



The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?

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INTRODUCTION

The International Labour Organisation, with less formal powers, but strong management capacities and a direct link to employers and workers associations is at least as good to ensure compliance with international labour standards at enterprise level as the European Union.²

The theme of the present study is the critical assessment of the traditional perception of the relationship between the International Labour Organisation (ILO)³ and the European Union (EU), as that is expressed in the opening quote. There is a pragmatic need to revisit the debate that concentrates on the dynamics of the relationship between these two legal regimes, because of the substantive impact that modern phenomena have had on the evolution of labour rights. Those phenomena relate primarily to the coming of the modern era of

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² Hartlapp, M., "Labour law Supervision and Enforcement by the EU and ILO: Is There One International Implementation Style?" Paper presented at the ECPR Joint Session in Uppsala, 13-18 April 2004, <<http://www.wz-berlin.de/ars/ab/pdf/Hartlapp%20ECPR%20Paper.pdf>>, at p. 29.

³ On the ILO generally, see Betten, L., *International Labour Law: Selected Issues* (Deventer; Boston: Kluwer Law and Taxation Publishers, 1993); Price, J., *I.L.O.: Fifty Years On* (London: Fabian Society, 1969). On the unique tripartite structure, see Fashoyin, T., "Tripartism and Other Actors in Social Dialogue" (2005) 21 (1) *International Journal of Comparative Labour Law and Industrial Relations* 37; Fashoyin, T., "Tripartite Cooperation, Social Dialogue and National Development" (2004) 143 (4) *International Labour Review* 341 (application of tripartite approach nationally); Tikriti, A. K., *Tripartism and the International Labour Organisation: A Study of the Legal Concept: its Origins, Function and Evolution in the Law of Nations* (Stockholm: Svenska Institutet for Internationell Ratt, 1982); Bèguin, B., "ILO and the Tripartite System," No. 523 (New York: Carnegie Endowment for International Peace, 1959).

internationalisation and globalisation that has introduced the beginning of a fresh phase of intense transformation for the regime of labour rights.⁴ The essence of the new developments is characterised by the need to rebalance economic considerations that are related to employment with the human rights dimension of labour standards. As a corollary, it becomes imperative to assess the effect of those influences on the relationship between the ILO and the EU.

The exegesis of the current state of labour rights is founded on the working hypothesis that there is a dynamic system connecting different legal organisations that interact and interpenetrate in order to contribute to the evolution of the corpus of labour rights. At the epicentre of the process of transformation is the relationship between the ILO and the EU. It is, therefore, essential to engage in the analytical assessment of the relationship between these two legal regimes that represent the epitome of the impact that globalisation phenomena have on the formation, interpretation and enforcement of labour standards.

The stepping stone for introducing the purposes and methodological targets of this paper is the description of the parameters of the relationship between the ILO and the EU that will form the field of analysis. An essential component of the framework of study is the narrowing of the thematic focus to the examination of the specific area of equal remuneration.⁵ Nonetheless, it must be clarified that equal pay is inherently linked with the broader concept of non-discrimination, thus certain parameters that have an impact on the development of the principle of equal pay at work will be examined. The second integral component of the framework of study refers to the adoption of the methodological perspective of the enforcement capacity of the two legal regimes.⁶ The enforcement capacity is approached as a generic term that is directly linked with the concept of compliance. Naturally, it is acknowledged that the formation of norms and the creation of legislative measures are essential aspects of the enforcement processes and influence the scope and character of legal systems that operate in parallel.

⁴ For an analysis, see Alston, P., "Core Labour Standards and the Transformation of the International Labour Rights Regime" (2004) 15 (3) *EJIL* 457.

⁵ On EU labour law and equal pay, see Barnard, C., *EC Employment Law*, 2nd ed. (Oxford: OUP, 2000), at pp. 197-298; Szyszczak, E., *EC Labour Law* (Harlow: Longman, 2000); Barnard, C., "The Economic Objectives of Article 119," in O'Keefe, D. and Hervey, T. (eds.), *Sex Equality Law in the European Union* (Wiley, 1996), p. 32; Fredman, S., "European Community Discrimination Law: A Critique" (1992) 21 *ILJ* 119, at p. 125 (critique of indirect discrimination test); Mancini, F. and O'Leary, S., "The New Frontiers of Sex Equality Law in the EU" (1999) 24 *ELRev* 331.

⁶ On EU enforcement of equal pay, see McCrudden, C., "The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Law in the Light of European Requirements" (1993) 13 *OJLS* 320; McGlynn, C. and Farrelly, C., "Equal Pay and the Protection of Women within Family Life" (1999) 24 *ELRev* 202; More, G., "'Equal Treatment' of the Sexes: What Does 'Equal' Mean?" (1993) 1 *Feminist Legal Studies* 45, at p. 70 (criticism of indirect discrimination test).

To sum up, the enforcement capacity of the ILO and the EU in relation to combating discrimination in pay form the framework of operation of the present study, while the working hypothesis is that between the two systems there is mutual interaction and interpenetration.

Needless to say, there is a plethora of pre-existing analytical accounts that have undertaken a similar task. The monitoring and improvement of the compliance rate by national authorities with the numerous standards established by the ILO and the EU has resulted in the systematic comparison of the two systems,⁷ with the broad consensus endorsing the view that the EU has been more effective in inducing compliance⁸ because of the existence of a strong legal enforcement network dominated by the European Court of Justice (ECJ)⁹ and complemented by the European Commission's role as watchdog¹⁰ of the 1957 EC Treaty¹¹ and by specific legal provisions¹² contained therein, coupled with constitutional principles empowering the individual to act as enforcer of State obligations.¹³

⁷ Hartlapp, M., "Two Variations on a Theme: Different Logics of Implementation Management in the EU and the ILO" (2005) Vol. 9 No. 7 *European Integration online Papers* <<http://eiop.or.at/eiop/texte/2005-007a.htm>>; Elliott, K.A., *The ILO and Enforcement of Core Labour Standards*, International Economics Policy Briefs, Institute for International Economics, (July 2000); Neyer, J., and Zürn, M., "Compliance in Comparative Perspective. The EU and Other International Institutions" (2001) *InIISArbeitspapier* No. 23/01, <<http://www-user.unibremen.de/~iniis/papiere/23-01.doc>>; Cesare P.R., "The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements" (1996) *Executive Report ER-96-1*, International Institute for Applied Systems Analysis; Valticos, N., "Once More About the ILO System of Supervision: In What Respect is it Still a Model?" in Blokker, N. and Muller, S. (eds.), *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers* (Dordrecht: Martinus Nijhoff Publications), p. 99.

⁸ Hartlapp, *op. cit.*, note 6, at p. 2; Hartlapp, *op. cit.*, note 1, at p. 1; Hepple, B., *Labour Laws and Global Trade* (Oxford: Hart, 2005), at pp. 47-56; Maupain, F., "Is the ILO Effective in Upholding Workers' Rights?" in Alston, P. (ed.), *Labour Rights and Human Rights, Vol. XIV/I* Collected courses of the Academy of European Law (Oxford: OUP, 2005), p. 85; Langille, "Core Labour Rights – The True Story" (2005) 16 *EJIL* 409, at p. 420; Charnovitz, S., "The (Neglected) Employment Dimension of the World Trade Organization" in Leary, V. and Warner, D. (eds.), *Social Issues, Globalization and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Dordrecht: Martinus Nijhoff Publishers, 2006), Ch. 3.

⁹ On the ECJ's role generally, see Arnulf, *The European Union and its Court of Justice* (Oxford: OUP, 1999); Bengoetxea, *The Legal Reasoning of the ECJ* (Oxford: Clarendon Press, 1993); Mancini, "The Making of a Constitution for Europe" (1989) 26 *CMLRev.* 595; O'Neill, A., *Decisions of the ECJ and their Constitutional Implications* (London, Dublin, Edinburgh: Butterworths, 1994); Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court" (1988) 13 *E.L.Rev.* 28.

On the ECJ's role in equal pay, see Fredman, S., "Affirmative Action Before the Court of Justice: A Critical Analysis," in Shaw, J. (eds.), *Social Law and Policy in the Evolving EU* (Hart, 2000); Ellis, E., "The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality" (2000) 37 *CMLRev.* 1403; Kilpatrick, C., "Turning Remedies Around: A Sectoral Analysis of the Court of Justice," in De Búrca, G. and Weiler, H.H. (eds.), *The European Court of Justice* (Oxford: OUP, 2001), p. 143; Shaw, J., "Gender and the Court of Justice," in De Búrca, G. and Weiler, H.H. (eds.), *The European Court of Justice* (Oxford: OUP, 2001), p. 87.

¹⁰ Art. 211 EC and role of Commission as watchdog: Dashwood, A. and White, R., "Enforcement Actions under Article 169 and 170 EEC" (1989) 14 *European Law Review* 388; Borzsak, L., "Punishing Member States or Influencing their Behaviour or *Iudex (non) calculat?*" (2001) *Journal of European Law* 235.

¹¹ <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_325/c_32520021224en00010184.pdf>.

¹² E.g. Art. 234 EC: Tridimas, T., "Knocking on Heavens Doors: Fragmentation, Efficiency and Defiance in the Preliminary Reference Proceedings" (2003) 40 *CMLRev.* 9; Barnard and Sharpston, "The Changing nature of Article 177 References" (1997) 34 *CMLRev.* 1113.

¹³ On Direct Effect see De Witte, B., "Direct Effect, Supremacy and the Nature of the Legal Order," in Craig and

Nonetheless, it has been argued that it is counterproductive to compare the two legal regimes with the objective of stressing the enforcement superiority of the legal procedures of the EU over the enforcement mechanisms available under the ILO rules.¹⁴ The unsuitability of such a comparison is to be found in the lack of an appreciation for the differing objectives of the two systems and in an oversimplified analysis of the complementary relationship between the ILO and the EU in the setting of norms to be implemented by national entities.¹⁵ It is the essence of the relationship between the ILO and the EU and the deeper understanding of the nature and types of enforcement mechanisms that aim to promote national compliance that must operate as the bases for the repositioning of the debate.

