid obligation to impound the aircraft according to the relevant EU Regulation. The Ministry required the Supreme Court to reconsider the High Court interpretation of the Community Regulation and submit this question to the Luxembourg Court through the preliminary mechanism.

The Luxembourg Court confirmed that the action of Irish Ministry of Transport strictly followed the requirement of Community Regulation. Moreover, Advocate General (thereafter AG) Jacobs present his opinion that the Community Regulation was compatible with the ECHR that was a precondition of the lawfulness of Community Act.[78] This Opinion aimed at persuading the Irish Supreme Court that the Community Regulation did not infringe the European Convention. Moreover, Jacobs pointed out that the applicant did not present any Strasbourg decision as the evidence to uphold his claim that this challenged EU regulation infringed the Convention right.[79] The essential question at the present case focused on whether the interference of the right to possession had been proportional to the maintenance of Community interest. Ending the Civil War in the former

78. *Id.* at 122. Jacobs stated that "Respect for fundamental rights is thus a condition of the lawfulness of Community acts - in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be binding upon the Community; nevertheless, for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in the ECJ and in national courts where the Community law is in issue. This is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release the member states from the obligation under the Convention".

79. *Id.* at 123. Jacobs asserted that "The conclusion seems consistent with the case law of Luxembourg Court in general. Nor has the applicant company suggested that there is any case-law supporting its own conclusion".

Federal Republic of the Yugoslav was the biggest public interest of the EU.[80] Consequently, Luxembourg Court should choose the deference to the domestic decision, even the applicant might suffer a great loss, unless the EU decisions or regulations were completely unreasonable.

Indeed, Jacobs affirmed that the Luxembourg's deliberation on the interference of the right to property followed a similar route to the two Strasbourg case-law - *AGOSI* and *Air Canada* - in which the Human Rights Court scrutinized the legitimacy of interference to property rights through the proportionality test, who got inspired from the Luxembourg decision of *Hauer*. The right to property was not absolute. The restriction can be justified by the EU objective of general interests. Moreover, given the direct effect of EU law, Jacobs argued that domestic implementation of the Community law must strictly follow the requirement of EU Regulation.

When the applicant appealed the case to the European Court of Human Rights, the Strasbourg judges reiterated the *Matthews* decision that the Contracting States, after transfers of a sovereign power to an international organization, still needed to observe the Convention's duties. Thus, the applicant's claim fell into the Strasbourg *rationae materiae.* In the assessment of whether the state activities had infringed the right to property under Art. 1 ECHR Protocol No. 1, the European Commission suggested that the Strasbourg Court should adopt the "presumption of equivalent protection" doctrine because the unique nature of Community law in the European pluralism legal order. The Community authority would be undermined if a national court reviewed conventionality of the Community Regulation in accordance with the ECHR, because the competence to annul the secondary legislation incompatible with the EU Treaties was exclusively granted to the Luxembourg Court in the EU legal order.

The Strasbourg Court was persuaded in consideration of the limited discretion of Irish authority in the Community Regulation. Given the previous case-law providing that the European Convention could not prevent the Contracting Parties from transferring their sovereign powers to international organizations or blocking the international cooperation, the Strasbourg Court should structurally respect the Luxembourg decision in the sense that the CJEU stood in a better position on the interpretation of EU regulation, unless the international obligations imposed to the Contracting Parties had seriously infringed to the Convention obligation. The Strasbourg Court described this doctrine as "*presumption of equivalent standard, unless*

80. *Id.* at 124. Jacobs argued that "It is in light of those circumstances that the aims pursued by the sanctions assume a special important, which is, in particular, in terms of Regulation and more especially the eighth recital in the preamble thereto, to dissuade the Federal of Republic Yugoslav from 'further integrity and security of the Republic' of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in the republic".

the manifestly deficient in the protection of human rights". Actually, this doctrine will mostly be applicable in a specific circumstance where the Contracting Party has very limited discretion in Community Regulation.

