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The Enforcement Problem of International Labour Law
Comparative Perspectives

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Abstract The enforcement of international labour law (ILL) becomes more acute problem in the context of globalization and the deployment of neoliberal economic forces threatening the effectiveness of ILL. Based on comparative outlook on this problem with examples taken from five countries, the following general observations could be made. Firstly it is crucial to acknowledge the diversity of the systems of enforcement of non-domestic labour standards. Secondly collective labour rights enjoy lower levels of enforcement than individual rights. This seems to be caused by an issue springing from the particularities of the national traditions as well as a genuine by-product of the neoliberal expansion against the social sphere. Thirdly, "soft" and "hard" law should not be understood as static categories. The distinction between "soft" and "hard" law cannot be determined a priori, hence a dynamic and flexible approach and potentially a re-reading of the hard/soft law distinction are required. We have concluded that, towards redressing the enforcement problem, there is a need for a radical reconceptualisation of the hard/soft law distinction and a need for a pluralistic, open and integrated approach to different mechanisms of enforcement.

Keywords Enforcement. Soft Law. Hard Law.

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1 Introduction

The challenges of international labour law (ILL) could be divided into two categories. On the one hand, the task of promulgation of proper international legal norms has captured the intellectual attention of many scholars. Yet, on the other hand it is the second category that poses the most serious threat to ILL, namely the enforcement of these rules. In short, the problem is not normative. It is of enforcement which could be called as the enforcement problem of ILL. As Keith Ewing remarks «the supervision and enforcement of international labour law relies on the *goodwill* of governments to abide by obligations voluntarily entered into and ultimately on *moral persuasion* by international community»[1]. The problem becomes more acute in the context of globalization and the deployment of neoliberal economic forces threatening the effectiveness of ILL.

In light of these considerations we structure our article as follows.

First, as a preliminary question, we will briefly deal with the concept of Fundamental Rights which has been a common and recurrent theme in the scholarship. Subsequently, we will state the effectiveness problem of ILL. Rather than having a theoretical discussion, we consider more useful to present a comparative outlook on this problem with examples taken from five countries. Following this comparative presentation, we will make some general observations.

2 The Concept of Fundamental Social Rights

In spite of its wide application the concept of fundamental social rights seems to be quite ambiguous. This is so for two reasons: 1) the difficulty in determining what counts social rights; 2) what fundamental means. The social rights include the labour rights as well as a broader category of rights associated with human social actors. The task of determining which social rights are fundamental is equally challenging. Without having the space to enter into the full merits of the debate, the following observation should be briefly made regarding different approaches to the concept of "fundamental". In particular, a relativist camp would suggest

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1 Keith Ewing, *Britain and the ILO*, Institute of Employment Rights, 1994, 14, emphasis added. For the effectiveness of international standards see Bob Hepple, *Labour Laws and Global Trade* Hart, 2005, Ch 2.

that the concept acquires different meanings within the various national and international sources. In contrast, a more human oriented approach would associate "fundamental rights" with the concept of human dignity.

Let us now move to the sensitive issue of enforcement. The latter is related to how fundamental social rights work and are implemented in practice. It is not enough to have the proper norms without a relevant and effective mechanism of enforcement.

3 National Cases

3.1 Argentina

Since 2008, the Supreme Court of Justice of Argentina has dealt with some cases related to the enforcement of the principle of Freedom of Association.

Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87)[2], the Right to Organise and Collective Bargaining Convention, 1949 (no. 98)[3], Workers' Representatives Convention, 197 (no. 135)[4] and the Collective Bargaining Convention, 1981 (no. 154)[5].

The trade union system in Argentina allows the registration of different trade unions covering a particular industry, profession, category or enterprise, but the official trade union status is only granted to the most representative one in each of these areas. This means that, although all these unions may coexist, only the official union (*Sindicato con personería gremial*) is granted the rights of representation of collective interests, collective bargaining, administration of social welfare activities, tax exemption, trade union special protection for their representatives, administration of their own healthcare organizations, ecc[6].

The aforementioned trade union system is known as "*Unicato*" and has been repeatedly alleged to be in serious breach of the principles laid down both in international law and in Argentina's own Constitution in respect to the freedom of association[7]. The ILO, through the Committee of Experts

2 Ratified on 18 January 1960.

3 Ratified on 24 September 1956.

4 Ratified on 23 November 2006.

5 Ratified on 29 January 1993.

6 According to Sections 31, 38, 39, 48 and 52 of the Trade Union Law No. 23,551.

7 Section 14*bis* of Argentinean Constitution sets forth: «Labour in its several forms shall be protected by law, which shall ensure to workers: dignified and equitable working condi-

on the Application of Conventions and Recommendations and the Committee on Freedom of Association has issued several observations and recommendations since 1989, year in which this system was finally ratified and implemented by the Argentinean Trade Union Law (Law no. 23,551).