Therefore, the purpose of the study is threefold: to offer a descriptive account of the enforcement mechanisms utilised by the ILO and the EU; to create an explanatory rationale for the interrelationship between the two legal systems; and to assess whether the converging and diverging enforcement characteristics can be reconciled within an exegetical account of enforcement as a process.

In response to the title, it is submitted that the two systems exist in parallel and have different objectives and enforcement mechanisms at their disposal, but there is now a state of coexistence through the circulation and movement of labour standards. The ILO has been setting the minimum requirements and the EU has incorporated the essence of those standards when forming the regional framework of legislative regulations. Therefore, there is a circle in which both the ILO and the EU are participating and it includes the stages of norm formation, transition to binding effect of those norms, and enforcement. The segments of the circle are not autonomous, since the ILO has functioned as the source for minimum benchmarks for the EU, thus the presence of the ILO is continuous at both levels. In terms of enforcement, there are types of tactics that form a spectrum that includes enforcement proper, supportive management, and soft persuasion.¹⁶ This spectrum is the second bridging element between the ILO and the EU, and points to the existence of all three shades of enforcement in both systems but in different degrees of intensity. Nonetheless, at the EU level, the availability of more stringent legal enforcement provisions has been used to create a web of protection for equal pay that is unparalleled at the ILO level, with the ECJ taking a proactive role in its

De Bùrca (ed.), *The Evolution of EU Law* (Oxford University Press, 1999), p. 177; Pescatore, P., "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) 8 *E.L.Rev.* 155.

¹⁴ Hartlapp, *op. cit.*, note 6, at p. 2; Hartlapp, *op. cit.*, note 1, at p. 1.

¹⁵ Hepple, B., "Enforcement: the Law and Policy of Cooperation and Compliance," in Hepple, B. (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge: CUP, 2002), at p. 241.

¹⁶ Hartlapp, *op. cit.*, note 6, at pp. 3-5; Alter, K., "Do International Courts Enhance Compliance with International Law?" (2003) 25 *Review of Asian and Pacific Studies* 51, at p. 56.

judicial decisions to contribute to the formation of that conclusion. It is, therefore, submitted that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as non-existent. Rather, an intermediate state exists that takes the form of interpenetration¹⁷ of standards and degrees of enforcement.

In terms of structure, the paper is divided into three parts. The first section focuses on the theoretical approaches to enforcement as a concept, in order to create the theoretical basis for the repositioning of the debate that focuses on the relationship between the ILO and the EU. The advantage of that methodological approach relates to the introduction of the innovative element of a theoretical rationale that has been absent in the pre-existing assessments of the relationship between the ILO and the EU. In that respect, the present study departs from methodological orthodoxy and remedies the unsystematic character of the debate thus far. The second section concentrates on the descriptive analysis of the mechanisms of enforcement applied by the ILO and the advantages and shortcomings of that system. Moreover, the impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work¹⁸ on the state of the law on discrimination in pay is examined in order to reach a conclusion as to the possible impact it has had. The third section turns to the EU's enforcement methods with the emphasis being placed on the work of the ECJ in the field of discrimination in pay and the related fields of social security contributions and affirmative action.

In conclusion, the present study introduces certain novel elements to the study of the relationship between the enforcement mechanisms of the ILO and the EU aiming to combat discrimination in pay. These elements include the adoption of the working hypothesis of interaction and interpenetration between the legal regimes, the introduction of a theoretical foundation that revisits the different facets of enforcement, and the realisation that different tasks and purposes are fulfilled by the ILO and the EU. The degree of success of both legal regimes in creating those conditions that would ensure the equality in pay in the field of employment is a complex matter that cannot be answered accurately, due to the different and subjective expectations of the assessor. What can be argued is that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of

¹⁷ O'Higgins, P., "The Interaction of the ILO, the Council of Europe and the European Union Labour Standards," in Hepple, B. (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge: CUP, 2002), p. 55.

¹⁸ *ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 86th Session, Geneva, June 1998, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT>. Hereinafter referred to as the 1998 ILO Declaration.

interpenetration of standards and degrees of enforcement. The aforementioned themes form the skeleton of analysis in the following sections.

1. The Concept of Enforcement: Theoretical Perspectives and its Role as Analytical Yardstick

1.1 Compliance and Enforcement: Two Sides of the Same Coin?

The relationship between the ILO and the EU in the light of their attempts to combat employment discrimination in pay has traditionally centred round the adoption of a comparative efficiency yardstick that attempts to measure the degree of compliance of State actors with the norms created by the two organisations.¹⁹ The orthodox approach sees the issue of compliance as being inherently linked with the concept of enforcement, thus implying that, originally, there was a lack of compliance on behalf of the State that triggered those procedures of the ILO and the EU designed to induce compliance by the defaulting State.²⁰ In other words, enforcement follows lack of compliance in order to finally ensure the objective of compliance. Moreover, enforcement is construed as a deterrent, thus having a prospective dimension that pre-empts lack of future compliance.

The compliance of States with legal obligations created at the international level and by bodies that are often supranational in nature, as is the case mainly with the EU, has created numerous problems especially in view of the domination of the principle of legalisation.²¹ This principle sees norm creation as the amalgam of political initiatives forming the core of the created norms and their actual definition and procedural parameters as creating the subsidiary element of “legal consequences requiring compliance.”²² In other words, the process of norm creation at the supranational level, whether at the ILO or the EU level, and the monitoring of the compliance by the States form part of the assessment of the relationship between the ILO and the EU.

¹⁹ See Wisskirchen, A., “The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience” (2005) 144 (3) *International Labour Review* 253; Novitz, T., “The EU and International Labour Standards: The Dynamics of Dialogue Between the EU and the ILO,” in Alston, P. (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005), p. 214; Swepston, L., “Equal Remuneration for Work of Equal Value: European Perspectives,” <<http://www.ilo.org/public/english/region/eurpro/geneva/conf/malta/equal.htm>>; Heide, I., “Sex Equality and Social Security: Selected Rulings of the ECJ” (2004) 143 (4) *International Labour Review* 299.

²⁰ Hartlapp, M., *op. cit.*, note 1, at p. 2.

²¹ On legalisation as a process, see Zürn, M. and Neyer, J., “Conclusions: the Conditions of Compliance,” in Zürn, M. and Joerges, C. (eds.), *Law and Governance in Postnational Europe* (Cambridge: CUP, 2005), p. 183.

²² Abbott, K. *et al.*, “The Concept of Legalisation” (2000) 54 (3) *International Organisation* 401, at p. 401.

The ILO and the EU have been described by Zangl and Zürn as “having reached a high degree of legalisation,”²³ thus creating the need for examining the reception of that intense legalisation and the subsequent compliance of States with the norms created. The issues of reception and reaction by States form the starting point for reaching an understanding of the concept of compliance, since there is the practical issue of an external body in the form of the supranational organisation, creating – through different processes – measures that have different types of binding effect upon States.²⁴ It is the immediate aftermath of the adoption of the different norms that is the focal point of analysis, in the sense that compliance by States can take different forms that range from mere observance of the requirements of the norm, to the exercise of discretionary powers in the form of taking implementing measures that have the purpose of adhering to the objective of the norm created at the supranational level.²⁵ Therefore, the issue of compliance is a complex concept that depends on the nature of the legislative norm and the requirements it imposes on the State as well as on the powers delegated to the State for ensuring compliance with the requirements of the measure.²⁶

In summary, the relationship between the ILO and the EU when approached from the perspective of mechanisms that have the purpose of combating discrimination in pay must be seen as a bi-dimensional matter. One dimension relates to the norm creation/standard setting at the supranational level and the reception of the norms. The second dimension refers to the reaction of States to those norms. In more detail, compliance is in effect the resultant of action and reaction taking place in two phases. In the first phase and at the level of the supranational body where the norm creation takes place, there is the action element that then triggers a reaction at the national level that is required to comply with the set norm. In the second action/reaction phase, the national level has to act in order to comply, whether by merely following the requirements of the norm or by taking implementing measures (action stage). At the supranational level of phase two, the organisation would react through monitoring State action and, if necessary, it would trigger those enforcement procedures designed to induce compliance (reaction stage). Moreover, the reaction of States is equated primarily with the practical matter of compliance that must in turn be approached from the point of view of the procedural form of the norm. In other words, the norm could create an immediate obligation that must be complied automatically, akin to the legal effect of regulations at the EU level, and which requires no further implementing action by the State. Alternatively, there is also the

²³ Zangl, B. and Zürn, M. (eds.), “Make Law, Not War,” in Zangl, B. and Zürn, M. (eds.), *Verrechtlichung-Baustein für Global Governance* (Bonn: Dietz, 2004), at p. 24.

²⁴ Goldstein, J. *et al.*, “Legalisation and World Politics” (2000) 54 (3) *International Organisation* 385, at p. 388.

²⁵ Abbott, K. *et al.*, “The Concept of Legalisation” (2000) 54 (3) *International Organisation* 401, at p. 406, table 1.

²⁶ Zürn, M., “Law and Compliance at Different Levels,” in Zürn, M. and Joerges, C. (eds.), *Law and Governance in Postnational Europe* (Cambridge: CUP), at pp. 23-4.

possibility of the norm setting a task for the States by establishing a binding objective that needs to be given legal effect through implementing measures taken by the State, as is the case with the legal effect of directives at the EU level.

