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THE VALUE OF COMPARATIVE RESEARCH AND INTERNATIONAL LABOUR STANDARDS FOR THE ADJUDICATION OF LABOUR-LAW-RELATED CASES BY THE EUROPEAN COURT OF HUMAN RIGHTS

by Elena Sychenko

The paper establishes the ways the European Court of Human Rights (ECtHR) applies international labour standards and refers to comparative research of national labour legislations when it adjudicates cases related to labour rights. In the first part, the author researches the meaning of the "living" character of the European Convention on Human Rights (ECHR) and the outcomes of an evolutionary interpretation of the Convention in cases related to labour law. The second part investigates the references to the international instruments other than the ECHR in the ECtHR's case law, and outlines the contributions of the ILO standards to the development of labour rights protection. The third part follows the use of comparative research of national labour legislations by the ECtHR and argues its particular impact on anti-discrimination protection and on the protection of the freedom of association.

Il presente contributo definisce le modalità con cui la Corte europea dei diritti dell'uomo applica le norme internazionali in materia di lavoro e con cui essa fa riferimento alla ricerca comparata nell'ambito delle norme giuslavoristiche nazionali quando è chiamata a dirimere casi afferenti al diritto del lavoro. Nella prima parte, l'autrice conduce una disamina del significato dell'espressione "strumento vivo", definizione applicata alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (CEDU). Analizza inoltre i risultati di un'interpretazione evolutiva di tale strumento legislativo in casi afferenti alla materia giuslavoristica. La seconda parte analizza i riferimenti agli strumenti internazionali diversi dalla CEDU all'interno della giurisprudenza della Corte europea dei diritti dell'uomo, e delinea il contributo fornito dalle norme dell'OIL allo sviluppo della tutela dei diritti dei lavoratori. La terza parte analizza invece l'uso, da parte della Corte europea dei diritti dell'uomo, della ricerca comparata in riferimento alle normative giuslavoristiche nazionali, focalizzandosi sull'impatto significativo a livello di lotta contro le discriminazioni e di tutela della libertà sindacale.

1. Introduction

In recent years, the European Court of Human Rights ("ECtHR" or "the Court") has acquired a strong position among other international bodies having authority to consider the cases on labour rights protection. The Court is no more associated with the efficient

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protection of solely civil and political rights as its case law now includes numerous cases on unfair dismissal[1], the protection of employees' privacy[2] or occupational health[3].

The emergence of employment cases before the ECtHR is the result of the application of the European Convention on Human Rights ("ECHR" or "the Convention") as a "living instrument", which allowed the Court to interpret the Convention in a broad manner, acknowledging new rights or new facets of the existing rights. The aim of the present paper is to reveal the value of the comparative research of national labour legislations and of the international labour standards for the adjudication of "labour law" cases by the ECtHR.

The paper is structured in the following way: Section 1 will briefly deal with the meaning of the "living" character of the ECHR. Subsequently, Section 2 will research how the ECtHR applied international instruments other than the ECHR and will outline the contributions of the ILO standards to the development of labour rights protection; Section 3 will investigate the use of comparative research of national labour legislations by the ECtHR and will emphasise its impact on anti-discrimination protection and on the protection of the freedom of association.

2. The interpretation of the ECHR as a "living instrument"

The words "living instrument" were used by the ECtHR for the first time in *Tyrer v. the United Kingdom*[4], where the Court underlined the importance of interpreting the ECHR in the light of contemporaneous conditions, taking into account the then-current development and commonly accepted standards in the concerned sphere. This was a starting point for the "extensive use of evolutive interpretation"[5]. This method, even without being directly mentioned in the majority of the cases, largely determined the development of human rights protection under the ECHR.