As it has been already mentioned, it was only in 2008 (twenty years after the enactment of the law) that the Argentinean Supreme Court of Justice started to challenge this system in its judgments. Furthermore, as pointed out by Von Potobsky and Goldín, it was also as from that moment that the Supreme Court of Justice started to take into account the provisions of Convention (no. 87), as well as its construction by the bodies and committees of the ILO[8].

We take as an example the case "*Rossi, Adriana María vs. National State – Argentine Army*", decided by the Argentinean Supreme Court of Justice in 2009[9].

Ms. Rossi was subjected to a disciplinary measure by her employer, the Argentine Army. She alleged that this measure had been illegal due to her position as president of a Trade Union, *Asociación de Profesionales de la Salud del Hospital Naval (PROSANA)*, a simply registered union.

According to Argentine law, if a disciplinary measure has to be imposed to a union representative or even in the case of a dismissal with cause, the

tions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work; participation in the profits of enterprises, with control of production and collaboration in the management; protection against arbitrary dismissal; stability of the civil servant; free and democratic labor union organizations recognized by the mere registration in a special record.
Trade unions are hereby guaranteed: the right to enter into collective labour bargains; to resort to conciliation and arbitration; the right to strike. Union representatives shall have the guarantees necessary for carrying out their union tasks and those related to the stability of their employment.
The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: mandatory social insurance, which shall be in charge of national or provincial entities with financial and economic autonomy, administered by the interested parties with State participation, with no overlapping of contributions; adjustable retirements and pensions; full family protection; protection of homestead; family allowances and access to a worthy housing.»

8 Von Potobsky, G. *Norma internacional y derecho colectivo del trabajo.* Buenos Aires, DT 2010 (February), p. 229: *«In this respect, it should be highlighted that the Supreme Court, which traditionally has kept distance from the ILO's Conventions, has radically changed its position in the case "ATE vs. Ministry of Employment", not only concerning quotes of Convention No. 87, but specially with regards to the construction of the ILO's control bodies.»* (translated quotation by the author).
Goldín, A. *La representación en la empresa y la tutela sindical. A partir de la jurisprudencia de la Corte Suprema de Justicia de la Nación.* Buenos Aires, DT 2011 (February), 219: *«The Supreme Court overcomes its previous tendency of not applying or just mentioning ILO's Conventions in a secondary manner.»* (translated quotation by the author).

9 Supreme Court of Justice, 9 December, 2009, "*Rossi, Adriana María v. National State – Argentine Army",* (R.1717.XLI.RHE).

measure must count with the prior authorization of a labour judge due to the special protection granted to union's representatives. However, this protection is only granted by law to the representatives of the official trade union, but not to those belonging to simply registered unions.

In this leading case, the Supreme Court of Justice declared this provision unconstitutional (section 52 of Law 23,551), based on the following grounds:

1. The principle of democratic and free union trade organization is embodied in the Constitution (section 14 *bis*), in several International Treaties of Human Rights with constitutional hierarchy –American Declaration of the Rights and Duties of Man (article XXII), Universal Declaration on Human Rights (art. 20 and 23.4), American Convention on Human Rights (art. 16), International Covenant on Civil and Political Rights (art. 22.1/3) and International Covenant on Economic, Social and Cultural Rights (art. 8.1.a and c and 3)- and in Convention no. 87 of the ILO, which was duly ratified by Argentina.
2. Protection of union representatives is *necessary* in order to ensure this freedom of association.
3. Consequently, confining this protection only to the representatives of the official trade unions violates said principle of freedom of association.
4. In practice, this limitation forces workers to affiliate to the official unions in order to enjoy full labour representation[10].
5. In reaching its judgment, it is worth mentioning that the Supreme Court of Justice examined in detail the twelve annual observations that the Committee of Experts on the Application of Conventions and Recommendations has issued since 1989. In these observations, the Committee had maintained that this provision damaged the principle of freedom of association.

It is worth mentioning, as remarked by Goldín, that it is not the union unity that has been challenged by this judgement, but the unity imposed by law. The alternative of plurality must be kept opened inside the system in order to ensure the principle of freedom of association[11].

So, with a twenty-year delay, the Supreme Court of Justice of Argentina has started to include in its judgments the observations and recommenda-

10 In this sense, Goldín expresses: *«When the most representative union monopolizes the powers of the union condition it is difficult that workers might become interested in incorporating minority unions (lacking, therefore, of sufficient powers) or becoming members of them. Consequently, the existence itself of this kind of unions becomes improbable».* Goldín, *supra* n. 9, at p. 219. (translated quotation by the author).

11 Goldín, *supra* n. 9, at p. 220.

tions of the ILO bodies on the interpretation of Conventions 87 and 98[12]. According to the national system of constitutional review, decisions of judges are only applicable to the particular case decided. In the aftermath of these decisions, a call for the amendment of the legal framework for the trade union system is being put forward by some academics[13], politicians and some trade union representatives[14].