Consequently, the concept of compliance has a complex nature that cannot be automatically equated with the concept of enforcement, if the latter is defined in terms of sanctioning powers aiming to trigger compliance. However, if the concept of enforcement is broadened to include the task of triggering compliance, then enforcement must be seen as a broader phenomenon and can possess elements of persuasion and delegation that could prove more productive than the sanctioning process. It is in this multidimensional manner that the comparison between the ILO and the EU as regards combating discrimination in pay must be approached, since the idea of combating discrimination can have a wider scope that facilitates compliance in conjunction with imposing sanctions after the failure to comply has taken place.

The aforementioned reasoning that distinguishes between norm creation, compliance, and degree of discretion delegated to States provided the foundation for Hartlapp to present a descriptive pattern that identifies three different types of enforcement: sanctioning enforcement, management, and persuasion.²⁷ These three variations will now be analysed in turn.

1.2 Three Variants of Enforcement: Moving Beyond Sanctioning

The **enforcement approach** stems from the utilitarian ideas of rational calculating actors that estimate the cost-benefit of non-compliance and determine whether to comply with the obligations set on the basis of the assessment of possible sanctions flowing from non-compliance.²⁸ Based on this line of reasoning, international bodies that possess significant enforcement powers that include sanctioning of failure to comply with the set norms, are assumed to be in an advantageous position to ensure compliance.²⁹ It is this view that has formed the foundation for the majority of analyses focusing on the enforcement power of the ILO and EU, and it is this specific angle that has been criticised as presenting a distorted and mono-dimensional picture of the concept of enforcement.³⁰ In other words,

²⁷ Hartlapp, *op. cit.*, note 2, at p. 3.

²⁸ Hart, H.L.A., "Postscript: Responsibility and Retribution," in Hart, H.L.A. (ed.), *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), at p. 210.

²⁹ Hartlapp, *op. cit.*, note 2, at p. 3.

³⁰ Alter, K., "Do International Courts Enhance Compliance with International Law?" (2003) 25 *Review of Asian and Pacific Studies* 51, at p. 56.

compliance has been equated with the enforcement mechanisms available to the supranational body that created the norm for imposing compliance on the State primarily through sanctions.

A second variant of enforcement has been proposed in the form of the **management method** that perceives failures to comply with norms set by international organisations as a corollary of “financial, administrative or technical shortcomings due to lack of resources or expertise, not to opposition to norms.”³¹ Therefore, if non-compliance is the result of lack of resources and expertise, then the imposition of sanctions would be counterproductive in ensuring compliance.³² If this perspective is adopted, then the enforcement mechanisms of the ILO can be seen in a different light and this point will be made when those mechanisms are considered *infra*.³³

The third variant is coined **persuasion** and it stresses that “compliance with norms is not achieved via instrumental influence, but by recognition of norms following a logic of appropriateness”³⁴ to which a State responds.³⁵ Therefore, the logic is to convince the State that it is appropriate and aligned to its interest to comply, thus triggering the response of that State. On this basis, the pragmatic aspects of enforcement are reflected, since the persuasion element can be seen as inherent in the negotiating processes that take place during the adoption of norms and in latter stages when the organisation tries to ensure compliance with avoidance of resorting to sanctions.

The meaning of enforcement that this paper refers to consists of the three aforementioned elements of enforcement, management, and persuasion, thus offering a holistic perception of the term enforcement. For purposes of clarity, and in order to avoid terminological confusion, enforcement would be the generic label that includes enforcement proper, supportive management, and soft persuasion.³⁶ The three terms have been supplemented with the descriptive subtexts of proper, supportive, and soft in order to ensure that the meaning of each term is explained through the label.

³¹ Hartlapp, *op. cit.*, note 2, at p. 3.

³² Chayes, A. and Chayes, H.A., “On Compliance” (1993) 47 (2) *International Organisations* 175.

³³ See Section 2.

³⁴ Hartlapp, *op. cit.*, note 2, at p. 3.

³⁵ On responsiveness, see Neyer, J. and Wolf, D., “Analysis of Compliance with International Rules: Definitions, Variables and Methodology,” in Zürn, M. and Joerges, C. (eds.), *Law and Governance in Postnational Europe* (Cambridge: CUP, 2005), at pp. 59-60.

³⁶ Hartlapp, *op. cit.*, note 2, at pp. 3-5.

1.3 Why the Expanded Meaning of Enforcement?

The advantage of offering the preceding brief theoretical analysis is conceptually and methodologically significant, since perceptions of enforcement in the contexts of the ILO and the EU have omitted to draw this trichotomy that would now provide the yardstick for assessing the effectiveness of the enforcement mechanisms of each system. The comparison of the two systems on the basis of enforcement as sanctioning would result in the formation of a distorted picture that would practically reflect the procedural superiority of the EU in ensuring compliance. The legal procedures taking the form of infringement actions and primarily the use of individuals as enforcers of EU law, in conjunction with the existence and operation of the ECJ that has the jurisdiction to deliver binding judgments, would essentially point to the superiority of the EU's enforcement system.³⁷ In contrast, the ILO's reporting procedures are not effectively a counterweight to the ECJ, but there could be a different type of significance attributed to the tripartite system of the ILO that encourages compliance and essentially supports and facilitates compliance through support mechanisms.³⁸

Additionally, the expanded version of the concept of enforcement allows for the meaningful analysis and description of the basic characteristics of the ILO and the EU that would not be otherwise possible if the focus was on sanctioning. The similarities between the two legal regimes especially in terms of delegating powers to States³⁹ have not thus far supported analyses that attempted a broader comparison.⁴⁰ A holistic understanding of the characteristics, strengths, and weaknesses of the ILO and the EU would surely "contribute to a better understanding of the partial success or failure of policy implementation by States."⁴¹

In conclusion, the theoretical repositioning of the concept of enforcement that is in effect more aligned to compliance by States with the norms set by the ILO and the EU, offers the methodological tool that enables the more accurate comparison of the mechanisms available under the two legal regimes for combating pay discrimination or for ensuring the protection of any other labour right. In Alter's words, "it would be silly for an international organisation not to use all of these levers to encourage compliance."⁴² It would also be misleading for the analyst to ignore these levers when describing and assessing the mechanisms at the disposal

³⁷ See *infra*, Section 3.

³⁸ See *infra*, Section 2.

³⁹ Mbaye, H., "Why National States Comply with Supranational Law: Explaining Implementation Infringements in the EU 1972-1993" (2001) 2 (3) *European Union Politics* 259; Mendrinou, M., "Non-Compliance and the European Commission's Role in Integration" (1996) 3 (1) *Journal of European Public Policy* 1.

⁴⁰ Argument supported by Hix, S., "The Study of the EU II. The 'New Governance' Agenda and its Rival" (1998) 5 (1) *Journal of European Public Policy* 38, at pp. 54-5.

⁴¹ Hartlapp, *op. cit.*, note 2, at p. 2.

⁴² Alter, *op. cit.*, note 12, at p. 56.

of the ILO and the EU, to which the next section turns.

2. The ILO's Enforcement Mechanisms: Purposes, Nature, and Problems

2.1. General Background: The Origins, the Constitution and the Organs of the ILO

The historical origins⁴³ of the ILO can be traced back to the founding document of the ILO that was Part XIII of the 1919 Peace Treaty of Versailles.⁴⁴ The driving ideas, principles, and objectives of the ILO are both summarised and reflected in the preamble to the ILO Constitution: “[U]niversal and lasting peace can be established only if it is based upon social justice.”⁴⁵ The driving ambition of the organisation has been the creation of those conditions that would facilitate the existence of enduring peace⁴⁶ through the removal of unfair working conditions. The rationale stated that the fragile peace settlement after the First World War could be further endangered if there was minimal improvement of the conditions in such areas as the regulation of working hours, the prevention of unemployment, the provision of an adequate living wage, the protection of certain groups of workers, and the principle of the freedom of association.⁴⁷ In May 1944, the 26th Session of the International Labour Conference adopted a Declaration Concerning the Aims and Purposes of the International Labour Organisation and the principles which should inspire the policy of its Members.⁴⁸ Known as the Declaration of Philadelphia, it reaffirmed the essence and broadened the scope of the principles and responsibilities of the ILO in the field of social policy as laid down in the original Constitution. The importance of the Philadelphia Declaration remains paramount in both symbolic and practical terms since it is annexed to, and part of, the ILO Constitution,⁴⁹ thus forming an integral part of the regulatory system.

Needless to say, the setting of labour standards has been promoted long before the establishment of the ILO,⁵⁰ while the factors that created a negative feeling towards the

⁴³ On the history of the ILO, see Morse, D. A., *The Origin and Evolution of the ILO and its Role in the World Community* (Ithaca: Cornell University, 1969); Follows, J., *Antecedents of the ILO* (Oxford: Clarendon Press, 1951); Brett, B., *International Labour in the 21st Century: the ILO, Monument to the Past or Beacon for the Future?* (London: European Policy Institute, 1994); Charnovitz, S., “The Influence of International Labour Standards on the World Trading Regime. A Historical Overview” (1987) 126 *ILR* 525.

⁴⁴ London, H.M.S.O, 1919, Part XIII, pp. 387-411.

⁴⁵ <<http://www.itcilo.it/english/actrav/telearn/global/ilo/law/phila.htm#Preamble>>.

⁴⁶ Mitrany, D., *A Working Peace System: An Argument for the Functional Development of International Organization* (Chicago: Quadrangle. Puchala, 1943).

⁴⁷ Wisskirchen, A., “The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience” (2005) 144 (3) *International Labour Review* 253, at p. 254.

⁴⁸ <<http://www.ilo.org/public/english/about/iloconst.htm#annex>>.

⁴⁹ Art. 1 (1) ILO Constitution.