Scholars note that the application of this concept means that the interpretations of the ECtHR's decisions must be made having regard to the evolving values in European societies and to the new human rights problems brought about by advances in science and technology, which could not have been imagined back in 1950[6]. These adjustments, for instance, lead the ECtHR to expand the protection of private life to take into account rights regarding electronic correspondence and the use of Internet at work[7], or to argue the necessity of applying contemporary protective measures as far as occupational health is concerned[8].

[1] ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013.

[2] ECtHR, Halford v. the United Kingdom (20605/92) 25/06/1997; Peev v. Bulgaria (64209/01) 26/07/2007; Köpke v. Germany (420/07) 05/10/2010.

3 ECtHR, Vilnes and others v. Norway (52806/09, 22703/10) 05/12/2013; Brincat and others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24/07/2014.

[4] ECtHR, Tyrer v. the United Kingdom (5856/72) 25/04/1978, para. 31. See also: G. Letsas (2012), *The ECHR as a Living Instrument: Its Meaning and its Legitimacy*, available at: http://ssrn.com/abstract=2021836 (accessed 20/09/2014).

[5] G. Letsas, *The Truth in Autonomous Concepts: How To Interpret the ECHR*, "European Journal of International Law", 15, 2015, p. 299.

[6] M. Pellonpaa, *Continuity and Change in the Case-Law of the European Court of Human Rights*, in M. G. Kohen (ed.), *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Martinus Nijhoff Publishers, Leiden 2007 p. 409.

[7] ECtHR, Copland v. the United Kingdom (62617/00) 03/04/2007.

[8] ECtHR, Vilnes and others v. Norway (52806/09, 22703/10) 05/12/2013.

The roots of this concept might be found both in the text of the ECHR, which was intended as "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"[9] and in the approach of the European judges to the interpretation of the ECHR. Judge Sorensen in 1975 proclaimed the ECHR to be a "living legal instrument" and emphasised the need to take into account current circumstances of life by using an evolutive interpretation method[10]. The Justice of the Supreme Court of the United Kingdom suggests that the expression "living instrument" is reminiscent of the expression "[a] living tree capable of growth and expansion within its natural limits", used by Canadian judge Sankey in 1930[11].

The evolutive approach to interpretation has never been applied unanimously by the judges of the ECtHR. Moreover, the approach has been consistently criticised by the representatives of Member States and some leading scholars as being illegitimate and leading to unpredictable interpretations of the text of the ECHR, which are contrary to the initial will of the States[12].

Some judges of the ECtHR have emphasised the impossibility of implementing important international obligations when they are not defined in a way as to enable the States to know exactly what would be involved[13], as well as the fact that the evolutive approach is at odds with the principle of legal certainty[14]. Judge Pinheiro Farinha noted: "The ECtHR has jurisdiction not to re-draft the Convention but to apply it. Only the High Contracting Parties can alter the contents of the obligations assumed"[15].

Franz Matscher, a former judge of the ECtHR, stated that the ECtHR has reached the limits of what can be regarded as treaty interpretation in the legal sense and at times has perhaps even crossed the boundary and entered territory that is no longer that of treaty interpretation but is actually legal policy making[16].

However, in spite of the critics and criticisms of the "lack of clarity"[17] with the approach, the ECtHR still interprets each right in accordance with various contemporaneous trends, together with relevant legal and social developments in Europe[18]. This approach has been indispensable in the sphere of protecting labour rights as many of the rights and freedoms

[9] Preamble to the ECHR.

[10] M. Sorensen, *Do the rights and freedoms set forth in in the ECHR in 1950 have the same significance in 1975?*, in Proceedings of the Fourth International Colloquy on the European Convention on Human Rights, held in Rome on 05-08/11/1975, Strasbourg 1976, pp. 86-106.

[11] B. M. Hale, *Beanstalk or living instrument? How tall can the European Convention on Human Rights grow?*, lecture held at the Grasham College on 16/06/2011.