3.2 Greece

The Greek case of implementation of far-reaching collective labour law reforms imposed as a condition for EU/IMF bailout assistance to Greece, despite being contrary to ILO standards, exemplifies a manifestation of the "enforcement problem".

In examining the complaint by the Greek trade unions, the ILO Committee on Freedom of Association has concluded that many of the reforms are manifestly inconsistent with ILO standards[15]. Without entering into the full details, three inconsistencies deserve attention. The first relates to the absence of social dialogue, or as put by the CEACR of "frank and full consultations" with social partners, before the passage of the legisla-

12 Since 2008, the Supreme Court of Justice has issued four judgments in favor of the principle of freedom of association. Apart from the case commented on this article, we can mention the following cases:

12 In Supreme Court of Justice, 11 November 2008, *Asociación Trabajadores del Estado v. Ministerio de Trabajo,* (Fallos: 331;2499), the Court stated that the exclusive right to call for union representatives elections, as reserved to the official unions, is unconstitutional.

12 In Supreme Court of Justice, 7 December 2010, *"Alvarez, Maximiliano and others v. Cencosud S.A."*, (1023. XLIII. RHE), the Court applied the non-discriminatory law and granted absolute stability to the representatives of the simply registered unions.

12 In Supreme Court of Justice, 18 June 2013, *Asociación de Trabajadores del Estado re: declaration of unconstitutionality,* (A. 598. XLIII. RHE), the Court declared that the exclusiveness of collective representation in the head of the official unions is unconstitutional.

13 Goldín, *supra* n. 9, at p. 230: «*The amendment of the legal system becomes therefore an inevitable alternative*» (translated quotation by the author).
Rodríguez mancini, J. *La libertad sindical y el modelo sindical en la Jurisprudencia de la Corte Suprema de Justicia de la Nación.* Buenos Aires, DT 2010 (February), p. 223.

14 Meguira, H.D. *El "Fallo Rossi" y la estabilidad de todos los representantes de los trabajadores.* Buenos Aires, DT 2010 (February), p. 209.

15 ILO Committee of Freedom of Association, Conclusions on Case no. 2820 (Greece) in 365th Report on Committee of Freedom Association (1-6 November 2012). For general reading on ILO and austerity measures in Europe see Niklas Bruun, *Legal and Judicial International Avenues: The ILO*, in N. Bruun, K. Lörcher, I. Schömann, *Economic and Financial Crisis and Collective Labour Law in Europe*, Hart, 2014.

tion[16]. The pressure of concluding the Memoranda with the lenders under strict timetables for the disbursement of the instalments of financial assistance means that the dialogue with the Troika (the institution representing the IMF, European Commission and ECB) has effectively replaced "social dialogue". Moving to the second example, the repeated Government interventions in collective autonomy through suspending, modifying or annulling the effects of the provisions of freely concluded agreements were considered to be in discordance with the ILO principle of voluntary and free collective bargaining as enshrined in art. 4 of Convention 98. To quote CFA, there are «important and significant interventions in the voluntary nature of collective bargaining and in the principle of the inviolability of freely concluded collective agreements»[17]. Finally, the granting of the power to the non-trade union entities of associations of persons, formed even by six workers in the enterprise, to conclude enterprise agreements in the absence of enterprise trade unions was considered by the CFA as a measure that it may seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process since they are not trade unions with full functions and guarantees of independence[18].

In spite of these unequivocal ILO pronouncements, ILO standards remain unenforced thus giving rise to a typical "enforcement problem". Why is so? For making a long and complicated story short, two main remarks should be made. First, this is not a traditional case where the violation of international legal standards assumes the *bilateral* form of a Government not implementing international legal norms. Instead, it has a *trilateral* character as the collective labour law reforms violating ILO norms are dictated by the IMF/EU to the Government through the mechanism of the Memoranda of Understanding. And the direct effectiveness of EU/IMF conditions lies not in their normative effect but in the fact that they are conditions whose observance is necessary for ensuring the financial survival of the state. Evidently, there is an indirect collision between the EU/IMF and ILO as they prescribe conflicting obligations for Greece. Secondly, and perhaps more importantly, the lack of effectiveness of ILO standards in Greece detects, like a seismograph, a more fundamental trend: the growing *asymmetry* between economic (or neo-liberal) governance and socially-oriented governance. Whereas the economic (or neo-liberal) side promotes a de-regulatory agenda for labour law through exploiting the

16 Committee of Experts on Application of Conventions and Recommendations (Committee of Experts), *Observation on the Right to Organise and Collective Bargaining Convention 194, no. 98,* adopted in 2010, emphasis added.

17 CFA, *Conclusions*, p. 996.

18 *Ibidem*, p. 998.

material needs of the Greek state and ignoring ILO standards, the social side represented by the ILO lacks an equally powerful carrier for its realisation. This *asymmetry* appears both in the general imposition of a narrow "fiscal straitjacket" to which labour law reforms should conform within the Eurozone Government and the remarkable absence of the ILO or social partners in the deliberations for the conclusion of the Memoranda. Labour law questions are seemingly and increasingly approached as pure technocratic questions to be determined by the application of the rules of the neoclassical economic orthodoxy.