Strasbourg judges defined this doctrine in a relatively articulate way. International organizations must offer substantive guarantees and effective mechanisms controlling the observance to the fundamental rights in a manner that can be considered at least equivalent to the ECHR requirements. It implied that international organizations, though not be a Contracting Party of the ECHR, must take a due regard of the ECHR and ECtHR case-law In fact, the doctrine is essentially a "comparable" notion revealing that the interest of international organization must be compatible with the requirement under the ECHR order. In order to highlight its "living instrument" identity, the Strasbourg Court particularly underlined at the present case that "*any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in the fundamental rights protection*". The state decision based on the international obligations would only be overthrown if it was "manifestly deficient". The "manifest deficiency" might be a tautology with Jacobs' term "complete unreasonableness", meaning that a restriction on the fundamental rights might bring a chilling effect on the potential public interests even it complied with legitimate aim.

However, some scholars[81] and concurring judges expressed their confusion to this Strasbourg doctrine. Six of the dissenting judges worried that this doctrine would gradually change Strasbourg judicial review from case-study approach to a general deference to national application of the EU law. The "equivalent standard" test might be taken by the Strasbourg judges by a flexible approach. The other dissenting judges expressed that the criterion of "manifest deficiency" seemed unrefined and vague, which provided limited normative guidance to judicial deliberation. The concurring judges also pointed out that the "equivalent standard" should not only be confined to the scope of the "result", but the measures taken by the Community should also be one subject of the Strasbourg scrutiny in order to substantively guarantee the fundamental rights protection required by the ECHR. The concurring judges wonder about why the majority of Strasbourg judges offered a privileged status only to the European Union, which might bring a new discrimination *de facto* between the Community and non-Community member states in the fulfillment of the ECHR.

Judge Ress individually expressed his concurring opinion. He criticized

81. Some scholars expressed their critical opinions on the Doctrine. *See* Kathrin Kuhnert, *Bosphorus - Double Standards in European Human Rights Protection?*, 2 UTRECHT L. REV. 177, 177 (2006); Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS L. REV. 87, 87 (2006).

the final judgment for having omitted the intensive judicial review of Community law in accordance with the ECHR. The Strasbourg judges failed to reply to the question if the right to fair trial under the Community law was compatible with Strasbourg jurisprudence under Art. 6(1) ECHR. In the *Bosphorus* judgment, the Strasbourg Court's analysis of the "equivalence" of protection was rather formal, and it only related to the procedures of protection. Ress also called for that the Strasbourg Court should maintain its substantive scrutiny on Community law through the case-by-case approach, since that the EU Charter had explicitly treated the ECHR as the minimum standard of the fundamental rights in Europe. Therefore, Ress requested his Strasbourg colleagues of to clarify the significance of the "manifest deficiency" in a further step. He held that the "manifest deficiency"[82] defined by the *Bosphorus* judgment seemed reveal that the Community's decision would fall beyond the "equivalent standard" in two circumstances: (1) the Luxembourg Court deviated from the interpretation and the application of the Convention or its Protocol that has already been the subject of well-established ECtHR case law; (2) the Strasbourg Court would not prepare to follow the Luxembourg jurisprudence in the future cases concerning new questions of the interpretation and application of the Convention right. However, it is hard to say that the deficiencies in the second situation are manifest because the Strasbourg Court is accustomed to adopt the evolutive approach to interpret the Convention rights.

This doctrine was also widely questioned by legal scholars. Similar to the confuse of concurring judges, Scholars doubted the reasonableness that the EU was the only international organization granted with such a privilege under the ECHR. In addition, the criterion of "manifest deficiency" sounded a bit vague in the absence of the concrete definition through case judgments.[83] Until now, the Strasbourg Court has not yet invoked "manifest deficiency" as a criterion to overthrow any EU decision. On the contrary, the Strasbourg Court applied this doctrine in very limited cases after the judgment of *Bosphorus*.[84]

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82. Ress argued that, in the procedural terms, the manifest deficiency might be applied to the cases such as: (1) ECJ lacks competence; (2) The Court of Justice has been too restrictive in its interpretation of individual access to it; (3) There has been an obvious misinterpretation or misapplication by the ECJ on the guarantee of Convention Rights.