[12] See, for example, the speech of British Prime Minister J. Cameron (http://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full) or the article of the President of the Russian Constitutional Court, V. Zorkin, "Предел уступчивости" ("The limits of pliability"), *Rossyskaya gazeta*, 29/10/2010, available at: http://www.rg.ru/2010/10/29/zorkin.html, accessed 07/10/2013. R. Bellamy (2014), "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights", *European Journal of International Law*, 25, 4; L. Hoffmann, "European Human Rights – A Force for Good or a Threat to Democracy?", lecture held at the Dickson Poon School of Law, King's College London, on 17/06/2014, available at: http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Theat-to-Democracy-17-June-2014.pdf (accessed 20/08/2014).

[13] ECtHR, Golder v. the United Kingdom (4451/70) 21/02/1975. Separate opinion of Judge Fitzmaurice, para. 30.

[14] Joint Concurring Opinion of Judges Villiger, Nussberger and De Gaetano in Lucky Dev v. Sweden (7356/10) 27/11/2014.

[15] Partly Dissenting Opinion of Judge Pinheiro Farinha in Marckx v. Belgium (6833/74) 13/06/1979, para. 4.

[16] F. Matscher, *Methods of Interpretation of the Convention*, in R. St. J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Leiden 1993, pp. 69-70.

[17] ECtHR, Concurring Opinion of Judge Ziemele in O'Keeffe v. Ireland (35810/09) 28/01/2014, para. 10.

[18] I. Foighel, *Reflections of a former Judge of the European Court of Human Rights*, in S. Lagoutte *et al.* (eds.), *Human Rights in Turmoil*, Brill, Leiden 2007, p. 277.

are defined in the ECHR in "too general terms to be fully self-executing"[19]. Scholars suppose that the lack of precision in the terms of the ECHR leads to the emergence of the "creative legislative element" in the ECtHR's power of interpretation, comparable to that of the judiciary in common law countries[20].

Understanding of the evolutive interpretation of the ECHR is possible through an analysis of the limits of its application and its sources. The ECtHR has faced the necessity of delimiting the use of the evolutive interpretation of the ECHR. In *Johnston and others v. Ireland* it underlined that "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset, this is particularly so here, where the omission was deliberate"[21]. However, as we will see further, this statement did not prevent the ECtHR from concluding, for example, the right not to join a trade union as being inherent to Article 11, although that negative right was deliberately excluded from the text in the drafting process[22].

Another limit might be found in the acknowledgement of the rule that any interpretation must not place an impossible or disproportionate burden on the States. This rule concerns the imposition of the positive obligations on the States to ensure the protection of ECHR rights[23]. For example, in *Brincat and others v. Malta*[24], the ECtHR referred to this rule in the interpretation of the scope of the State's obligation to ensure the protection of the lives of employees.

The search for common standards, a "constant thread running through the case law of the Court" is another limit of the application of the evolutive interpretation of the ECHR[25]. Common standards in human rights protection are both the limits and the sources of such interpretations. They limit the ECtHR in being too "expansive" where common standards, on the one hand, cannot be found, and on the other, provide the ECtHR with evidence of the development of foreign law (with emphasis on European law), and of the relevant international instruments.

The references to international labour standards and to the comparative research of relevant national provisions allow the Court to develop the interpretation of the Convention, rendering it more applicable for the protection of labour rights. The integration of certain labour rights or of the "labour" facets to the original conventional rights is the most important result of the application of the Convention as a "living instrument". New "labour" facets of existing rights are represented by the acknowledgment of the right to manifest one's religion by wearing a religious symbol at work[26], or the right to appeal against unfair dismissal on political grounds[27]. The examples of the integration of new rights are numerous: the right to collective bargaining[28], the right to strike[29], the right