To sum up, the enforcement problem of ILO standards in the Greek case has two important dimensions. It arises from the conflicting obligations derived from international institutions and from the growing asymmetry between economic and social considerations in favour of the former.

3.3 Japan[19]

Here, unlike other sections, we deal with the development of the Equal Employment Opportunity Act (EEOA) which was enacted to ratify the Convention on the Elimination All Forms of Discrimination against Women (CEDAW), not with concrete national cases. There are two reasons for this.

Firstly, there are very few Japanese domestic cases which discuss conflicts between national statutes and international treaties that provide fundamental social rights[20]. The Japanese government takes a cautious and strict approach to ratify treaties. When ratifying a treaty, it makes scrupulous efforts to eliminate any inconsistency and conflict between Japanese domestic laws and the international treaty. Accordingly, if there is any conflict between them, the government makes it sure that domestic laws are amended before it ratifies the treaty or convention[21]. In case that

19 This part is greatly dependent on T. Araki, *The impact of fundamental social rights on Japanese law*, in: B. Hepple, *Social And Labour Rights in a Global Context***,** Cambridge University Press, 2002, pp. 215, 230-235.

20 As one example of such cases, The *Sendai Kishodai* Case, Supreme Court, 2 March 1993, 629 *Rohan* 7. In this case, the Supreme Court rejected an allegation that the National Public Service Act which prohibits national public servants who are holding regular service from striking is violating the ILO conventions ratified by Japan such as Freedom of Association and Protection of the Right to Organise Convention, (no. 87), and the Right to Organise and Collective Bargaining Convention (no. 98), simply reasoning those conventions does not guarantee public servants' right of strike. In this connection, Japan does not ratify the Labour Relations (Public Service) Convention (no. 151) at the writing time.

21 N. Valticos, *International Labour Law* (Tadashi Hanami, *trans*., Sanseido 1984) iv; Y. Iwasawa, *International Law, Human Rights, And Japanese Law* (Oxford University Press 1998), p. 306; Araki, *supra* n.Error: Reference source not found, 230. A comment says that this is the reason why the number of the ILO conventions ratified by Japan is relatively smaller

eliminating such conflict is impossible or difficult, the government often gives up ratifying a new treaty[22]. In addition, the sources of international social rights in Japan are more limited than in European countries. Japan is neither a member of the European Union nor the Council of Europe. The main sources of international fundamental social rights for Japan are those established by the United Nations and the International Labour Organization[23].

Secondly, taking Japanese employment tradition into consideration, the EEOA adopted very unique way in implementing the CEDAW[24]. This provides interesting materials for discussion about "enforcement problem" of international labour laws.

Let us move to examine the development of the EEOA.

3.3.1 Development of the EEOA

Before ratifying the CEDAW and the enactment of the EEOA, it was a common practice among Japanese companies that female workers quit their jobs when they got married or pregnant. It was also common that female workers were hired and engaged in simple deskwork. At that time, the Labour Standards Act of 1947 did not prohibit sex discrimination universally but simply prohibited wage discrimination on account of being a woman. There were no statutes prohibiting "discriminatory treatment" such as discrimination in the process of recruitment, hiring, allocation of jobs. Case law protection was also limited[25] and insufficient to redress Japan's male-centred employment practice[26].

Japan signed the CEDAW in 1980. Given the situations mentioned above, in order to ratify the CEDAW, the Japanese government needed to make

(Hanami, *supra* n.Error: Reference source not found, v). Indeed, according to the ILO website (`http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:0:::::`, 2014-10-09), the number of ILO conventions ratified by Japan is the smallest in our targeting five countries (Spain 133, Argentina 80, Russia 72, Greece 71, and Japan 49).

22 The Hours of Work (Industry) Convention (no. 1) and Weekly Rest (Industry) Convention (no. 14) can be such examples (T.Hanami, *The influence of ILO standards on law and practice in Japan,*1981, 120(6) *International Labour Review,* p. 765 ff.).

23 Araki, *supra* n. 20, 230.

24 Japan ratified the CEDAW in 1985, although the Discrimination (Employment and Occupation) Convention (no. 111) has not yet been ratified at the writing time.

25 Courts held that sex discrimination in retirement age and obligatory retirement by reason of marriage violates the public policy and nullify the provisions of contracts (see the *Nissan Jidousha* Case, Supreme Court, 24 March, 1981, 35 *Minshu* 300, the *Sumitomo Semento* Case, Tokyo District Court, 20 December 1966, 20(4) *Rominshu* 715).

26 Araki, *op. cit.*, n. 20, p. 232.

necessary amendments in national legislation, and such legislative changes necessarily required radical reform of the firmly rooted male-centred employment tradition in Japan[27]. After a heated debate, the EEOA was enacted in 1985 because of international pressure to ratify the CEDAW.