83. Kuhnert, *supra* note 81, at 185-86.

84. Sionaidh Douglas-Scott, *The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon* 11 (Oxford Law Faculty, Oxford Legal Studies Research Paper No. XX/2015, 2015), http://ssrn.com/abstract=2533207. The presumption of the "equivalent standard" has a very limited role in the influence of the latter case law. European Court of Human Rights Press Unit, *Factsheet - Case-law Concerning the European Union* (2016), http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf. The Strasbourg Court applied the doctrine of "presumption of the equivalent standard" also into the decisions of *Povse* and *Avotins.* In the judgment of *Povse* concerning the right to family union, the Strasbourg Court ruled that the application was inadmissible because the Austrian Court enjoyed little latitude of discretion under the

D. *The Judgments of M.S.S and Michaud: An Intensive Review of the Implementation of EU Regulations by Member States*

The Strasbourg Court refused to apply the doctrine of presumption of the equivalent standard in the decisions of *M.S.S* and *Michaud*,[85] although the subject matters in both cases fell into the EU jurisdiction. In the *M.S.S* case, three Afghan nationals arrived in Belgium via Greece. They submitted a refugee application to the Belgian authority. By virtue of the Dublin Regulation II, Belgian Alien Office submitted a request to the Greek authority to take charge of the refugee application. After several months, the Belgian Alien Office ordered the applicants to leave for Greece where they could submit their application for the title of refugee. The Alien Office received no answer from the Greek authority within two months a maximum period provided by the *Dublin Regulation II*, indicating that the Greek authority tacitly accepted the Belgian request. Thus, the Belgian authority argued that it did not have the obligations to accommodate these refugees and examine their refugee status under the *Dublin Regulation II*, nor to make sure that Greece honored the common rules concerning asylum matters by virtue of the *Dublin Regulation II* having entailed the presumption of "mutual trust". Thus, the Belgian delegates stressed that the decision to send them back to Greece was consistent with the Strasbourg decision of *Bosphorus*.

The Dutch and British delegates also suggested the Strasbourg Court in following the *Bosphorus* judgment, due to the fact that the Belgian decision was an implementation of EU Regulation. The Court clarified that the doctrine of "equivalent standard" was only applicable in the circumstance that the Luxembourg Regime had taken due regards to the substantive guarantee of fundamental rights through the controlling mechanism set in place for ensuring an observance. The Court has strictly confined the applicable scope of the *Bosphorus* judgment to the "first pillar" of the EU law until Lisbon Treaty came into effect. The Strasbourg Court pointed out that the Belgian authority should have applied the exceptional provision under Art. 3(2) of the Dublin Regulation II into the examination of refugee status, even though this task might not be a national responsibility laid down in the relevant EU Regulation. Thus, some new developments were appeared after the judgment of *Bosphorus*: (1) the Convention responsibility would be

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Brussels Regulation. In the judgment of *Avotinus* concerning the enforcement in Latvia of a judgment delivered in 2004 by a Cyprus court, the applicant complained that the enforcement of this Cypriot judgment in Latvia breached a regulation of the Council of European Union. Given the fact that Latvian domestic Court referred to the decision of *Bosphorus* in its decision, the Luxembourg Court deferred to the domestic decision.

85. Michaud v. France, 2012-VI Eur. Ct. H.R. 89.

exempted in the condition of prior involvement of the Luxembourg Court, who has main responsibility to take account of the ECHR in its control of activities of member states; (2) when the domestic decisions have not been submitted to the Luxembourg Court, even which were strictly determined in compliance with the EU Regulation, Strasbourg Court would not lose its competence on scrutiny of the domestic decisions under the Convention obligation, regardless of EU being a Contracting Party to the European Convention or not. The Strasbourg interpretation imposed the Belgian authority more obligation than the EU Regulation did, because the Convention prohibited Contracting States from removing these refugee applicants to a receiving state whenever the removing state authority know and should know that they would suffer a systematic torture and inhumane treatments through the reports issued by the Human Rights NGOs and UN High Commission on Human Rights. Therefore, this Strasbourg decision substantively overthrew the EU doctrine of "mutual trust" enshrined by the Dublin Regulation II. In the later judgment of *Sharifi and others*[86] concerning the deportation of refugee under the Dublin regulation II, the Court reiterated the *M.S.S* judgment requiring Italian authorities to seriously guarantee the applicants' rights during the implementation of the Community Regulation. However, the Strasbourg Court did not provide this Community Regulation an "equivalent standard" to the ECHR.[87]

In the *Michaud* case, the French Administrative Court (*conseil d'Etat*) denied the applicant's request to submit a challenged French provision to the Luxembourg Court through the preliminary mechanism. The applicant alleged that the said provisions had breached the Convention rules. Consequently, he appealed the case to the Strasbourg Court after the exhaustion of domestic remedy. In the hearing of the case before Strasbourg judges, the applicant claimed that the present case should be distinguished from the *Bosphorus* case because the domestic court failed to turn it over to the Luxembourg Court.