[19] H. Waldock, *The Effectiveness of the System Set up by the European Convention on Human Rights*, "Human Rights Law Journal", 1, 1980, p. 9.
[20] *Ibid*.
[21] ECtHR, Johnston and others v. Ireland (9697/82) 18/12/1986, para. 53.
[22] ECtHR, Sorrensen and Rassmussen v. Denmark [GC] (52562/99, 52620/99) 11/01/2006.
[23] ECtHR, Koval and others v. Ukraine (22429/05) 15/11/2012, para. 73, among labour law cases; Vilnes and others v. Norway (52806/09, 22703/10) 05/12/2013, para. 220.
[24] ECtHR, Brincat and others v. Malta (60908/11 et al.) 24/07/2014, para. 101.
[25] N. Bratza, *Living instrument or dead letter – the future of the ECHR*, "European Human rights Law Review", 2, 2014, p. 124.
[26] ECtHR, Eweida and others v. the United Kingdom (48420/10) 15/01/2013.
[27] ECtHR, Redfearn v. the United Kingdom (47335/06) 06/11/2012.
[28] ECtHR, Demir and Baykara v. Turkey [GC] (34503/97) 12/11/2008.
[29] ECtHR, Enerji Yapı-Yol Sen v. Turkey (68959/01) 21/04/2009.

to access information concerning risks the employee is exposed to[30] or the right to be reinstated in case of unfair dismissal[31], and the right to solidarity strike[32].

Furthermore, the research will focus on the use of international instruments in the adjudication of labour law cases by the Court.

3. The use of other international instruments and opinions of other international bodies

The possibility to refer to other international instruments has particular importance for the ECtHR's ability to make decisions about the protection of labour rights, given that in recognising the possibility of protecting those rights, the ECtHR inevitably faces the lack of entirely appropriate provisions within the ECHR itself. The general basis for the ability to refer to other international instruments in its deliberations was acknowledged in *Cudak v. Lithuania*: "The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account"[33]. The Vienna Convention on the Law of Treaties (VCoLT) fixed the possibility to refer to "other relevant rules of international law" for the interpretation of international treaties (Article 31.3 (C)). The direct reference to this discretion can be found in numerous labour law cases[34]. An analysis of the ECtHR's case law shows that the ECtHR resorted to Article 31.3 of the VCoLT as a means to support either an expansive or a restrictive reading of the ECHR when substantive issues of fundamental importance for the protection of human rights have come out[35].

Magdalena Forowicz, who conducted profound research on the consideration of international law by the ECtHR, noted that the Court finds itself at the apex of two diametrically different judicial paradigms; an open paradigm characterised by a high level of judicial activism and unhindered references to international law; and the closed paradigm, marked by judicial restraint and few references to international law[36].

The most vivid application of the "open paradigm" is represented by the *Demir and Baikara v. Turkey* case. In the Grand Chamber judgment the ECtHR directly stated the following:

> The Court, in defining the meaning of terms and notions in the text of the Convention, *can and must* take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. […] In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in

[30] ECtHR, Brincat and others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24/07/2014.
[31] ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013.
[32] ECtHR, The National Union of Rail, Maritime and Transport Workers v. the United Kingdom (31045/10) 08/04/2014, para 86.
[33] ECtHR, Cudak v. Lithuania (15869/02) 23/03/2010, para. 56.
[34] ECtHR, R.M.T. v. the United Kingdom (31045/10) 08/04/2014, para. 76; Demir and Baikara v. Turkey [GC] (34503/97) 12/11/2008, para. 65, Cudak v. Lithuania, para. 56.
[35] M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford University Press, Oxford 2010 p. 59.
[36] M. Forowicz, see s*upra* note 106, p. 4.

the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies[37].

The ECtHR further referred to the norms of the European Social Charter, which were not ratified by Turkey, and concluded that the right to collective bargaining was "an essential element" of the right to freedom of association. This approach triggered a wave of criticism both from judges of the ECtHR and scholars. It was said to be inconsistent with approaches adopted by other international tribunals[38] and contrary to the VCoLT[39].