Prohibition of discriminatory treatment on account of being a woman under the 1985 EEOA was still limited to discrimination in vocational training, retirement age, obligatory retirement by reason of marriage, pregnancy or childbirth, and dismissal by these reasons. These prohibitive provisions nullify contracts which violate them. By contrast, the 1985 EEOA refrained from directly intervening in recruitment, hiring, assignment and promotion, the main arena of differential treatment between men and women. The Act merely provided that employers have a *duty to endeavour* to provide women with opportunities equal to those provided to men[28]. If a violation of this duty were detected, the administrative agency would give a guidance to make it removed[29], but there was no criminal penalty against it. Courts held that this duty did not constitute the public policy automatically and that the violation did not nullify contracts or constitute torts[30]. The reason why the 1985 EEOA took such a weak attitude towards the male-centred employment practices is that the legislation was only possible through a compromise between labour and management, or liberal and conservative parties[31].

In spite of such a mild prohibition against sex discrimination under the 1985 Act, the employment practice in Japan was changed significantly. The employment rate of woman increased and an advertisement offering employment which was previously separated based on prospective employees' sex rapidly disappeared.

After the several amendments, the 1997 EEOA explicitly prohibited discrimination concerning recruitment, hiring, assignment and promotion by reason of being a woman. The duty to endeavour to provide equal opportunities was replaced by a "legal" prohibition of discrimination against women. And finally, by the amendment in 2006, the EEOA reaches a genuine discrimination prohibitive law for both sexes and also prohibits indirect discrimination.

27 *Ibidem*.

28 *Ibidem*, p. 233.

29 It is said that such administrative guidance to realize administrative aims is used more frequently in Japan than in European countries.

30 The *Nomura Shouken* Case, Tokyo District Court, 20 February, 2002, 822 *Rohan* 13.

31 Araki, *supra* n. 20, p. 232.

3.3.2 Remark

In sum, faced with the international pressure to ratify the CEDAW, Japan started to engage in sweeping legislative changes. Japan's equal employment policy concerning the elimination of sex discrimination began with a modest intervention entailing a *duty to endeavour* rather than outright prohibition. If Japanese legislature had adopted the legal duty instead of the duty to endeavour in 1985, most employers would not have even tried to comply with the legal duty because such legislation would have been far from actual employment practice and societal consciousness at that time. Can we consider as effective a legal duty which no one even tries to comply with? Through a soft law regulation and administrative guidance and campaign promoting equality between two sexes, Japan sought gradual but steady changes in societal consciousness towards equal employment[32]. After a society had accepted a new norm and the way had been paved for a more direct legal intervention without causing serious societal confusion, Japan introduced more direct and mandatory forms of regulations[33].

Japan's ratification of the CEDAW and the enactment of the EEOA show that international pressure can be an important promoter of the fundamental social rights. The Japanese legislature adopted the gradual and soft-law approach to implement the international norms enshrined in CEDAW[34]. Partly it might have been a political compromise, but partly it was thought that such a gradual but steady approach could be more effective in the end than direct legal intervention entailing social dislocation[35].

3.4 Russia

Russia as many other countries all over the world has ratified all eight of the core ILO conventions as well as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) better known as the European Convention on Human Rights (hereafter – the Convention) within the Council of Europe the member of which it became in 1996. In

32 Indeed, unlike situations of the enactment of EEOA in 1985, there was no public objection against replacing the duty to endeavor with the legal duty when EEOA was amended in 1997.

33 Araki, *op. cit.*, n. 20, 234.

34 *Ibidem*.

35 If we divide fundamental social rights into two categories, core rights regarded inviolable and peripheral ones which legislature has wider legislative discretion, it is worth noting that the treatment of fundamental social rights such as sex equality in Japan suggests that Japan views core rights more narrowly than European and admits more legislative discretion (Araki, *op. cit.*, n. 20, 237).

opinion of some foreign scholars which seems to be quite fair the Convention was eyed by Russia as many other countries from Central and Eastern Europe as a document that it should subscribe to in order to demonstrate its commitment to a democratic future[36]. In the Soviet period, the influence of international labour standards on national legislation was rather restricted that can be explained, firstly, by the relative closedness of the Soviet economy and, secondly, by the fact that the rest of international labour law was not "ideologically neutral" and were chiefly oriented to communist states and not socialist ones[37]. However, with Russia's transition to a market economy and declaration of democratic values as the basis for its further development the situation has been changed substantially. At present, both in theory and practice international labour standards are considered as a principal guideline for further development of national legislation. At the same time, the number of applications submitted by Russian citizens to the European Court of Human Rights (hereafter – ECHR) indicates that in spite of numerous legislative attempts on adjustment of national legislation there are still a lot of problems with enforcement of human rights, including social ones[38]. One of the most discussable questions of late concerns the issue of different interpretation of fundamental social rights by the ECHR and the Constitutional Court of the Russian Federation (hereafter – CC RF) which occurred in connection with the case *Konstantin Markin v. Russia* where the ECHR for the first time severely criticized arguments of the CC RF on the same matter.