The Strasbourg Court reiterated its previous decision that the state duty under the Convention could not be exempted after it had responsibility to

86. Sharifi and others v. Italy, App. No. 16643/09, http://hudoc.echr.coe.int/eng?i=001-147702 (2014) (The judgment was published in an official French version and in an unofficial Italian version).

87. *Id.* ¶ 223. The Court states that "À ce dernier propos, le gouvernement italien explique que, dans le système de Dublin, seule la Grèce était compétente pour statuer sur les éventuelles demandes d'asile des requérants, et donc pour procéder à l'évaluation des situations particulières de chacun d'entre eux, telle que requise, justement, par l'article 4 du Protocole no 4 . . . En ce qui concerne l'application des règles de compétence établies par le règlement Dublin II, la Cour considère au contraire que, pour établir si la Grèce était effectivement compétente pour se prononcer sur les éventuelles demandes d'asile des requérants, les autorités italiennes auraient dûprocéder à une analyse individualisée de la situation de chacun d'entre eux plutô que les expulser en bloc. Aucune forme d'éloignement collectif et indiscriminé ne saurait être justifiée par référence au système de Dublin, dont l'application doit, dans tous les cas, se faire d'une manière compatible avec la Convention".

observe the obligation flown from a parallel international organization. Even this Contracting state has transferred parts of sovereign power to this supranational organization. The international obligation could be justified only if the fundamental rights were respected in aspects of substantive guarantees and mechanism controlling, comparable but not identical, in equivalent standards to the ECHR. When international organization satisfied this qualification, the State's action flowing from the international obligation were presumed not to deviate from the Convention requirement, Otherwise, the state's decision would be substantively scrutinized by the Strasbourg Court in the circumstance that the international treaties left its member states some certain latitude of discretion.

In this case, the Strasbourg Court articulately clarified "why and how" the Strasbourg Court applied the doctrine of "presumption of the equivalent standard" when a Contracting State applied the EU law: (1) This doctrine aimed to avoid EU member states facing a dilemma when they must observe an international obligation; (2) The Strasbourg Court reduced the intensity of judicial review towards the domestic decision in accordance to EU law in the circumstance that the international organization had substantively taken am account of Conventional rights and provided an effective procedural remedy to fundamental rights violations.

However, the Court noticed that the context of *Michaud* were different from *Bosphorus* in two aspects. Firstly, The Irish authority had no margin of discretion during its implementation of the EU regulation in the latter context, whereas the EU Directive in *Michaud* had left the member states enough discretion to choose the appropriate measures for achieving the aim. The Strasbourg Court thus had considerable reasons to set aside this doctrine, considering that the EU Directive had left the French authority large margin of appreciation on choosing an appropriate measure. Secondly, the requirement on the mechanism control and substantive guarantee were completely fulfilled in the *Bosphorus* case in light of that the Luxembourg judges and Advocate Generals had taken due account of the Strasbourg case-law in the decision. On the contrary, the fact that French Administrative Court refused to submit a preliminary question to the Luxembourg Court resulted the Luxembourg Court into failing to examine the state decision in accordance with fundamental rights, nor did the Luxembourg Court have the opportunity to review this dispute in the context of another case or with other actions. Thus, the French decision was intensively examined by the Strasbourg Court under the ECHR.

Generally, the applicability of the "presumption of equivalent standard" doctrine is confined to a very limited circumstance. Although the doctrine had been criticized as provide an exceptional privilege to the European Union after the judgment of *Bosphorus*, and the criterion of "manifest

deficiency" sounded unrefined and vague, the Strasbourg Court articulately clarified its applicable conditions in the judgment of *Michaud* where the substantive guarantee and mechanism control provided by international treaties should be comparably equivalent to the ECHR requirement and the highly Contracting Parties lacked of room of discretion in its fulfillment of EU law.