Judge Wojtyczek in the Concurring Opinion to the judgment in *R.M.T. v. the United Kingdom* noted:

> The fact that a treaty rule is not binding on at least one Contracting State is an argument against any kind of theological re-interpretation of the Convention in accordance with this rule. In my view, it is illegitimate to transform treaty rules that bind only some members of the Council of Europe into an element of the Convention for the Protection of Human Rights and Fundamental Freedoms, unless unequivocal rules of treaty interpretation require otherwise. In any case, invoking arguments such as a "continuous evolution in the norms and principles applied in international law" or a "strong international trend" usually discloses the fact that there are no strong arguments based on international law to support the chosen interpretation[40].

In fact, the indirect application of norms that a relevant State refuses to ratify evidently cannot be justified in comprehensible legal terms. It must be noted that the *Demir and Baikara v. Turkey* decision remains the only example of such a questionable approach to labour law cases. It seems that the ECtHR was too bold in applying international law, based generally on the consent of States, in such an "innovative" way. As the decision in *R.M.T. v. the United Kingdom* shows, the ECtHR itself realised that this approach might lead to contradictions and confusion and noted: "The Court would stress that its jurisdiction is limited to the Convention. It has no competence to assess the respondent State's compliance with the relevant standards of the ILO or the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action"[41].

The ECtHR thus seems to have stepped back from its "Demir and Baikara methodology"[42], returning to the classical interpretative use of other international instruments based on the VCoLT.

There are frequent references to ratified ILO conventions and the European Social Charter throughout ECtHR labour law cases. These documents mirror the development

[37] ECtHR, Demir and Baikara v. Turkey [GC] (34503/97) 12/11/2008, paras. 85-86.

[38] R. Nordeide, *Demir & Baykara v. Turkey – European Court of Human Rights judgment on rights of trade union formation and of collective bargaining*, "American Journal of International Law", 103, 3, 2009, p. 572.

[39] L. Wildhaber, A. Hjartarson, S. Donnely, *No consensus on consensus? The practice of the European court of human rights*, "Human Rights Law Journal", 33, 7-12, 2013, p. 252.

[40] Concurring Opinion of Judge Wojtyczek, The R.M.T. v. the United Kingdom (31045/10) 08/04/2014.

[41] ECtHR, The National Union of Rail, Maritime and Transport Workers v. the United Kingdom (31045/10) 08/04/2014, para. 106.

[42] See more on this method in K. Lorcher, *The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up*, in F. Dorssemont, K. Lörcher, I. Schömann (eds.), *The European Convention on Human Rights and the employment relation*, Hart Publishing, Oxford 2013, pp. 3-47.

in the protection of labour rights and enable the ECtHR to fill certain gaps in the text of the ECHR[43].

For example, it is acknowledged in the Strasbourg case law that the term "forced or compulsory labour", left without definition in Article 4 of the ECHR, is defined in the light of ILO Convention No. 29 concerning forced or compulsory labour[44].

The lack of definition of the right to freedom of association makes the ECtHR refer to the relevant provisions of the ILO conventions, the European Social Charter and the opinions of ILO bodies and the European Committee of Social Rights[45]. The analysis of these resources, for instance, made the ECtHR conclude that there exist "core"[46] and "additional" collective rights[47].

These international resources support the ECtHR in its interpretation work, including in relation to the possible restriction of the freedom of association, set out in Part 2 of Article 11. For example, in the recent case *Tymoshenko and others v. Ukraine*[48], the ECtHR had to ascertain whether the "interests of national security or public safety, or the protection of health or morals or the rights and freedoms of others" might justify the prohibition of strikes by pilots of a private company. The ECtHR used references to the provisions of ILO conventions and the European Social Charter in order to show that the derogative clause must be read in a restrictive way[49].

It is curious to note that the notion of private life was interpreted by the ECtHR relying on the provisions of Articles 1 and 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights. In *Sidabras and Dziautas v. Lithuania*[50], which concerned the restrictions in employment for former KGB officers, the ECtHR found that "a far-reaching ban on taking up private sector employment does affect 'private life'"[51]. The ECtHR attached "particular weight" in this respect to the text of international instruments and reiterated that there was no watertight division separating the sphere of social and economic rights from the field covered by the ECHR. The wide interpretation of the right to private life opened the way to numerous applications claiming that unfair dismissal was in breach of the ECHR[52].