This case originated in 2005 when a military serviceman Konstantin Markin – a divorced father of three minor children – asked the head of his military unit for three years' parental leave to take care of his children. Since the request was rejected on the ground that in accordance with Russian legislation such leave could be granted only to female military personnel and Markin was allowed to take only three months' leave, he pursued unsuccessful multiple appeals to military courts of different levels, complaining, in particular, that that the refusal to grant him three years' parental leave violated the principle of equality between men and women

36 E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press, 2010, p. 22.

37 N. Lyutov, *Rossiyskoye trudovoe zakonodatelstvo i mejdunarodniye trudoviye standarty: sootvetstvie i perspectivy sovershenstovaniya [Russian Labour Legislation and International Labour Standards: The Issues of Compliance and Perspectives for Modification]* (Tsentr sotsial'no-trudovyh prav [Centre for Social-Labour Rights] 2012). Available at "Center for social and labour rights" website: `http://trudprava.ru/files/pub/rostrudzak.pdf` (25 July 2014).

38 Until recently Russia usually has led in number of appeals submitted to the ECHR against it. Only in 2014 it ranks not the first place in number of pending applications allocated to a judicial formation, but the third one (after Ukraine and Italy). `http://www.echr.coe.int/Documents/Stats_pending_month_2014_BIL.pdf` (2014-07-25).

guaranteed by the Constitution. In 2006, after all his unsuccessful courts proceedings Markin lodged his complaint with the ECHR and in 2008 he applied to the CC RF, claiming that the provisions of the Military Service Act concerning the three-year parental leave were incompatible with the equality clause in the Constitution. In 2009, the CC RF rejected his application and concluded that Markin was not entitled to three years of parental leave so long by signing a military service contract he had voluntarily chosen professional activity which entailed limitations on his civil rights and freedoms which were necessary for proper defense of the country and its security. At the same time, granting the right to parental leave to servicewomen, on the exceptional basis, on the opinion of the CC RF, is explained, firstly, by the limited participation of women in military service and, secondly, by the special social role of women associated with motherhood.

About a year later the ECHR delivered its Chamber judgment in the case *Konstantin Markin v. Russia*[39], where it found that there had been a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life). The Court was not convinced by the argument of the CC RF that the different treatment of male and female military personnel concerning the right to parental leave could be justified by the special social role of mothers in the upbringing of children as well as by the argument that taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces.

In reality, it was for the first time when the ECHR so seriously criticized the arguments of the CC RF as groundless. Before then their legal positions on the issue of interpretation of fundamental social rights were generally coincided that can be explained by the fact «that both the Constitution of the Russian Federation and the Convention include per se the same range of fundamental rights and freedoms»[40] .However, in the case of *Konstantin Markin v. Russia* the ECHR has not confined itself just to criticizing the CC RF. It also instructed Russia to take legislative measures in order to put an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned. Essentially it means that the

39 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{“appno”:[“30078/06”],“documentcollectionid2”:[“CHAMBER”,“DECISIONS”,“COMMUNICATEDCASES”,“CLIN”,“ADVISORYOPINIONS”,“REPORTS”,“RESOLUTIONS”],“itemid”:[“001-100926”]} (2014-07-25).

40 V. Dmitrievich Zor´kin, *Dialog Konstitucionnogo Suda Rossiyskoy Federacii i Evropeiskogo Suda po pravam cheloveka v kontekste konstitucionnogo pravoporyadka* [*The dialogue of the Constitutional Court of the Russian Federation and the European Court of the Human Rights within the context of the constitutional law and order*]: the Report of the Chairman of the Constitutional Court of the Russian Federation at XIII International Forum on Constitutional Justice “The European convention on human rights and fundamental freedoms in the XXIst century: problems and prospects of implementation” (18-20 November 2010). http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=39 (2014-07-25).

ECHR has sufficiently exceeded bounds of the specific case when passing the judgment so long as there was no systematic problem and, therefore, no grounds to consider this decision as a pilot one[41]. As a result, it was considered by Russian authorities as an attempt to infringe of Russian sovereignty and provoked a lot of debates on the limits of the ECHR' interference in domestic affairs of a country. One of the consequences followed from these debates was a draft law according to which any decision by "an interstate organ" would only be fulfilled if the Constitutional Court of the Russian Federation confirmed that the norms called into question did not correspond with the Russian Constitution. In other words, it meant that the Constitutional Court would be granted veto power over the decisions of the ECHR. However, such radical legislative proposal has not received total support and eventually was withdrawn, formally as a result of a few procedural irregularities, although it seems to be quite obvious that political considerations were also taken into account[42].

Russia appealed the original decision on the case and in 2012 the Grand Chamber issued its final decision[43] where it upheld the previous one and increased the applicant's total award. However, it did not give rise to further polemics on the issue so long as the Grand Chamber preferred to limit itself by the merits of the concrete case and not to recommend the Russian legislator to change national legislation that could be considered as a compromise at that moment.