⁵⁰ Huberman, M., “International Labour Standards and Market Integration Before 1913: A Race to the Top?” August 2002,

internationalisation of labour standards were associated with disbelief as to whether it was practically possible to monitor and to enforce such standards. The breakthrough came in the form of the ILO, even if the monitoring concerns remain until today, due to the realisation that the lack of universally applicable labour standards created an inequality between States that granted a competitive advantage to those that failed to adhere to the minimal labour standards requirements.⁵¹ Therefore, the background ideology to the ILO is an amalgam of concerns about the rights of workers, concerns about fair competition, and concerns about monitoring.⁵² Once again, the preamble to the ILO Constitution mirrors those concerns by stating: “Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”⁵³

The main organs of the ILO are the annual General Conference, the Governing Body, and the International Labour Office.⁵⁴ An important function is performed by the International Labour Office headed by a Director-General, with regional representation and numerous officers that in effect form the bureaucratic and technocratic backbone of the ILO. The Conference is the most important body and consists of representatives of all 178 States which are currently members and comprises Government, Employers’ and Workers’ delegates, an arrangement coined as tripartite.⁵⁵ The voting process is based on the tripartite arrangement that provides for each country to have two Government delegate seats, one Employers’ delegate seat and one Workers’ delegate seat. Therefore, the votes are distributed equally, with a balance between the State votes and the employers’ and workers’ votes taken as a unit.⁵⁶ Finally, the understanding of the tripartite arrangement is dependent on the realisation that the epitome of the ILO structure is the independence of the delegates from their national identity. In other words, the delegates approach issues by transcending national boundaries and with the interests of the class they represent rather than national interests. At least, that is the ideal situation, but as will be shown *infra*, that is not always the case.

<<http://www.hist.umontreal.ca/u/huberman/Huberman%20-%20International%20Labor%20Standards.pdf#search=%22Huberman%2C%20%20E2%80%9CInternational%20Labour%20Standards%22>>.

⁵¹ Novitz, T., *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at p. 97.

⁵² Wisskirchen, *op. cit.*, note 5, at p. 255.

⁵³ <<http://www.itcilo.it/english/actrav/telearn/global/ilo/law/phila.htm#Preamble>>.

⁵⁴ Art. 2 ILO Constitution.

⁵⁵ On the unique tripartite structure see Fashoyin, T., “Tripartism and Other Actors in Social Dialogue” (2005) 21 (1) *International Journal of Comparative Labour Law and Industrial Relations* 37; Fashoyin, T., “Tripartite Cooperation, Social Dialogue and National Development” (2004) 143 (4) *International Labour Review* 341 (application of tripartite approach nationally); Tikriti, A. K., *Tripartism and the International Labour Organisation: A Study of the Legal Concept: its Origins, Function and Evolution in the Law of Nations* (Stockholm: Svenska Institutet for Internationell Ratt, 1982); Bèguin, B., “ILO and the Tripartite System,” No.523 (New York: Carnegie Endowment for International Peace, 1959).

⁵⁶ Art. 7 ILO Constitution.

In terms of procedure, the ILO's main quest was the groundwork and adoption of international labour standards that took the form of Conventions and Recommendations. Currently, there is an official corpus of 185 Conventions and 195 Recommendations.⁵⁷

The formal procedure for adoption starts with the Governing Body placing the examination of a specific question on the agenda of a forthcoming International Labour Conference and then naming different preliminary actions that would contribute to the promotion of the identified matter. After consultation with States and delegates representing the employers and employees, a preliminary draft is produced, which is given a first reading and possibly amended during the International Labour Conference by a technical committee set up to deal with the matter. A second reading normally follows the next year, in the course of which the competent committee establishes the formal character of the standard (a Convention or a Recommendation). The final adoption of a Convention or Recommendation requires a two-thirds majority of the votes cast by the delegates present.⁵⁸

Conventions become binding on every State which has ratified them, while the issue of ratification naturally remains within the constitutional jurisdiction of the States and their respective rules contained therein. In relation to the nature of implementation at State level, according to Art. 19 (5) (d) ILO Constitution, a Member must inform the Director-General of ratification and "will take such action as may be necessary to make effective the provisions of such Convention." Therefore, the effectiveness of implementing measures is monitored in order to remove the possibility, at least in theory, of consenting to measures that are not given effect at the national level during the stage of exercising the discretion in the form of adopting implementing measures. In contrast, Recommendations cannot be ratified and remain non-binding *stricto sensu*.⁵⁹

The preceding general and selective description of the main organisational and procedural features of the ILO is intended to operate as the introductory step needed for forming a general understanding of the broader workings of the organisation prior to concentrating on the specific theme of equal pay.

⁵⁷ <<http://www.ilo.org/ilolex/english/convdisp1.htm>>; <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

⁵⁸ Art. 19 (2) ILO Constitution.

⁵⁹ Wisskirchen, *op. cit.*, note 5, at pp. 256-58.

2.2 General Background: The ILO and Equal Pay

Its long history,⁶⁰ extensive membership,⁶¹ and the plethora of Conventions⁶² and Recommendations it adopted, position the ILO at the forefront of establishing labour norms. Central to the theme of this paper are the Equal Pay Convention (No. 100)⁶³ and Recommendation (No. 90),⁶⁴ adopted in 1951, but the most useful insight into the state of the law is to be found in the General Survey by the Committee of Experts on the Application of Conventions and Recommendations.⁶⁵ Adherence to the principle of equal remuneration has been an objective of the ILO since its establishment and was contained in Art. 41 of the ILO Constitution⁶⁶ as part of the general principles “of special and urgent importance that men and women should receive equal remuneration for work of equal value.”⁶⁷ The principle is again enshrined in the preamble to the present Constitution⁶⁸ and consequently in other instruments predating Convention No. 100 and Recommendation No. 90.⁶⁹

During the negotiations for the adoption of Convention No. 100,⁷⁰ equal pay was acknowledged as a prerequisite and material precondition for placing the status of men and women in a horizontal relationship.⁷¹ The significance of the principle of equal remuneration had also been recognised at the international level through Art. 23 of the Universal Declaration of Human Rights 1948 and Art. 7 of the International Covenant on Civil and Political Rights 1966,⁷² and at the regional level through Art. 141 (former Art. 119) of the 1957 EC Treaty, Art. 4 of the European Social Charter 1961, and the African Charter on Human and People's Rights 1981.⁷³

⁶⁰ On ILO's history, see Morse, D. A., *The Origin and Evolution of the ILO and its Role in the World Community* (Ithaca: Cornell University, 1969); Follows, J., *Antecedents of the ILO* (Oxford: Clarendon Press, 1951); Brett, B., *International Labour in the 21st Century: the ILO, Monument to the Past or Beacon for the Future?* (London: European Policy Institute, 1994).

⁶¹ 178 Members from 7 March 2005: <<http://www.ilo.org/ilolex/english/mstatede.htm>>.

⁶² 185 Conventions and 195 Recommendations: <<http://www.ilo.org/ilolex/english/convdisp1.htm>>; <<http://www.ilo.org/ilolex/english/recdisp1.htm>>. On the nature of the ILO's legal instruments, see Hepple, B., *Labour Laws and Global Trade* (Oxford: Hart, 2005), at pp. 29-47.

⁶³ *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention: C100*, adopted in 1951, entered into force in 1953, <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

⁶⁴ *Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value Recommendation: R090*, adopted in 1951, <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

⁶⁵ *1986 General Survey on Equal Remuneration*, <<http://www.ilo.org/ilolex/english/surveyq.htm>>.

⁶⁶ Article 427 of the Treaty of Versailles, *ibid.*, para. 3.

⁶⁷ *Ibid.*

⁶⁸ <<http://www.ilo.org/ilolex/english/constq.htm>>.

⁶⁹ The Minimum Wage-Fixing Machinery Recommendation, 1928 (No. 30); the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71); Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82): available at <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

⁷⁰ ILO, 33rd Session, Geneva, 1950, Report V (1), p. 99.

⁷¹ General Survey, *op. cit.*, note 34, at para. 4.

⁷² *Ibid.*, para. 5.

⁷³ General Survey, *op. cit.*, note 34, at para. 6.

Turning to the substantive provisions *per se*, Convention No. 100 and Recommendation No. 90 cite numerous instruments to be implemented to promote, ensure, encourage, or facilitate “the application of the principle of equal remuneration for men and women workers for work of equal value.”⁷⁴ What is focal to this paper is the methods used for the enforcement and monitoring of the principles and measures included in the legal framework.

2.3. The Enforcement Mechanisms of the ILO

The stepping stone for describing the enforcement mechanisms of the ILO must be the principle that ILO Conventions are binding only on those States that ratify them,⁷⁵ thus in the event of a systematic failure to ratify legal norms, other States could be discouraged from agreeing to ratify Conventions. Therefore, the issue of enforcement of implementation has a practical impact on the legitimacy of the ILO. Inherent in that process is the premise that the ILO sets the minimum standards and leaves the implementation to the discretion of States.⁷⁶ Therefore, once a Convention has been ratified, the national governments are under an obligation to ensure the proper implementation of the relevant labour standards, thus making the enforcement a crucial parameter.

The enforcement mechanisms of the ILO have been described as unique⁷⁷ since they fall into two overlapping categories: reporting obligations and adversarial procedures.⁷⁸

The reporting procedures aim to establish a dialogue between the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the Centres for Corporate Accountability (CCA), and the States, and those procedures take three different forms. Firstly, under Art. 22 ILO Constitution,⁷⁹ States are required to submit periodical reports on the Conventions they ratified, but nonetheless it must be noted that thirteen States have failed to comply for two or more years with that reporting obligation.⁸⁰ The CEACR examines conformity with the respective Convention concerned. Secondly, under Art. 19 ILO

⁷⁴ Preamble, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention: C100*, adopted in 1951, entered into force in 1953, <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

⁷⁵ Art. 19 ILO Constitution, <<http://www.ilo.org/ilolex/english/constq.htm>>.

⁷⁶ *Ibid.*

⁷⁷ Hepple, *op. cit.*, note 20, at p. 47.

⁷⁸ Hepple, *op. cit.*, note 20, at pp. 47-8.

⁷⁹ ILO Constitution, <<http://www.ilo.org/ilolex/english/constq.htm>>.