Examples of the influence of international instruments on the protection of labour rights by the ECtHR demonstrate that the reference to ILO conventions and the European

[43] See more on earlier references of the ECtHR to the ILO and European Social Charter standards in J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester 1988, pp. 202-3.

[44] ECtHR, Van Der Mussele v. Belgium (8919/80) 23/11/1983, Siliadin v. France (73316/01) 26/07/2005, Stummer v. Austria (37452/02) 07/07/2011, Graziani-Weiss v. Austria (31950/06) 18/10/2011.

[45] ECtHR, Trade Union of the Police in the Slovak Republic and others v. Slovakia (11828/08) 25/09/2012, para. 53, Vörður Ólafsson v. Iceland (20161/06) 27/04/2010, para. 38, Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom (11002/05) 27/02/2007, para. 67, Veniamin Tymoshenko and others v. Ukraine (48408/12) 02/10/2014.

[46] For further information on the right to collective bargaining and on the negative freedom of association, see ECtHR, Demir and Baikara v. Turkey [GC] (34503/97) 12/11/2008 and Sorensen and Rasmussen v. Denmark [GC] (52562/99, 52620/99) 11/01/2006.

47 For example, the right to solidarity strike; see ECtHR, R.M.T. v. the United Kingdom (31045/10) 08/04/2014. In regard to the right to strike, the ECtHR, noting that it was recognised by ILO's supervisory bodies as intrinsic corollary of the right to organise, protected by ILO Convention C87, acknowledged its non-absolute status in the context of the ECHR. See ECtHR, Enerji Yapı-Yol Sen v. Turkey (68959/01) 21/04/2009, paras. 24 and 32.

[48] ECtHR, Veniamin Tymoshenko and others v. Ukraine (48408/12) 02/10/2014.

[49] *Ibid.*, paras. 32-49.

[50] ECtHR, Sidabras and Dziautas v. Lithuania (55480/00, 59330/00) 27/07/2004.

[51] *Ibid.*, paras. 31, 32 and 47.

[52] ECtHR, İhsan Ay v. Turkey (34288/04) 21/01/2014, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013, Pay v. the United Kingdom (32792/05) 16/09/2008 (inadmissible); Schüth v. Germany (1620/03) 23/09/2010.

Social Charter is a significant source of further development of the protection of labour rights under the ECHR. It enables the ECtHR to interpret the ECHR in "harmony with other rules of international law of which it forms part"[53] and to effectively widen the scope of the ECHR.

4. The use of comparative research

Comparative research helps the ECtHR determine whether a matter is dealt with consistently by Member States, and establishes the consensus among them, which in turn narrows the margin of appreciation in each particular case. References to domestic legislation legitimise the ECtHR's interpretative approach, which allows its decisions to be more easily accepted by Contracting States[54]. Therefore, two main ends might be achieved through comparative analysis: first, harmonisation of the ECHR interpretation with national legislations; and secondly, the enhancement of the authority of the ECtHR's decisions in Member States.

4.1. European consensus

The establishment of European consensus on a specific issue leads to a more rigorous assessment by the Court of the conduct of the respondent State, thus entailing a narrowing of the latter's margin of appreciation[55], and it means a greater scrutiny of the realisation of the State's positive or negative obligations under the ECHR. The finding of consensus is a very controversial point as, even in the cases where it is directly established, the ECtHR did not refer to all the Member States of the Council of Europe (CoE). For example, in *Markin v. Russia*[56], the ECtHR found "European consensus" on the question of men's entitlement to parental leave even though only 23 countries out of 47 CoE members were mentioned in the study relied on by the EctHR in that case[57].