Summing up, one can say that this case reflects a particular problem of non-enforcement, arising from the differences in the interpretation of fundamental social rights by the national constitutional courts and the European Court of Human Rights. Such an issue, which is quite typical for those countries where fundamental social rights are stipulated by the basic laws, is derived from the different models of correlation between national legal systems and the European Convention on Human Rights[44] that makes

41 In accordance with Rule 61 of the Rules of Court, the ECHR «may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications». http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (2014-07-25).

42 W.M.E. Pomeranz, *Uneasy Partners: Russia and the European Court of Human Rights*. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1863&context=hrbrief (2014-07-25).

43 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109868#{"itemid":["001-109868"]}.

44 Usually, three approaches to the question are indentified in the legal literature: 1) the Convention is considered as having a legislative ranking (e.g., in the UK); 2) the Convention is regarded as having constitutional rank (e.g., Austria and the Netherlands); 3) the Convention is treated as having a super-legislative ranking (e.g., in France, Belgium, Portugal) (the classification is cited in accordance with Giuseppe Martinico, *Is the European Convention*

for further search of the optimal conception of their correlation in the age of globalization, including the legal one. As a final note, it is important to stress that in the case of Russia it was the national interpretation that prevailed over the ECHR's one.

3.5 Spain

For Spain, we have chosen case concerning an employer's refusal to accord a father the so-called "breastfeeding" leave, as decided by the European Court of Justice in "Roca Álvarez v Sesa Start ETT, S.S." (Judgment of the Court (Second Chamber) of 30 September 2010, case C-104/09).

The case involved a worker who provides services to the company Sesa Start Spain ETT SA since July 2004. In March 2005, he applied to benefit from the provisions of art. 37.4 of the Workers' Statute (*Estatuto de los Trabajadores*, hereafter ET)[45] where the law regulates lactation[46], for the period between January 4 and October 5, 2005. This article refers to the possibility of paid leave during working time, or to accumulate breastfeeding time, in the terms stipulated in collective bargaining or by agreement with the employer. The interpretation of this provision has not always been peaceful, first, by the difficulty of reaching a negotiated agreement between the parties and, secondly, because of the difficulty for the parent to enjoy this right when the mother is not employed. This has been reflected in numerous judgments where sometimes the father is granted a leave and sometimes not.

In the present case, the worker applied to benefit from the provisions of art. 37.4 ET, but his request was rejected on the ground that the mother of his child was not employed but self-employed and that consequently neither she nor he were entitled to this leave.

This decision was confirmed in the first instance by the Social Court (nº 4) of A Coruña. On appeal, the High Court of Justice of Galicia found that the national legislation had been correctly applied, but understood

Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts (2012), 23(2) *Eur. journ. intern. law.*, p. 404).

45 Royal Legislative Decree 1/1995, of March 24, approving the Consolidated Text of the Law on the Workers' Statute.

46 Art. 37.4 ET: «Female workers shall have the right to one hour of absence from work to breast-feed an infant of less than nine months. This may be divided into two fractions. The duration of such leave shall be increased proportionally in cases of multiple childbirth. Women, at their choice, may substitute this right for a reduction of their working day by half an hour for the same purpose, or accumulate this into complete days under the terms provided for by the collective bargaining agreement or by the agreement arrived at with the employer, respecting, as applicable, what is set forth in collective bargaining. This leave may be enjoyed by either the mother or the father, in the event that both work.»

that as long as the authorization required under these regulations was unrelated to the biological fact of breastfeeding, the regulation maybe discriminatory. Therefore a consultation was submitted to the European Court of Justice for a preliminary ruling regarding Spanish national regulation compatibility with art. 13 of the Treaty, and the principle of equal treatment of men and women in matters of employment and occupation enshrined in Directives 76/207/EEC of 9 February 1976 and 2006/54/EC of 5 July 2006, or, on the contrary, it is a discriminatory rule since only allows access to the exercise of this right by the father if the mother is employed.

Directive 76/207 / EEC, as amended in 2002, establishes a series of rules in order to enforce equal treatment between men and women in matters of employment and working conditions. Specifically, art. 5 of the standard provides for the application of this principle to the working conditions, the question is whether we consider breastfeeding as a working condition as required by the referred Directive. To make this analysis we must start from art. 37.4 ET, where it is expected that during the first nine months of childbirth, workers may choose either paid absence during the workday, or the accumulation of that leave in whole days. In this respect, Spanish regulation seeks to amend working hours and therefore refers strictly to working conditions, according to art. 5 of the Directive[47].