⁸⁰ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2003, <<http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>, at para. 89.

Constitution,⁸¹ Governments may be requested to submit reports explaining the reasons for failing to ratify specific Conventions and describing what steps they are taking through national legislative measures to achieve the objectives of these Conventions. These reports are subsequently analysed by the CEACR in the General Surveys.⁸² Thirdly, under Art. 19 ILO Constitution, States are obliged to submit a Convention for ratification to the competent national legislative body and to report on progress, with the CEACR entrusted with the responsibility to examine the reports and give advice.

The CEACR performs an instrumental role in the reporting procedure through reviewing the reports for compliance with the Conventions, making requests for clarifications, by preparing its own report on progress and difficulties in implementing stages, and by issuing observations in situations of ongoing serious violations. The CEACR publishes a general survey annually in which it examines the law in a specific area, irrespective of whether the Convention has been ratified or not. Moreover, the CEACR can decide to attend to a potential problem by submitting a direct request for additional information to States. In addition, there is also the possibility in the yearly meeting of the International Labour Conference when the CCAS reviews the CEACR report, to discuss the specific case of a State and to request explanatory comments on implementation difficulties.⁸³ The CCAS invites participation in the discussion through requests for comments and adopts conclusions where reference can be made to persistent failures.⁸⁴ Finally, for fundamental Conventions there is a compulsory reporting requirement,⁸⁵ irrespective of whether the State has ratified that Convention, with the Director-General reviewing and reporting on success and failure, and presenting a scoreboard on implementation for all States.⁸⁶

The second enforcement procedure is quasi-judicial and more adversarial in nature, with representations being submitted under Art. 24 from workers or employers in relation to non-compliance by a State. An *ad hoc* committee could then be set up by the Governing Body to examine the complaint and make recommendations that could be considered by the Governing Body by asking the State to appear before it when the matter would be considered. Moreover, complaints can be submitted under Art. 26 for serious cases of failure to comply with ratified Conventions, by States that have ratified the Convention, by the Governing Body

⁸¹ *Op. cit.*, note 37.

⁸² Elliott, K.A., "The ILO and Enforcement of Core Labour Standards" (2000) *International Economics Policy Briefs*, <<http://www.iie.com/publications/pb/pb00-6.pdf>>, at p. 2.

⁸³ *Ibid.*, at p. 2.

⁸⁴ Hepple, *op. cit.*, note 20, at p. 49.

⁸⁵ 1998 Declaration on Fundamental Principles and Rights at Work, <<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>>.

⁸⁶ Hartlapp, M., "Two Variations on a Theme: Different Logics of Implementation Management in the EU and the ILO" (2005) Vol. 9 No. 7 *European Integration online Papers* <<http://eiop.or.at/eiop/texte/2005-007a.htm>>, at p. 11.

acting on its own initiative, or after a delegate has filed a complaint. The next step that might take place is the establishment of a Commission of Inquiry, which is rather rare with only three examples so far. A report will be prepared and discussed by the Governing Body, but without a vote, while the State has to reply within three months as to whether it accepts the proposals of the report, and if not, then the State can appeal against the recommendations before the ICJ. Finally, in the Myanmar case, a complaint procedure in relation to child labour had been pending since 1996 and a Commission of Inquiry in 1998 severely criticised the State for its inaction. In June 2000, the ILO called for sanctions under Art. 33 for the first time in its history and on the basis that there was persistent and serious breach of the standards. Even so, the powers of the ILO are extremely limited in such instances and the sanctions were effectively indirect since other States were requested to reconsider any actions that could be contributing factors in the continuity of the breach.⁸⁷

2.4. Assessment of the ILO's Enforcement Mechanisms

The first point to be made is that enforcement as a generic term consists of enforcement proper, supportive management, and soft persuasion,⁸⁸ those elements would provide the skeleton for assessment.

In relation to enforcement proper, the reporting procedure that dominates the enforcement mechanisms of the ILO is suffering from exactly that reliance on it to promote implementation. Therefore, in 2005, 2,569 reports were requested and 1,645 of these reports were received,⁸⁹ which marks a tremendous workload for the secretariat and an increase of 1025 % since 1927.⁹⁰ It is also problematic that the selection of cases to reach the ILO is classified, thus leading to claims for transparent and streamlined procedures.⁹¹ The workload problem is magnified by the consensus element⁹² that reflects the tripartite structure of the ILO, involving the workers, employers, and States.⁹³ This creates difficulty because workers

⁸⁷ On Myanmar, see at Hartlapp, *op. cit.*, note 44, at pp. 51-2.

⁸⁸ Hartlapp, *op. cit.*, note 44, at pp. 3-5.

⁸⁹ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2005, <<http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>, at para. 16.

⁹⁰ On the workload see Gravel, E. and Charbonneau-Jobin, C., *La Commission d'Experts pour l'Application des Conventions: Dynamic et Impact* (Genève: Organisation International du Travail, 2003), at p. 2 for data on 1927.

⁹¹ Hepple, *op. cit.*, note 20, at p. 55.

⁹² Hepple, *op. cit.*, note 20, at pp. 50, 53.

⁹³ On the unique tripartite structure see Fashoyin, T., "Tripartism and Other Actors in Social Dialogue" (2005) 21 (1) *International Journal of Comparative Labour Law and Industrial Relations* 37; Fashoyin, T., "Tripartite Cooperation, Social Dialogue and National Development" (2004) 143 (4) *International Labour Review* 341 (application of tripartite approach nationally); Tikriti, A. K., *Tripartism and the International Labour Organisation: A Study of the Legal Concept: its Origins, Function and Evolution in the Law of Nations* (Stockholm: Svenska Institutet for Internationell Ratt, 1982); Bèguin, B., "ILO and the Tripartite System,"

and employers vote en bloc, while there is problem with the representation element since it is often the case that employers' and employees' organisations are too weak nationally or are under the effective control of the State, with the consequence that their independence is effectively nominal. Therefore, the bargaining process that is at the heart of the ILO does not always efficiently support enforcement. One example of this is the Myanmar case where it took thirty years of CEACR observations before a Commission of Inquiry was set up and four years to make use of Art. 33, yet the issue was not satisfactorily resolved.⁹⁴ The example shows that there is direct dependence on the goodwill of the offender, because the lack of enforcement proper measures grants discretion to the non-compliant State.⁹⁵ In the same light, the CEACR expresses satisfaction with the progress in 30 cases from 24 States in 2003,⁹⁶ while in 2005 64.03% of requested reports were submitted to the CEACR.⁹⁷ However, 15 States had not submitted the instruments of 1999 to the competent authorities in relation to the Worst Forms of Child Labour Convention of 1999 (No. 182),⁹⁸ thus leading to the comment that the backlog of specific States raises serious cause for concern.⁹⁹ In relation to the reporting procedure, it was not used in the first 40 years of the ILO,¹⁰⁰ and currently there are 26 cases, while eleven Commissions of Inquiry had been established by 2003, but compliance with the observations was not uniform.¹⁰¹ For example, Germany failed to comply with its obligations by banning individuals from professions on the basis of political beliefs, Poland failed to comply with the right to freedom of assembly and Myanmar ignored the findings on child labour.¹⁰² Moreover, Art. 33 was only used once in the Myanmar case, but the sanctions imposed were indirect and depended on the willingness of States to take action rather than on the ILO as an organisation. In addition, the outcome of that case was not positive because even Art. 33 was applied in 2000, the State suspended a joint action plan in 2003, and in 2005 the State was finally visited.¹⁰³ There is also the problem with the nature of action to be taken under Art. 33 as the provision is unclear as to whether economic sanctions are included and if

No.523 (New York: Carnegie Endowment for International Peace, 1959).

⁹⁴ Hartlapp, *op. cit.*, note 44, at pp. 13-4; Hepple, *op. cit.*, note 20, at p. 54.

⁹⁵ Hepple, *op. cit.*, note 20, at p. 54.

⁹⁶ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2003, <<http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>, at para. 107.

⁹⁷ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2005, <<http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>, at para. 16.

⁹⁸ <<http://www.ilo.org/ilolex/english/convdisp2.htm>>.

⁹⁹ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2003, <<http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>, at para. 132.

¹⁰⁰ Valticos, N., "Once More About the ILO System of Supervision: In What Respect is it Still a Model?" in Blokker, N. and Muller, S. (eds.), *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers* (Dordrecht: Martinus Nijhoff Publications), at p. 108.

¹⁰¹ Hartlapp, *op. cit.*, note 44, at p. 12. With reference to Germany see the case *Extremisten*, BVerfGE 39, 334 and the findings by the ECtHR in *Vogt v Germany* [1996] (ECtHR).

¹⁰² Elliott, *op. cit.*, note 40, at p. 5, n. 14.

¹⁰³ Hartlapp, *op. cit.*, note 44, at p. 14.

that is the case, whether the States or the ILO should impose such sanctions.¹⁰⁴

On the other hand, there is an element of strengthening of the enforcement proper by the Director-General's score-board on fundamental Conventions, because it establishes "direct comparability between all member countries, and, second, by doing so it increases the (moral) pressure on those states that are lagging behind in ratification."¹⁰⁵

In conclusion, despite the useful work and the relatively high rate of compliance with the different reporting obligations and the paradigm of Myanmar as possibly setting a new trend in enforcement proper, it can be argued that the ILO's enforcement proper is relatively weak. It remains indirect through reporting, dependent on formation of consensus, rare – the only example is Myanmar – and even then lacks direct imposition of clear sanctions.