Eva Brems is right to call European consensus as "a rebuttable presumption in favor of the solution adopted by the majority of the Contracting Parties"[58]. Taking into account that the ECtHR is operating on the international stage, where obligations of the States depend on their consent to be bound by those obligations, this approach is highly debatable. Judge Wojtyczek has pointed out that, when a majority of States adopt a higher standard of protection of a right, it is not (in itself) a sufficient argument for imposing this standard on the minority of States that reject it[59]. Scholars also criticise this approach as "unsystematic and unscientific"[60] and lacking legal standards of application in a fair and predictable way[61].

[53] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010, para. 274.
[54] M. Forowicz, see *supra* note 106, p. 9.
[55] ECtHR, Fernández Martínez v. Spain (56030/07) 12/06/2014, para. 125.
[56] ECtHR, Konstantin Markin v. Russia (30078/06), Chamber judgment 07/10/2010, paras. 28-29.
[57] Bilyaria Petkova noted that the ECtHR, in contrast with its historical approach, now tends to find European consensus if the particular legal trend among fewer Member States can be established. See B. Petkova, *The Notion of Consensus as a Route to Democratic Adjudication?*, "Cambridge Yearbook of European Legal Studies", 14, 2012, p. 682.
[58] E. Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers,Leiden 2001, p. 420.
[59] Concurring Opinion of Judge Wojtyczek, R.M.T. v. the United Kingdom (31045/10) 08/04/2014, para. 9.
[60] A. McHarg, *Reconciling Human Rights and the Public Interest Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, "Modern Law Review", 62, 5, 1999, pp. 671-87.
[61] J. A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, "Columbia Journal of European Law", 11, 2005, p. 145.

However, this approach has positive facets as well. It allows the ECtHR to open the ECHR to the changes of the modern world and imbue it with a truly "living" character as it creates an "important link between common European values and the ECtHR's decision-making"[62]. Turning to the use of the European consensus approach in labour law cases, it must be noted that, in the majority of cases where a reference to European consensus can be found[63], the ECtHR has also established the lack of consensus and left to the States a wide margin of appreciation. For example, the States were granted a wide margin of appreciation in relation to the regulation of solidarity strikes in *R.M.T. v. the United Kingdom*[64] and in relation to the creation of trade unions by employees of a church in *Sindicatul "Păstorul cel bun" v. Romania*[65].

The establishment of European consensus might influence the interpretation of the ECHR only if the right in question is not explicitly fixed in the Convention. For example, in the case *Adefdromil v. France*[66], which concerned the right of military personnel to form or join a trade union, the ECtHR ignored the respondent's arguments relying on the lack of consensus in this area of law. The ECtHR rejected the European consensus approach in its reasoning in this case, as the right to form and join trade unions was already clearly expressed in Article 11. The "restrictions" to this right, mentioned in the second part of Article 11 in regard to servicemen, cannot "impair the essence of the right to organise"[67].

Comparative research of national approaches to the protection of a particular right is important in labour law cases. It allows the ECtHR to determine certain trends and to follow them in its judgments, thus ensuring the dynamic interpretation of the ECHR. For example, in *Sorensen and Rasmussen v. Denmark*[68], comparative research on the admissibility of closed-shop agreements in Member States showed that "such agreements are not an essential means for securing the interests of trade unions and their members and that due weight must be given to the right of individuals to join a union of their own choosing without fear of prejudice to their livelihood". The emergence of this trend enabled the ECtHR to overrule the original idea of the drafters of the ECHR in relation to Article 11: according to the "Travaux Préparatoires", it was considered undesirable to introduce into the ECHR a rule under which "no one may be compelled to belong to an association" because of the difficulties raised by the "closed-shop system" in certain countries[69].