As to whether there is gender-based unequal treatment, the judgment analyses art. 37.4 ET because parents do not have the right to reduce working time, they just have the right arising from the fact that the mother is entitled or not, for which it is necessary that she works for others. Thus, unequal treatment arises when women workers have an inherent right to reduced working hours, while male workers only have a derived right from the right of the mother of his child. Consequently, a mother who is employed is entitled to a leave, but a parent who is employed can only enjoy it if the child's mother is also a worker. We must consider too that the goal of the leave is to let parents have enough time to take care of the child; as parents of young children, they are in a comparable situation with regard to the need to reduce their daily working time to take care of their child[48], hence the importance of recognizing the permit at issue and enjoyment interchangeably by the parent worker or working mother to be able to feed and care the child.

That is why the European Court of Justice states, on paragraph 47 of its

47 See Judgment of the Court (Sixth Chamber) of 20 March 2003, Kutz-Bauer, C 187/00, ECR I-2741, specially paragraphs 44 and 45.

48 In this regard Judgment of the Court of 29 November 2001, Griesmar, C-366/99, ECR 1-9383 in relation to education of children, and Judgment of the Court of 19 March 2002, Lommers, C-476/99, ECR I-2891, paragraph 30, in relation to places reserved only for children of female officials.

judgment, that the denial of the leave to the parents that have the status of employees on the sole ground that the mother does not have this condition, could lead to a self-employed woman, as the mother of the son of Mr. Roca Álvarez, to limit her professional activities and bear alone the burden resulting from the birth of her child, without the child's father being able to ease that burden.

In conclusion, the European Court of Justice ruled that art. 37.4 ET is inconsistent with arts. 2.1, 2.3, 2.4 and 5 of Directive 76/207 / EEC, and therefore the Spanish legislation is incompatible with Community law and consequently the Spanish courts are required from this point to make an interpretation in line with the EU directive, so to ensure the full effectiveness of the Directive and achieve an outcome consistent with the objective pursued by it. That is, to ensure that both parent and mother workers are entitled with a leave to facilitate the reconciliation of work and family life and create the conditions for and effective and balanced co-responsibility in child and family care[49].

4 Conclusion

The preceding comparative investigation confirmed the centrality of the "enforcement problem" of ILL. In light of these comparative findings, the following general observations could be made.

First, it is crucial to acknowledge the diversity of the systems of enforcement of non-domestic labour standards in the countries examined. Nonetheless, in most of the countries investigated, a serious common problem of enforcement has been identified that may disguise in different manifestations. The only clear case of enforcement is the Spanish case where the strong EU mechanism of enforcement was used in order to promote the individual right of equal treatment, the latter having been a cornerstone of ECJ jurisprudence. An interesting conclusion concerns the different levels of enforcement between individual and collective labour rights. Within our comparative inquiry, it was evident that collective labour rights enjoy lower levels of enforcement than individual rights. The Greek and Argentinian cases may be perceived as providing a verification of the thesis positing an asymmetrical development of individual and collective rights. Is this merely a confirmation of the famous Otto Kahn-Freund

49 See O. Fotinopoulou Basurko, *El derecho del padre a disfrutar del permiso por lactancia cuando la madre es una trabajadora autónoma (A propósito de la STJUE de 30 de septiembre de 2010, Asunto C-104/09; Roca Álvarez)[The father's right of leave for breastfeeding when his wife is self-employment (With respect to the judgment of the Court of Justice of European Union 30 September 2010, C-104/09; Roca Álvarez)]*, RL, nº 23, July 2010, pp. 121-136.

argument on his "Uses and Misuses of Comparative Labour Law"[50] that collective labour rights are more difficult to be transplanted due to being very much connected with national traditions than individual ones? Or this asymmetry of enforcement should be also understood in the context of a growing asymmetry in the age of neo-liberalism between economic and social rights where the former enjoy superior levels of enforcement than the latter[51]? Our conclusion is that both answers are correct. The enforcement problem is as much an issue springing from the particularities of the national traditions as well as a genuine by-product of the neo-liberal expansion against the social sphere.

In this context, our conclusion is also that "soft" and "hard" law should not be understood as static categories. The question of how "soft" or "hard" is the soft law cannot be determined *a priori*. One should only look at the soft law of Memoranda or the Japanese non-legal duty to endeavour for adopting a more *dynamic* approach to the soft/hard law question. Is the financial sanction of debt default for non-compliance a relevant "sanction" for "hard law" or is the latter confined only to legal sanctions? We suggest that the answer is far more complex than it first appears. Hence a *dynamic* and *flexible* approach is required and potentially a re-reading of the hard/soft law distinction.

So, we have concluded that the main challenge for international labour law resides in how to address the "enforcement problem". Towards achieving this purpose, perhaps there is a need for a radical reconceptualisation of the hard/soft law distinction and a need for a pluralistic, open and integrated approach to different mechanisms of enforcement.

50 O. Kahn-Freund, *On Uses and Misuses of Comparative Law* (1974) 37(1) *Modern Law Review,* 1, p. 21.

51 For a recent reformulation of the thesis in the context of the Eurozone as between the strong macro-economic and the "weak social constitution" see K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014).