V. THE INFLUENCE OF THE EU LAW ON THE ECTHR DECISIONS

The EU law has also given an impact on the development of Strasbourg decision.[88] The Strasbourg judges usually rethink its *res judicata* when they find some new EU Regulations and decisions. Nicolaou has openly stated that the Strasbourg judges pay intensive attention to Luxembourg judgments and the relevant EU Charter provisions.[89] In their eyes, the EU Charter is an EU primary human rights instrument applicable to more than half of Strasbourg Contracting States. The European Convention is a "living instrument" in which the scope and meaning of the rights are generally defined and interpreted by the consensus approach. Moreover, since many Strasbourg judges thought that Art. 52(3) EU Charter indicated that the Luxembourg Court would be bounded by the Strasbourg case-law, Strasbourg judges accordingly should interpret the Convention rights in harmony with Luxembourg jurisprudence and EU legal order. Hence, the Strasbourg Court gradually increases in the number and frequency of citation on the Luxembourg case-law and EU legal provisions concerning the fundamental rights in the areas of state administration and judicial affairs for enhancing the legitimacy of Strasbourg decisions.

A. *The Borrowing of Luxembourg Decisions in Strasbourg Judgments*

The UN and other regional human rights treaties are commonly regarded as the relevant documents by the Strasbourg Court for the dynamic interpretation of ECHR. The Strasbourg Court referred to the Luxembourg case-law - the *Defrenne*[90] case - in its earliest decision of *Marckx*[91] as an

88. Francis G. Jacobs, *The European Convention on Human Rights, The EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 291, 292 (Patricia Stöbener, Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006), http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf.

89. George Nicolaou, *The Strasbourg View on the Charter of Fundamental Rights* 2 (Coll. of Eur. European Legal Studies, Cooperative Research Paper No. 03/2013, 2013), https://www.coleurope.eu/system/files_force/research-paper/researchpaper_3_2013_nicolaou_lawpol_final.pdf?download=1.

90. Case C-43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, 1976 E.C.R. 455.

inspired reason for adopting the doctrine of "prospective overruling". The Strasbourg's reference to Luxembourg case-law was no more than a strategy to enhance the legitimacy of its decision, but an ignorance to the US Supreme Court who was the real earliest creator to this doctrine. The Luxembourg jurisprudence usually provides the Strasbourg judges legitimate parameters on justifying the interference of fundamental rights by administrative authorities. In the judgment of *Pellegrin*[92] concerning a balance between personal right of a public servant and public interest, the Strasbourg Court particularly referred to the Luxembourg decision of *Commission vs. Belgium*[93] to reconcile the diverse notions of "public service" between the two European regimes. In the judgment of *Hornsby*[94] where the Greek administrative authority denied issuing stay permits to a British national couple working in Greece, the Strasbourg Court urged this Greek authority to observe domestic court decision with reference to the Luxembourg decision of *Commission vs. Greece*.[95] Despite this reference failed to provide the applicants a help to any extent, it had a potential effect of consolidating EU's authority at the national level.

Actually, the Strasbourg judges are accustomed to revising, even overruling, its precedence through the reference to EU law provisions and Luxembourg case-law. In the judgment of *Vilho Eskelinen & Others*,[96] the Strasbourg Court extended the scope of judicial protection under Art. 6(1) ECHR to the public servant employment in line with the Luxembourg decision of *Johnston*.[97] In the judgment of *Micallef*,[98] the Strasbourg Court incorporated the provisional judicial procedure into the scope of the protection under Art. 6(1) ECHR in the consideration that the provisional measure - given *ex parte* without hearing the defendant - could not be recognized in the Luxembourg decision of *Denilauler vs. Couchet Frères*.[99]

Actually, the Luxembourg's decision is an inspirational tool for the development of Strasbourg case-law. In the judgment of *DH & Others*,[100] the applicants particularly referred to several Luxembourg decisions concerning the indirect discrimination.[101] Finally, the Strasbourg Court

91. Marckx v. Belgium, App. No. 6833/74, 2 Eur. H.R. Rep. 330 (1979).
92. Pellegrin v. France, 1999-VIII Eur. Ct. H.R. 207.
93. Case C-149/79, Commission v. Belgium, 1980 E.C.R. 3881.
94. Hornsby v. Greece, App No. 18357/91, 24 Eur. H.R. Rep. 250 (1997).
95. Case C-147/86, Commission v. Greece, 1988 E.C.R. 1637.
96. Vilho Eskelinen & Others v. Finland, 2007-II Eur. Ct. H.R. 1.
97. Case C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651.
98. Micallef v. Malta, 2009-V Eur. Ct. H.R. 289.
99. Case C-125/79, Denilauler v. SNC Couchet Frères, 1980 E.C.R. 1554.
100. D.H. & Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241.
101. Case C-167/97, Regina v. Sec'y of State for Emp't, 1999 E.C.R. I-666; Joined Case C-4 & 5/02, Schönheit v. Stadt Frankfurt am Main, 2003 E.C.R. I-12575.

permitted the validity of the statistical evidence and required national courts to take these statistical evidence into account when they were valuable and significant.