In the earlier case of *Young, James and Webster v. the United Kingdom*, the ECtHR, considering the practice of closed-shop agreements, did not use any references to comparative studies and refrained from reviewing the closed-shop system as it related

[62] K. Dzchtsiaro, *Interaction between the European Court of Human Rights and Member States: European consensus, advisory opinions and the question of legitimacy*, in S. I. Phlogaitēs, T. Zwart, J. Fraser (eds.), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength*, Edward Elgar Publishing, Cheltenham 2013, p. 122.

[63] ECtHR, R.M.T. v. the United Kingdom (31045/10) 08/04/2014, Martínez Fernández v. Spain (56030/07) 12/06/2014, Sindicatul "Păstorul Cel Bun" v. Romania (2330/09) 09/07/2013, Stummer v. Austria (37452/02) 07/07/2011.

[64] ECtHR, R.M.T. v. the United Kingdom (31045/10) 08/04/2014.

[65] ECtHR, Sindicatul "Păstorul Cel Bun" v. Romania (2330/09) 09/07/2013.

66 ECtHR, Adefdromil v. France (32191/09) 02/10/2014.

[67] *Ibid.*, para. 43.

[68] ECtHR, Sorensen and Rasmussen v. Denmark (52562/99, 52620/99) 11/01/2006, para. 70.

[69] Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", 4, p. 262, cited in Young, James and Webster v. the United Kingdom (7601/76, 7806/77) 13/08/1981, para. 51.

to the ECHR[70]. Therefore, it can be argued that the reference to comparative study is used as a justification of the enlargement of the ECHR's scope and of the overruling of previous case law. The same use may be found in *Markin v. Russia*[71], where the decision in *Petrovic v. Austria*[72] was held to be outdated. For another example, see *Christine Goodwin v. the United Kingdom*[73], by which an earlier decision on the protection of the rights of transsexuals was overruled[74].

5. Conclusions

The possibility to refer to international instruments other than the Convention and to the comparative research gives the Court much potential in the sphere of protection of labour rights. Hypothetically, the Court might consider cases on decent wages[75] or oblige the State to introduce an effective system of protection from discrimination in employment[76].

One scholar noted that in connection with changes affecting European society, the ECtHR has a mandate to redirect European human rights law[77]. The contrasting approaches highlighted above show that the ECtHR does not redirect the European human rights law itself, but ascertains the trend of redirection that becomes apparent from comparative research of national legislations or from an analysis of the relevant international instruments.

The use of international instruments and the comparative research of national legislations are the methods to adjust the interpretation of the Convention to present-day conditions. These references legitimise the Court's interpretative approach and provide certain limits of widening the scope of the Convention. Apparently, the Court's attention to international labour standards and to the relevant national provisions is also dictated by the need of ensuring support to the inclusion of certain labour rights into the Convention's scope.

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[70] ECtHR, Young, James and Webster v. the United Kingdom (7601/76, 7806/77) 13/08/1981, para. 53.

[71] ECtHR, Konstantin Markin v. Russia (30078/06), Chamber judgment 07/10/2010.

[72] ECtHR, Petrovic v. Austria (20458/92) 27/03/1998.

[73] ECtHR, Christine Goodwin v. the United Kingdom (28957/95) 11/07/2002, para. 86.

[74] ECtHR, Sheffield and Horsham v. the United Kingdom (22985/93, 23390/94) 30/07/1998, para. 58.

[75] In two cases the Court stated that a wholly insufficient amount of pension and social benefits may raise an issue under Article 3 of the Convention (prohibition of inhuman or degrading treatment). Hypothetically, this legal position might be applicable to the cases of wholly insufficient amount of wages. ECtHR, Larioshina v. Russia (56869/00) 23/04/2002 (inadmissible), Budina v. Russia (45603/05) 18/06/2009 (inadmissible).

[76] See, for example, ECtHR, Danilenkov and others v. Russia (67336/01) 30/07/2009, para. 123.

[77] M. Varju, *Transition as a Concept of European Human Rights Law*, "European Human Rights Law Review", 2, 2009, p. 172.

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