

ENFORCING THE PROHIBITION AGAINST HUMAN TRAFFICKING: THE TEACHING OF THE EUROPEAN COURT ON HUMAN RIGHTS

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INTRODUCTION

In 2002, I had the wonderful opportunity to join the Centre for Enforcement of European Law, a little oasis of research situated at the very heart of Utrecht, the Queen of the Dutch provincial cities, Utrecht. John Vervaele was the director of this small but warm shelter for a Belgian post-doc expat seeking to continue his academic existence. The experience was short lived, since a year later the Research centre was dissolved due to an economic restructuring affecting the Faculty of Law. No causal relation has ever been established between my arrival and the closure of this research centre. It was one of the most stimulating intellectual and human experiences in my ongoing academic journey. John Vervaele made me feel at home straight away, since in his own unique way he was a cosmopolitan son sent out by Flanders. He was not the kind of guy to curtail wings, he taught us how to fly. In fact, he facilitated my access to a standard employment contract for indefinite duration, the very first in my academic existence. It was a nice example of just in time management.

The issue of enforcement of European Law is not solely restricted to the law of the European Union. It also affects the enforcement of the European Convention on Human Rights. At the time, the European Convention of Human Rights (ECHR) was not the most relevant instrument for labour lawyers seeking to consolidate and promote the *acquis* of international labour standards. The ECHR is not mute on the issue of workers nor on the issue of labour. It refers implicitly to workers where it recognizes the right of everyone to form and join trade unions for the protection of his interests.¹ It also prohibits slavery, servitude and forced labour. These two standards are fundamental rights and principles at work according to the homonymous ILO Declaration (1998).² In fact, they are the very first in the short

1. Article 11 ECHR

2. International Labour Organization, 'ILO Declaration on Fundamental Principles and Rights at Work', 1998.

list. Hence, all Members of the ILO have a constitutional obligation to abide by the so-called fundamental ILO conventions, which tend to elaborate these principles. The disappointment of the community of academic labour lawyers can be explained by the reluctance of the European Court on Human Rights to interpret these provisions in a dynamic, activist way. Hence, the Court denied in the seventies that the freedom of collective bargaining and the right to strike fell within the ambit of Article 11 ECHR.³ Prior to the *Siliadin* judgment (2005), the Court never identified a violation of Article 4 ECHR.⁴

This cautious approach cannot be explained by the unwillingness of the Court to overcome the cold war divide between economic, social and cultural rights and civil and political rights. In fact, the rights enshrined in the ECHR are not qualified as civil and political rights. Such a qualification only occurred in retrospect and in a distinct instrument, the European Social Charter. As early as in the *Airey v. Ireland* judgment, the Court considered

Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.⁵

In an interesting contribution of 2003, Frédéric Sudre made a passionate and well-constructed plea for the recognition of social rights under the unaltered ECHR, but had to admit that this still constituted 'jurisprudence fiction'.⁶

In *Demir and Baykara v. Turkey* (2008) the Grand Chamber took its evolutive interpretation a step further.⁷ It stated:

85. 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. The consensus emerging from specialised international

3. *Swedish Engine Drivers' Union v. Sweden*, ECHR (1976), nr. 5614/72 and *Schmidt and Dahlström v. Sweden*, ECHR (1976), nr. 5589/72 and 5589/72.

4. *Siliadin v. France*, ECHR (2005), nr. 73316/01.

5. *Airey v. Ireland*, ECHR (1979), nr. 6289/73, § 26.

6. F. Sudre, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de jurisprudence fiction', *Revue trimestrielle des droits de l'homme*, 2003, pp. 775-779.

7. *Demir en Baykara v. Turkey*, ECHR (2008), nr. 34503/9. See *in extenso*: K. Loercher, 'The new social dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Methodology and follow up', in F. Dorssemont, K. Loercher and I. Schoemann, *The European Convention on Human Rights and The Employment Relation*, Cambridge, Hart, 2013, pp. 3-46.

instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. 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 (...)

This statement innovates since it allows to compensate to some extent the absence of common policies among the contracting parties by elements of international law other than the Convention. Furthermore, it prevents the Court from interpreting these international instruments in disregard of the case law of the specialised bodies which are competent in interpreting these instruments, including more specialised instruments in the field of labour law. The Court can and must take these international instruments into account, irrespective of the ratification of these instruments by a Contracting party of the ECHR. The potential of this approach is far reaching. A number of issues which fall within the ambit of the ECHR are intertwined with detailed ILO standards.⁸

2 FROM THE PROHIBITION TO FORCED LABOUR TO THE PROHIBITION OF HUMAN TRAFFICKING

A very spectacular example of this canon of interpretation heralded by the Grand Chamber of the ECtHR was the *Rantsev* judgment, where the Court ruled

In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it *unnecessary* (italics put by the author) to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.⁹

Although this judgment needs to be saluted from a substantive point of view, it is puzzling to see that the Court makes no effort to explain how the recognition of the prohibition of human trafficking relates to the existing prohibitions of slavery, servitude and forced labour. In fact, such an approach goes beyond the pledge enshrined in *Demir and Baykara* that the interpretation is related to defining the meaning of terms and notions in the text of the Convention. In a recent judgment, the Court gave some more guidance by considering that:

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8. See e.g. the relevance of ILO Forced Labour Convention nr. 29 for Article 4 ECHR; or of the ILO Conventions nr. 87 and 98 for Article 11 ECHR, or of ILO recommendation nr. 200 concerning HIV and Aids and the World of Work for Article 8 ECHR.
 9. *Rantsev v. Cyprus and Russia*, ECHR (2010), nr. 25965/04.

the global phenomenon of trafficking in human beings runs counter to the spirit and purpose of Article 4 and thus falls within the scope of the guarantees offered by that provision. This conclusion also finds support in the comparison of the essential elements of the concepts enunciated in Article 4, as construed in the Court's case-law (see paragraphs 279-85 above) and the constituent elements of the phenomenon of human trafficking (see paragraphs 113-17 and 155-62 above).¹⁰

The Court also clarified that it was not essential that trafficking of human beings would have a transnational character in order to fall within the ambit of Article 4 ECHR.¹¹

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ENFORCEMENT OF THE PROHIBITION HUMAN TRAFFICKING

The question arises how such a prohibition needs to be enforced. The enforcement issue is part of a bigger issue –, *i.e.* which *measures* States need to adopt. Hence, it is part of what is commonly called the positive obligations. *In liminis*, the question might arise whether there is a duty for the Member States to prohibit violations of Article 4 ECHR by means of criminal sanctions. To some extent such an obligation can be qualified as a substantive or material issue, but the choice for criminal sanctions is intertwined with procedural issues which bring us to the heart of enforcement.

The idea that Article 4 ECHR entails an obligation to penalise the prohibitions enshrined has been put forward in the very first landmark case on Article 4 ECHR where a violation could be found by the Court.¹² The problem at hand under French law was not the absence of the prohibition, but the fact that these provisions were not sufficiently precise and clear to allow the victim of forced labour (in casu resulting from human trafficking) to prove these provisions had been violated. The Court criticised more specifically that a provision prohibiting to submit a person to 'to working or living conditions that are incompatible with human dignity' was not adequate. The Court indicated that:

It noted with interest the conclusions reached by the French National Assembly's joint taskforce on the various forms of modern slavery. (...) The French National Assembly has highlighted in fact the lack of legal criteria enabling the courts to determine whether such a situation obtained, which had led in practice to unduly restrictive interpretations.

In a subsequent case, the French Republic was once more condemned on the basis of the same deficiencies of these unaltered provisions.¹³

10. *S.M. v. Croatia*, ECHR (2020), nr. 60561/14, §§ 292-293.

11. *S.M. v. Croatia*, ECHR (2020), nr. 60561/14, § 296.

12. See *Siliadin v. France*, ECHR (2005), nr. 73316/01.

13. See *C.N. and V. v. France*, ECHR (2012), nr. 67724/09.

In an authoritative guide to the case law of the ECHR related to article 4 ECHR, two categories of positive obligations are being mentioned which strike at the procedural heart of the enforcement issue.¹⁴

The first category is intertwined with the obligation to penalise the prohibitions enshrined. It urges states to put in place an administrative framework to prosecute effectively in order to punish acts aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. This administrative framework can not be reduced to the issue of prosecution. In the particular field of trafficking, the Court has clarified that this obligations has ramification outside the realm of criminal law, ranging from migration laws to business law. It has also insisted on adequate training for law enforcement and immigration officers. In the aforementioned *Rantsev* case the Court scrutinised the visa policies of Cyprus. In this case, miss Rantzev was able to obtain a so-called artist visa allowing here to stay at the territory of Cyprus, although it was well known that this system was used by owners of cabarets to recruit women to work in the sex-industry. The mere fact that these visa were applied for by the owner created a dependency of the worker on her employer or agent.

The other category relates to an obligation to investigate where there is a credible suspicion that an individual's rights has been violated. States are requested to investigate in a pro active way, not just awaiting a formal complaint by an alleged victim. Furthermore, in case of a complaint, they are asked to go beyond the mere comparison between the evidence or statements raised by the victim and the perpetrator.

Although the Court stated that the judicial control on this obligation to investigation would be restricted to significant shortcomings, the recent *S.M. versus Croatia* case indicates that the Court scrutinizes this issue in minute detail. Thus, the Court in this case about sexual exploitation in a context of trafficking, criticized the fact that Facebook communication was not examined nor that the mother who has had a relation with the perpetrator was not questioned, neither the neighbours of the victim.¹⁵

4 CONCLUSION

The case law of the European Court on Human Rights on trafficking of human beings stands out as a benchmark for the relevance of the ECHR in the field of the kind of employment relations which should never have to emerge. The situations which the Court had to deal affect human dignity at its very core and tend to highlight the existence of what could be called an international social public order. These situations have forced the Court to go beyond its formalistic approach of

14. www.echr.coe.int/documents/guide_art_4_eng.pdf.

15. *S.M. v. Croatia*, ECHR (2020), nr. 60561/14.

slavery which precludes States from ever being condemned. Indeed, slavery can only exist if a legal order of a State would deprive human beings from their right to be recognised as legal subjects. Instead, the Court has allowed the ECHR to combat what is often called modern slavery. Thus, the Court has taken the *Demir and Baykara* canon of interpretation a step further, beyond the formal necessity to link the prohibition to the actual wording, by adopting a purposive approach. It tends to overcome a suspicion against the use of criminal law to enforce labour standards and has made it abundantly clear that rights often qualified as civil and political rights requires positive State action and not just abstention.