In relation to supportive management, the process of direct requests for clarifications by the CEACR used for the collection of information introduces an element of dialogue, as does the selection of the cases by the CEACR and the establishment of *ad hoc* Committees for representations that are made on the basis of consensus. The same applies for the discussion of the report of a Commission of Inquiry, while for the next step of Art. 33 sanctions a vote is necessary. Moreover, technical and financial assistance¹⁰⁶ is provided in order to promote the "capacity-building"¹⁰⁷ of the States that do not comply. Practically, there are advisory bodies offering expert opinion on the drafting of national implementing legislation and a department entrusted with the task of organising projects funded by the ILO.¹⁰⁸ These technical programmes can be seen in action in the field of child labour in Bangladesh, where a memorandum of understanding between the ILO, UNICEF and the Bangladesh Garment Manufacturers Association was signed and which provided for the removal from work of all children for whom schools were available.¹⁰⁹ The funding and monitoring of the project was coordinated by the ILO, and since 1995, 353 schools have been established in conjunction with a rapid drop in the number of children at work.¹¹⁰ Furthermore, direct contacts or visits are used by the ILO. These include discussions with governmental officials on the problems of implementation in an informal and confidential tone that has proved to be highly

¹⁰⁴ Hepple, *op. cit.*, note 20, at p. 55.

¹⁰⁵ Hartlapp, *op. cit.*, note 44, at p. 12.

¹⁰⁶ Dufty, N.F., "Organizational Growth and Goal Structure: The case of the ILO" (1972) 26 (3) *International Organization* 479.

¹⁰⁷ Hartlapp, *op. cit.*, note 44, at p. 12.

¹⁰⁸ Elliott, *op. cit.*, note 40, at p. 4.

¹⁰⁹ *Ibid.*

¹¹⁰ US Department of Labour, Bureau of International Labour Affairs, *By the Sweat and Toil of Children: Efforts to Eliminate Child Labour* 5, Washington, 1998, p. 89.

effective.¹¹¹ Finally, even in the Myanmar situation, after the call for sanctions the ILO appointed a Liaison Officer in 2002 for the transition of the implementation to compliance,¹¹² while in 2003 a joint plan of action was discussed,¹¹³ and in 2005 a team visited that State.

To sum up, the element of supportive management is strong and that is understandable because the ILO depends on consensus, as its tripartite structure shows, and thus concentrates on “capacity-building”¹¹⁴ through a combination of dialogue, action after agreement and financial/technical assistance.

The distinction between soft persuasion and supportive management is a delicate one, as is illustrated by the Myanmar example of follow-up action after the sanctions and the consensus element engrained in the ILO’s structure. In addition, the direct contact visits can be seen as evidence of both soft persuasion and supportive management. Therefore, the soft persuasion element is quite strong in the ILO. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. That is not to say that enforcement as an entity is not entirely effective. With the emphasis on consensus and capacity building and with the different practices in place aiming to complement them, the lacunae in enforcement proper are partly, yet not fully, filled. The issue is how the same analysis would apply to the EU, but prior to addressing that theme, it is necessary to turn the analytical focus to the relatively recent development of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.¹¹⁵

2.5. The Formation of “Core Labour Rights” under the 1998 ILO Declaration: Changes and Problems

The ILO has performed an instrumental role in creating and effectively imposing an international labour rights regime, to the extent that the system has been “long held up as one of the most successful of international regimes.”¹¹⁶ The system has nonetheless undergone a radical transformation that is associated partly with the deficiencies of the monitoring system

¹¹¹ Valticos, N., “Une nouvelle forme d’action internationale: Les ‘contacts directs’ de l’O.I.T. en matière d’application de conventions et de liberté syndicale” (1981) *27 Annuaire Francais De Droit International* 477, at pp. 479-80, 488.

¹¹² Hartlapp, *op. cit.*, note 44, at p. 14.

¹¹³ ILO, Myanmar agree on facilitator to help end forced labour (press release 03/21), Geneva: International Labour Organization (14 May 2003), <<http://www.ilo.org/public/english/bureau/inf/pr/2003/21.htm>>.

¹¹⁴ Hartlapp, *op. cit.*, note 44, at pp. 12, 16.

¹¹⁵ 1998 ILO Declaration. See *supra* note 17.

¹¹⁶ Alston, P., “Core Labour Standards and the Transformation of the International Labour Rights Regime” (2004) 15 (3) *EJIL* 457.

of the ILO¹¹⁷ and partly with the shift in the rationale that favours globalisation. Accordingly, Charny argues that there is “a list of series of insurmountable barriers to international labour standards. They include irreconcilable cultural traditions, the unaffordability of social insurance schemes in the absence of international transfer payments, the inflexibility of international immigration policies which inhibits labour flexibility, and the problematic nature of international enforcement mechanisms.”¹¹⁸ Instead, what is preferable according to Sykes is the adoption of soft, flexible arrangements, which leave most of the choices at the national level in order to promote trade that tends to advance human rights.¹¹⁹ In a similar line of reasoning, Bhagwati argues that issues of trade and labour must be kept institutionally separate, each being dealt with by the international agencies suited to the specific agendas for which they have been set up.¹²⁰

The shift in the rationale materialised during the process of adoption of the 1998 ILO Declaration and with the 1995 Copenhagen World Summit for Social Development that followed the recommendations contained in the 1994 Report of the then Director-General of the ILO Michel Hansenne.¹²¹ The proposals referred to the need for some differentiation among the rights promoted by the ILO and asked for concentration on a list of seven conventions.¹²² The process of adoption of the 1998 ILO Declaration started and the final document contains a set of four “core labour standards” that include the freedom of association, freedom from forced labour and from child labour, and non-discrimination in employment.¹²³ The main change introduced relates to the monitoring procedures that is decentralised through the “follow-up procedures” annexed in accordance with Art. 4 1998 ILO Declaration.¹²⁴ There are two main activities: the preparation of an annual report reviewing the efforts of member States which are not parties to the fundamental conventions, and the global report which provides a “dynamic global picture” of a state of implementation

¹¹⁷ Elliott, K.A., “The ILO and Enforcement of Core Labour Standards” (2000) *International Economics Policy Briefs*, <<http://www.iie.com/publications/pb/pb00-6.pdf>>, at p. 2; McDougal, M. *et al.*, *Human Rights and World Public Order: the Basic Policies of an International Law of Human Dignity* (Yale University Press, 1980), at p. 310.

¹¹⁸ Charny, D., “Regulatory Competition and the Global Coordination of Labour Standards,” in Esty, D. and Geradin, D. (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford: OUP, 2001), at p. 328.

¹¹⁹ Sykes, A., “International Trade and Human Rights: An Economic Perspective”, *John Olin Law & Economics Working Paper No. 188 (2nd series)*, University of Chicago Law School, May 2003, <<http://www.law.berkeley.edu/students/curricularprograms/ils/papers/sykesInternationalTradeandHR.doc>>, at p. 4.

¹²⁰ Bhagwati, J., “Free Trade and Labour” (2001), <<http://www.columbia.edu/~jb38/papers/ft-lab.pdf>>, at p. 4.

¹²¹ Alston, *op. cit.*, note 74, at pp. 464-66; Art. 2 1998 ILO Declaration.

¹²² *Defending Values, Promoting Change: Social Justice in a Global Economy: an ILO Agenda*, Report by the Director General for the International Labour Conference 81st Session, 1994, <<http://www.ilo.org/public/english/standards/reim/ilc/ilc83/dg-rep.htm>>, at pp. 42-9.

¹²³ Alston, *op. cit.*, note 74, at p. 458.

¹²⁴ <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP>.

of each category of fundamental principles and rights.¹²⁵ In order to emphasise that the first activity has nothing to do with supervision, the existing Committee of Experts was not entrusted with the task of presenting an analytical introduction to the factual reports compiled by the International Labour Office. Instead a new group of seven Experts-Advisers was appointed in 2001 for that purpose.¹²⁶

The effectiveness of the follow-up procedure has been approached in diverging ways. On the one hand, there is satisfaction with the described arrangements as the 1998 ILO Declaration is felt to represent “a constitutional moment in the life of the ILO.”¹²⁷ Moreover, the principles contained in the 1998 ILO Declaration have been characterised as “fundamental international norms”¹²⁸ and have “attained the *jus cogens* status,”¹²⁹ while the four principles were portrayed as forming “the constitutive of the essence of humanity”¹³⁰ and as “transforming the international discourse of labour rights.”¹³¹ The enforcement issue has met with an enthusiastic reception since the Declaration was seen as establishing a decentralised system of labour standards implementation that reduces the burden on States and brings into the equation all types of private entities.¹³² Moreover, the Declaration removes the counterproductive element of enhanced legalisation and creates a more flexible framework that departs from the sanctioning mentality and emphasises promotional techniques that are preferred by employers and States.¹³³ Finally, and in connection with the impact of the 1998 ILO Declaration on the overall labour rights regime, it has been argued that the ILO methods designed to ensure compliance were based on suppositions that are no longer relevant in the new era of globalisation, of expanded flexibility, and with a plethora of actors involved in trade.¹³⁴ In this light, Verma argues that the core labour standards contained in the 1998 Declaration need to replace the ILO collection of standards, and that the former should be used as “a regime of process standards.”¹³⁵ In other words, the core labour standards should

¹²⁵ Alston, *op. cit.*, note 74, at p. 511.

¹²⁶ *Ibid.*

¹²⁷ Langille, B., “The ILO and the New Economy: Recent Developments” (1999) 15 *Int'l Journal Comparative Law & Ind. Rels.* 229, at p. 232.

¹²⁸ Wouters, J. and De Meester, B., “The Role of International Law in Protecting Public Goods. Regional and Global Challenges,” *Leuven Interdisciplinary Research Group on International Agreements and Development, Working Paper No.1*, December 2003, <<http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WPLirg1.pdf>>, at p. 21.

¹²⁹ Vandaele, A., “A Critical Analysis of the Use of International Trade Measures as a Means to Enforce Basic Labour Rights,” Ch.3, available under “Executive Summary PhD Thesis,” at <<http://www.kuleuven.ac.be/iir/eng/research/infopublications/ExSumDoctArne.pdf>>.