The references to Luxembourg case-law quite often appear in the dissenting and concurring Strasbourg opinions. In the dissenting opinion of *Demir & Baykara*[102] case, Judge Zagrebelsky expressed a critical opinion on the application of a new Strasbourg previous decision to a pending case at hand on the basis of his reference to Luxembourg jurisprudence. Similarly, Judge Ziemele argued in his dissenting opinion of *Andrejeva*[103] case that the Latvian Act adopted in the Soviet era would be invalid in line with the Luxembourg decision of *Anastasiou*.[104]

B. *Strasbourg's Decision on the Basis of the EU Directives*

Some Strasbourg judgments have a strong connection to EU Regulations and Directives. Regarding that most of Convention rights are not absolute, all the restriction to fundamental rights should be provided by "law". Although the original meaning of "law" specifically referred to the domestic legal source, the Strasbourg Court could not ignored the influence of EU law on domestic legal order any longer after the Luxembourg decisions of *Costa vs. ENEL*[105] and *Van Gender en Loos*[106] in which the Community law was granted with primary status and direct effects.

The Strasbourg judgment of *Mendizabal*[107] is a good example. The applicant Mendizabal described her identity as "a Basque citizen of Spanish nationality". Her request to be issued a residence permit was denied because she filled in "European Union" in her nationality. The French authority hesitated to issue her full-fledged residence in fear of her relationship with the Basque separatist organization ETA. However, the Strasbourg Court determined that the French authority breached Art. 8 ECHR because it should have issued the residence permit to the applicant according to the "law". Consequently, the Court highlighted the term "law" did not specifically refer to the domestic statute,[108] but the EU member states were

102. *Turkey*, 2008-V Eur. Ct. H.R. at 395.

103. Andrejeva v. Latvia, 2009-II Eur. Ct. H.R. 71.

104. Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food, *ex parte* S. P. Anastasiou (Pissouri) Ltd, 1994 E.C.R. I-3087, 3131.

105. Case C-6/64, Costa v. ENEL, 1964 E.C.R. I-585.

106. Case C-26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. I-1.

107. Mendizabal v. France, App. No. 51431/99, http://hudoc.echr.coe.int/eng?i=001-72057 (2006).

108. *Id.* ¶ 79. The Court stated that "Dans ces conditions, la Cour conclut que le délai de plus de quatorze ans mis par les autorités françaises pour délivrer un titre de séjour à la requérante n'était pas prévu par la loi, que la « loi » en question soit française ou communautaire . . .".

also required to respect the relevant obligation enshrined by Art. 48 Rome Treaty and various Community Directives,[109] as well as to follow the Luxembourg requirement based on the decision of *Commission vs. Belgium*.[110]

In the judgment of *Dangeville*,[111] Strasbourg Court defined the meaning of right to property through the reference to the Community Six VAT Directive. The Court finally ruled that the denial of EU Directive application by the French authority had infringed right to peaceful enjoy of possession under the Convention and right to gain benefits under the Sixth VAT Directive.

The Strasbourg Court often relies on the EU Directives in cases concerning expulsion. The Strasbourg Court determined that the Austrian Court had breached the obligation in the decision of *Maslov*.[112] The applicant was a Bulgarian youth who had been sentenced custodial penalty and ten years exclusion order. He was expelled in 2003 after two years in prison. Within the intervening period, he did not commit any further offense and he asked if the good conduct should be taken into account when the Austrian national reconsider an expulsion order under the ECHR. The Austrian authority replied to him a negative answer.