¹³⁰ Langille, B., “Seeking Post-Seattle Clarity-and Inspiration,” in Conaghan, J., Fischl, R.M. and Klare, K. (eds.), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford: OUP, 2002), at p. 152.

¹³¹ Alston, *op. cit.*, note 74, at p. 459.

¹³² *Ibid.*, at p. 460.

¹³³ *Ibid.*, at p. 460.

¹³⁴ *Ibid.*, at p. 509.

¹³⁵ Verma, A., “Global Labour Standards: Can We Get From Here to There?” (2003) 19 *Int'l Journal Comparative Law & Ind. Rels.* 515, at p. 533.

be used by States as the minimum to be ratified by States that should subsequently be used as the basis for setting new goals designed to improve the situation on an annual basis.¹³⁶

Therefore, the twin ideas of pluralism and decentralisation would be applied since the States would be contractually bound to comply with the core labour standards of the Convention and to pursue the expansion of these standards at the national level.¹³⁷

On the other hand, the critics of the 1998 ILO Declaration argue that the selection of the four core labour standards is arbitrary and represents a “very limited core list that offers de minimis protection.”¹³⁸ This is this case, since the 1998 ILO Declaration, despite the inclusion of the non-discrimination standard, fails to protect essential components of working rights such as “workplace safety, limits on the hours of work and rights to periods of rest, and freedom from workplace abuse...nor does it assert a global minimum wage, or a create a right to a fair or living wage.”¹³⁹ In addition, there is criticism related to the selection of the four core standards because that phrase could be construed as creating a hierarchy between the included core standards and those conventions that were excluded.¹⁴⁰ Therefore, Alston regards the selection of the core standards as creating two classes of status. This view is supported by the fact that the promotional activities taking the form of reports and technical help apply only to the four core labour standards and not to the excluded standards.¹⁴¹

Furthermore, there is a theoretical objection to the terminology used because it is seen as creating uncertainty as to whether the included core standards and the reference made in the title of the 1998 ILO Declaration refer to principles or rights.¹⁴² The argument states that the emphasis is placed on principles, and evidence in that respect is drawn from two different sources, namely, the ILO’s official stand that describes the document as “a reaffirmation...of central beliefs set out in the ...Constitution,”¹⁴³ and the content of the 1995 Copenhagen text stating that the four core standards would have a status of rights for States that ratified the relevant conventions and the status of principles for those States that were not parties to the relevant conventions.¹⁴⁴

¹³⁶ *Ibid.*, at p. 534.

¹³⁷ *Ibid.*, at p. 534.

¹³⁸ Di Matteo *et al.*, “The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime” (2003) 36 *Vand. J. Transnat’l L.* 95, at p. 124.

¹³⁹ *Ibid.*

¹⁴⁰ Bellace, J., “The ILO Declaration of Fundamental Principles and Rights at Work” (2001) 17 *Int’l Journal Comparative Law & Ind. Rels.* 269, at p. 271.

¹⁴¹ Alston, *op. cit.*, note 74, at p. 488.

¹⁴² *Ibid.*, at p. 483.

¹⁴³ “About the Declaration,”

<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN>.

¹⁴⁴ See text of para. 54 (b) of *Programme of Action of the World Summit for Social Development 1994*, <<http://www.un.org/esa/socdev/wssd/agreements/poach3.htm>>

A different line of criticism refers to the confusion about the relationship between the core labour standards contained in the 1998 ILO Declaration and the ILO Conventions. The relevant text states that “the principles and rights have been expressed and developed in the form of specific rights and obligations in conventions recognised as fundamental both inside and outside the Organisation.”¹⁴⁵ Consequently, there is uncertainty as to the nature of the relationship of the four core labour standards with the eight conventions covering the same themes. Of this relationship it has been said that “a fuller understanding of the meaning of those four core rights comes from the eight core ILO conventions underlying them,”¹⁴⁶ while the European Commission stated that “these four core labour standards are currently covered by eight ILO conventions.”¹⁴⁷ The last statement coming from the EU reiterates the argument put forward by this paper which sees the creation and development of labour standards as an interconnected process that involves both the ILO and the EU.

In the same line of reasoning, reference can be made to EU Regulation 2501/2001 that indirectly and partly resolves the issue of the relationship between core labour standards and the various ILO Conventions. The Regulation provides for special incentive arrangements to States that offer actual protection to labour rights through the creation of legislative structures that incorporate the substance of the standards set in the fundamental ILO Conventions.¹⁴⁸ As Novitz observes, the EU’s emphasis was placed on the ILO Conventions and not on the 1998 ILO Declaration that was in effect seen as auxiliary to and dependent on the ILO conventions.¹⁴⁹

The 1998 ILO Declaration has also been criticised as introducing a relegation of the ILO’s enforcement mechanisms by decentralising monitoring duties. The follow-up mechanism, described above, has been unsuccessful with a 64% reporting from States in 2003, while the information contained in those national reports has been described by the Expert-Advisers as limited and it was stated that “[i]t is unacceptable that the number of comments provided by the social partners is so limited.”¹⁵⁰ Moreover, the contributions by the associations of

¹⁴⁵ 1998 ILO Declaration, at para. 1 (b).

¹⁴⁶ Bellace, *op. cit.*, note 98, at p. 275.

¹⁴⁷ Commission of the European Union, *Communication by the Commission to the Council, the European Parliament and the Economic and Social Committee Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, EU Doc. COM (2001) 416, 18 July 2001, at p. 5.

¹⁴⁸ See preamble and Art. 14 of Council Regulation (EC) No. 2501/2001, 10 December 2001, Official Journal L346/1.

¹⁴⁹ Novitz, T., “The EU and International Labour Standards: The Dynamics of Dialogue Between the EU and the ILO,” in Alston, P. (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005), p. 214.

¹⁵⁰ *Introduction by the ILO Declaration Expert-Advisers to the Compilation of Annual Reports*, ILO Doc. GB.289/4, March 2004,

<http://www.ilo.org/public/english/standards/relm/gb/refs/pdf/rod289.pdf#search=%22ILO%20Doc.%20GB.289%2F4%2C%20March%202004%22>, at para. 11.

employers and employees were “almost non-existent,”¹⁵¹ thus creating serious doubts as to how effective those bodies consider the follow-up procedures to be. In addition, the central idea of “private enforcement and voluntarism”¹⁵² delegated to States seems to be ineffective and potentially dangerous for the supervision and enforcement mechanisms traditionally used by the ILO.

At this point, it may be concluded that the 1998 ILO Declaration introduced certain important changes to the labour right regime of the ILO and to the non-discrimination in employment right that is included in the 1998 ILO Declaration. Nonetheless, the lack of reference to equal pay in specific could create a problem in downgrading the status of Convention No. 100 through its exclusion, while the major changes in the monitoring system are different from the traditional enforcement mechanisms of the ILO analysed in the previous sections. The consequence of the weakened supervision system could further the low intensity of enforcement proper of the ILO, while at the same time it can be seriously doubted whether the management and persuasion aspects of the expanded enforcement concept that this study uses, would be promoted. In other words, if the 1998 ILO Declaration is the paradigm for the future of the ILO and if the equal pay right is brought within the spirit of the 1998 ILO Declaration, the enforcement capacity of the organisation will be seriously and unnecessarily weakened. Then, any comparison with the EU’s enforcement mechanisms would be unfavourable for the ILO, as the next section explains.

2.6 Conclusion

The work of the ILO in establishing and solidifying a labour rights regime has been consistent, intense, and highly influential. Imposing standards that would be complied with by States is a delicate task, and the ILO’s mechanisms for ensuring compliance are representative of the strict dichotomy between States and international organisations that show deference to the sovereign rights of the States to self-regulate issues of public importance. In other words, the ILO is not equipped with those enforcement mechanisms that could support imposition of drastic sanctions but has been granted the powers of a political body that is entrusted with the setting of standards that would then be transposed at the national level through effective cooperation with the States and essentially through granting a high degree of discretionary responsibility to the national authorities. Therefore, the implementation of the ILO standards

¹⁵¹ *Ibid.*, at para. 17.

¹⁵² Hepple, B., “Enforcement: the Law and Policy of Cooperation and Compliance,” in Hepple, B. (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge: CUP, 2002), at pp. 238, 246.

by the competent national authorities depends on cooperation and dialogue rather than on imposition. Therefore, the soft persuasion element is quite strong in the ILO. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. Overall, it can be concluded that the element of enforcement as an entity is only partly effective.

3. The EU and Enforcement of Equal Pay: The Role of the ECJ

3.1. The Enforcement Mechanisms of the EU

The establishment and promotion of equality in pay has been a key belief of the EU from the early stages of its formation and remains a priority at the core of the EU's labour policies, while it has evolved into an integral part of the social policy agenda. Attaining the objective of equality between women and men is at the forefront of the labour policies of the EU and its realisation requires the participation and involvement of all social actors. Moreover, the equality in pay has an economic dimension in ensuring the same application of equality rules to all Member States in order to remove the possibility of unfair competitive advantage in favour of defaulting parties, while at the same time the purpose of offering a protective network for employees remains. For these obvious reasons, the principle of equal pay is enshrined in the EU's primary law and it has been followed through and supplemented in secondary legislation. Nonetheless, significant differences in the positions of women and men remain and it is interesting to consider how the EU system has managed to take progressive steps and how it compares in terms of effectiveness of enforcement with the ILO.

There is broad consensus within the academic body on the instrumental role that the EU has performed in transforming and fundamentally changing the law and practice of discrimination, especially in relation to equal pay.¹⁵³ The humble origins of non-discrimination action can be traced back to Art. 141 EC that was adopted into the 1957 EC Treaty and which ensured equal pay at the insistence of the French government that wanted to pre-empt a competitive disadvantage arising from the fact that its domestic legislation offered equal pay protection.¹⁵⁴ These originally economic considerations that supported the introduction of Art. 141 EC were

¹⁵³ Bell, M., *Anti-Discrimination Law and the European Union* (Oxford: OUP, 2002), at pp. 33-42; De Burca, G., "The Role of Equality in EC Law," in Dashwood, A. and O'Leary, S (eds.), *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997), p. 13.