The Strasbourg Court stood an opposite position to this Austrian decision. By the reference to the EU Directive and the Luxembourg decisions, it clarified the reason why the State had breached the requirement of the ECHR that "*its task is to assess the compatibility with the Convention of the final expulsion order.* Mutadis Mutandis*, this would also be the approach followed by the European Court of Human Rights which stated in its* Orfanopoulos & Oliveri *judgment that Art. 3 of the EU Directive 64/221 precludes a national practice whereby it may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another member state, factual matters that occurred after the final decision of the competent authorities*". Apart from this, the Court also made a determination to prolong the expiration period by referring to the EU Directive in the judgment of *Saadi*.[113]

C. *The Strasbourg Decision on the Basis of the EU Charter Provisions*

The Strasbourg Court usually develops its case-law on the reliance of the EU Charter and the relevant Luxembourg judgments. The Strasbourg

109. *See Mendizabal*, ¶¶ 74, 76 (the official version is French).
110. Case C-344/95, Commission v. Belgium, 1997 E.C.R. I-1035.
111. Dangeville v. France, 2002-III Eur. Ct. H.R. 71.
112. Maslov v. Austria, 2008-III Eur. Ct. H.R. 301.
113. Saadi v. UK, 2008-I Eur. Ct. H.R. 31.

Court has developed the meaning of right to marry in its famous judgment of *Goodwin*[114] where the Strasbourg Court cited the Luxembourg decision of *P v. S*[115] as a comparative evidence showing that discrimination against gender reassignment constituted discrimination on grounds of sex. Since the European Convention was defined as a "living document", the Strasbourg judges needed dynamically interpreting the meaning and scope of Convention rights in a continuously changing social context. The institution of marriage had been consistently changed by the development of medical and science in the field of transsexuality after the adoption of European Convention. Meanwhile, the Strasbourg Court perceived that Art. 9 EU Charter had difference from wordings of Art. 12 ECHR with respect to the Charter right did no longer exclusively regards the marriage to opposite-sex couples. The Court thus changed its previous decision of *Rees*[116] and determined that it was a discrimination to preclude the transsexuals from enjoying the right to marry under the Convention.

In the judgment of *Scoppola*,[117] the Strasbourg Court redefined the meaning of Art. 7 ECHR in line with Art. 49 EU Charter, overruling consequently its previous decision of *X vs. Germany*.[118] The applicant of present case was sentenced to a thirty-year imprisonment for murdering his wife and injuring his children by an Italian criminal court. However, the Italian Court of Appeal applied a new criminal legislation convicting him a life imprisonment. The Strasbourg judges cited many relevant alien legal instruments, ranging from international treaties provisions to the numerous international case-law, in order to present that the consensus on the issue of prospective effect in the criminal legal system has been reached in the international community. The Strasbourg Court noted that Art. 49 EU Charter provided that only the criminal statute imposing lighter penalty had a prospective effect. Similarly, the applicability of a more lenient penalty was provided by the case decisions of International Criminal Court. In addition, the Strasbourg Court particularly referred to the Luxembourg decision of *Berlusconi*[119] where the CJEU explicitly recognized that the principle of *lex mitor* formed a general principle of the EU law rooted into the constitutional traditions common to EU member states. This Strasbourg reference to the Luxembourg judgment implied that the doctrine of *lex mitor* had been an *ius commune* in the EU law territory.

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114. Goodwin v. UK, 2002-VI Eur. Ct. H.R. 1.

115. Case C-13/94, P. v. S., 1996 E.C.R. I-2143.

116. Rees v. UK, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1986).

117. Scoppola v. Italy (No. 2), App. No. 10249/03, http://hudoc.echr.coe.int/eng?i=001-94073 (2009).

118. X v. Germany, App. No. 10565/83, http://hudoc.echr.coe.int/eng?i=001-86040 (1984) (inadmissible decision).

119. Case C-387/02, Berlusconi 2005 E.C.R. I-3565.

In the judgment of *Bayatyan*,[120] the applicant asked the Strasbourg Court whether if an objection to military service should be recognized under the Convention. The EU Charter, which by that time had acquired a binding effect in the EU, provided help to Grand Chamber of the Strasbourg Court. According to the Strasbourg case-law under Art. 9 and Art. 4(3) ECHR recorded by the European Human Rights Commission, the Chamber did not regard military service to be a forced and compulsory labor. Thus, the Strasbourg judges could not reach the conclusion that the forced military service had breach the European Convention. However, UN international human rights treaties provide a useful legal source to the Strasbourg judges. The Court found that the UN Human Rights Commission had determined that the International Covenant on Civil and Political Rights did grant such a right to objection to military service. Moreover, the majority of the Strasbourg contracting states had recognized this right in the national legal order, implying a consensus formed within European states. Apart from these relevant instruments, specifically given the right recognized by Art. 10(2) EU Charter, the Grand Chamber determined that "*such explicit is no doubt to deliberate . . . and reflects the unanimous recognition of the right to conscious objection by the member States of the European Union, as well as weighted attached to that rights in Modern European Society*".

At present, 48 states in Europe have acceded to the Strasbourg regime, but only 28 of them are EU member states. The EU Charter bounds a little more than half of the Strasbourg Contracting States. Some non-EU member states may consequently doubt on the legitimacy of the Strasbourg Court reliance on the EU law and Luxembourg case-law when for identifying the scope of European consensus on certain rights. Such a problematic question was particular revealed in the dissenting opinion of *Scoppola II* case where the doctrine of *lex mitor* seems hardly to be regarded as an *ius commune* beyond the EU member states.

VI. CONCLUSION

Although the EU Opinion 2/13 has temporarily blocked the EU accession to the ECHR, the two European Courts engage into a common European program on the fundamental rights protection. Both of them need to get legitimacy and inspiration from their counterpart decisions or provisions, while they respectively cherish their autonomy in the multilevel protection of human rights. Moreover, the author of EU Treaty took EU accession to the ECHR as a constitutional task. Therefore, the EU Opinion 2/13 could not be regarded as terminal point for the accession, while the EU

120. Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1.

judges still leave a door open for the further negotiation between CoE and EU.

As to the EU institutions on fundamental rights protection, the authors of the EU Charter regarded the European Convention as the minimum standard of fundamental rights. Thus, the Convention rights provided them an authoritative guidance in aspects of legislation and judicial decisions. Not only the EU Charter drafters borrowed nearly all the Convention rights, but also Art. 52(3) provided that the scope and meaning of the Charter rights should be defined in accordance to the Convention. The EU Official Explanation clarified in a further step that the scope of wording "Convention" extended to the relevant Strasbourg case-law. Despite the fact that the provision could hardly grant the Strasbourg decision a binding effect to the CJEU, the Luxembourg Court did not publicly oppose to the Strasbourg decision.

Apart from that, the Strasbourg Court indirect supervision to the EU law application by member states actually extend the Strasbourg jurisdiction to the EU affairs. However, the supervisions to member states seem only be applicable in the condition that EU member states have been granted certain latitude of the margin of discretion under the Union's law. Otherwise, the Strasbourg Court invokes the doctrine of "presumption of equivalent standard" towards the EU law application by the member states, unless it will be found "manifestly unreasonable".

On the other side, the Strasbourg Court also gains the relevant supportive source from the Luxembourg decision in aspects of EU legislation and judicial determinations. These decisions enhance the EU authorities in the national legal system. Meanwhile, these Strasbourg decisions may also be challenged by those non-EU member states judiciaries in the sense that the Strasbourg Court should not subject other 20 CoE Contracting States to the EU law jurisdiction.

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歐洲多層級基本權利保障：歐洲人權公約與歐盟法秩序間的關係

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摘 要

本文在歐洲多層級基本權利保障框架下具體研究歐洲人權公約與歐盟法間的互動關係。目前，儘管歐盟第2/13號意見暫時中止了歐盟加入歐洲人權公約的進程，但是為了確保成員國能夠有效地保障基本權利，兩個歐洲組織仍然需要合作。上個世紀70年，歐盟法院為了彌補歐盟尚沒有保障基本權利法典的缺陷，其將《歐洲人權公約》作為審查歐盟規章和法令的尺規。此後，歐盟法院將該公約視為歐盟法原則的一部分並且稱其為「對歐盟法秩序具有重要意義」。《馬斯特里赫特條約》和《里斯本條約》都再次確認了上述的判決結果。此外，《歐盟基本權利憲章》幾乎移植了所有公約權利，並且歐盟法院在其判決中也大量援引人權法院的判決。自從歐洲人權法院將公約定義為「歐洲公共秩序的憲法性文件後」，人權法院悄悄地將其管轄權伸向了歐盟事務。前者經常以公約標準審查締約國在履行歐盟法義務時是否違反了公約的規定。此外，人權法院經常用國際法或者比較法的途徑確定是否在基本權利保障領域中存在共識。因此，人權法院會將歐盟法條和判決作為相關性法院，並且以歐盟人權立法發展為導向解釋歐洲人權公約。

關鍵詞： 第2/13號意見，判例法移植、基本權利移植、間接性管轄、《歐洲人權公約》、《歐盟基本權利憲章》