¹⁵⁴ Ohlin, B., "Social Aspects of EC Co-Operation: Report by the Group of Experts" (1956) 102 *International Labour Review* 99; Barnard, C., "The Economic Objectives of Article 119," in Hervey, T. and O'Keefe, D., *Sex Equality Law of the European Union* (Chichester: Wiley, 1996), p. 32.

coupled with the work of the ECJ that elevated the principle of equal pay to a fundamental principle of EU law¹⁵⁵. This was recognised in the Treaty of Amsterdam that amended Art. 141 EC to cover not only equal work but also work of equal value, while the promotion of equality between women and men was recognised as one of the fundamental tasks of the EU. It also introduced a requirement to eliminate inequalities and to promote equality between women and men in all activities. Finally, it inserted a new article allowing the EU to take measures tackling all forms of discrimination based on sex, alongside a number of other grounds.

The role of secondary legislation has been paramount in complementing the principle of equal pay as expressed in Art. 141 EC. The starting point must be the setting of the framework for EU enforcement of equal pay. Legal measures have formed the tools for the enforcement of equality between men and women in the EU, and by using the legal bases provided by the Treaties, the Union has adopted thirteen directives on gender equality since the 1970s. These have ensured, among other things, equal treatment concerning access to work, training, promotions and working conditions, including equal pay and social security benefits, as well as guaranteed rights to parental leave.

In more detail, the principle of equal pay is guaranteed in substantive terms under Arts. 13 and 141 EC,¹⁵⁶ the Equal Pay Directive 75/117,¹⁵⁷ and the Equal Treatment Directive 76/207,¹⁵⁸ thus offering a deep protective basis for equal pay that is still expanding. Moreover, that legislative framework has been supplemented and safeguarded by the ECJ, and that forms a crucial point of difference with the ILO system. Numerous landmark cases have tested the legislation in practice and have led the ECJ to examine and define the meaning and scope of the legislative framework, thereby contributing clarity and precision to the directives. In this way, gender equality law remained responsive to modern social needs and at the same time the litigation before the ECJ contributed to the effective implementation of legislation by the Member States, as individuals can challenge the compatibility of national laws with the European directives.

There are, therefore, four essential differences between the EU and the ILO in the legalisation process: directional, institutional, constitutional and procedural.

¹⁵⁵ Case 43/75, *Gabrielle Defrenne v. Sabena (No.2)*, [1976] ECR 455.

¹⁵⁶ Art. 141 EC is based on ILO Convention 100.

¹⁵⁷ [1975] OJ L45/19.

¹⁵⁸ [1976] OJ L39/40.

Firstly, the directional difference between the ILO and the EU. The enforcement of equal pay is the general and shared purpose of the two regimes, with the EU being a supranational system that has functioned progressively for the attainment of economic, legal, and political integration.¹⁵⁹ This difference must be remembered because the EU has a much broader scope of application, both thematically and substantively, and it is for these two material differences in nature that the legal framework of operation of the EU is fundamentally different from that of the ILO. In other words, the legalisation process is at the epicentre of the EU system as a medium for attaining the integrationist ideals, while at the ILO level, legalisation is narrower in scope and intensity.

Secondly, there is the institutional difference. The institutionally distinguishing feature of the EU is the ECJ that has operated as the locomotive for legal integration in certain periods, thus providing *prima facie* an essential enforcing mechanism that is absent in the ILO.¹⁶⁰ Moreover, the enforcement mechanics of the EU are orientated towards the ECJ, but there is also a panoply of supplementing institutional support for the ECJ in the form of the Commission,¹⁶¹ the Member States, and the other Institutions. These must be approached in conjunction with a web of procedural provisions that enable those enforcement agencies to perform a supervisory task.¹⁶² These procedural provisions are not matched in the ILO system, thus providing the third point of difference.

The fourth difference is constitutional in nature. The crucial constitutional difference between the two systems is the fact that under the EU regime the individual is empowered to have a primary role in the enforcement process through the medium of the principle of direct effect.¹⁶³ Consequently, the individual has the capacity to enforce rights before national courts, if the relevant conditions are present.¹⁶⁴ The EU system is a constitutional legal order, with supremacy of EU law over conflicting national measures,¹⁶⁵ and with the principle of State liability¹⁶⁶ enabling the individual to claim compensation for the failure of the State to

¹⁵⁹ On the nature of the EU, see Weiler, "The Community System: the Dual Character of Supranationalism" (1981) *YEL* 273.

¹⁶⁰ On the role of the ECJ, see Weiler, "A Quiet Revolution: The European Court of Justice and its Interlocutors" (1994) 26 *Comparative Politics* 510; Toth, "The Authority of Judgments of the ECJ: Binding Force and Legal Effects" (1984) 4 *YEL* 1.

¹⁶¹ Mastroianni, R., "The Enforcement Procedure under Art. 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?" (1995) 1 *EPL* 535; Evans, A., "The Enforcement Procedure under Art. 169 EEC: Commission Discretion" (1979) 4 *ELRev.* 442.

¹⁶² Art. 234 EC, Art. 230 EC, Art. 226 EC, Art. 227 EC, Art. 228 EC.

¹⁶³ Prechal, S., "Does Direct Effect Still matter?" (2000) 37 *CMLRev.* 1047.

¹⁶⁴ Case 26/62, *Van Gend en Loos* [1963] ECR 1; Tridimas, T. "Horizontal effect of directives: a missed opportunity" (1994) 19 (6) *ELR* 621.

¹⁶⁵ Case 26/62, *Van Gend en Loos* [1963] ECR 1; Case 6/64, *Costa v. ENEL* [1964] ECR 585.

¹⁶⁶ Joined cases C-6/90 and C-9/90, *Andrea Francovich v. Italian State* [1991] ECR I-5357; Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur /Factortame III*, [1996] IRLR 267; Tridimas, T., "Liability for Breach of Community Law: Growing Up and Mellowing Down" (2001) 38 *CMLRev* 301.

comply with its implementing and other obligations.

Therefore, the EU is materially different from the ILO with reference to the web of provisions facilitating enforcement, the plethora of potential enforcers that include individuals, and the operation of a Court entrusted to safeguard the law of the Treaty under Art. 220 EC. The contrast could not be starker, but by taking the approach that regards enforcement as consisting of enforcement proper, supportive management, and soft persuasion, the existence of a spectrum of enforcement with varying degrees at each level would offer a clearer view of the nature of the relationship between the ILO and the EU in the enforcement of equal pay.

3.2. Enforcement of Equal Pay: the Variations of Enforcement

In terms of supportive management, “bilateral and package meetings are examples of instruments to improve the transposition of directives by means of knowledge transfer and capacity-building.”¹⁶⁷ There are also exchange programmes for labour inspectors, the Agency for Occupational Health and Safety in Bilbao, and the meetings of Senior Labour Inspectors that operate on the same rationale. The supportive management measures mentioned above are sporadic and are unjustifiably seen as gaining in importance within the EU,¹⁶⁸ while the situation is worse in relation to soft persuasion to the extent that Tallberg sees the EU as a “management and enforcement ladder.”¹⁶⁹

The EU is a system built around enforcement proper in relation to equal pay, with enforcement actions and preliminary references combining with individual enforcement of equal pay rights. The main layer of enforcement proper is the work of the ECJ, and to this topic this paper now turns.

¹⁶⁷ Hartlapp, M., “Two Variations on a Theme: Different Logics of Implementation Management in the EU and the ILO” (2005) Vol. 9 No. 7 *European Integration online Papers* <<http://eiop.or.at/eiop/texte/2005-007a.htm>>, at p. 8.

¹⁶⁸ *Ibid.*, at p. 16.

¹⁶⁹ Tallberg, J., “Paths to Compliance: Enforcement, Management, and the EU” (2002) 56 (3) *International Organisation* 609.

3.3. The Instrumental Role of the ECJ in Enforcement: Enforcement Proper

The landmark decision in *Defrenne I*¹⁷⁰ represents the first step in a long journey towards ensuring equal pay, with the ECJ accepting equal pay as a fundamental principle and Art. 141 EC as directly effective, but limiting the effect of the judgment for prospective purposes. Yet the first crucial step was made. In *Defrenne v. Sabena (No. 2)*,¹⁷¹ the Court held that Art. 141 EC had horizontal and direct application. The Court created the distinction between direct and indirect discrimination, the former being identifiable by the criteria of Article 141, whereas indirect discrimination is identified by reference to more explicit implementing provisions of a Community or national body. Moreover, Advocate General Trabucchi in *Defrenne v. Sabena (No. 2)* expressed the view that Art. 141 EC was not considered by the Commission and the Member States to be a complete and directly effective provision.¹⁷² Furthermore, Trabucchi concluded that while the words of Art. 141 EC may be regarded as vague and unspecific, the purpose of the provision is sufficiently precise. It was exactly this approach that was adopted by the Court, whereby the principle of equal pay was derived from the provision with no regard given to the complexity of factual situations where different types of work could be involved. The judgment can be seen as an example of the Court trying to derive a principle from a general and vague provision in order to expand the scope of the prohibitions imposed on Member States, but it led to unnecessary confusion. The issue was clarified in *Jenkins*¹⁷³ where it was held that a difference in pay between full-time employees does not amount to discrimination prohibited by Article 141 EC automatically, but only if it is an indirect way of reducing the pay of part-time workers because that group is made up exclusively or predominantly of women. This issue was a matter for the national courts to decide.

The ECJ went further in enforcing pay equality in *Commission of the European Communities v. Grand Duchy of Luxembourg*¹⁷⁴ where the ECJ insisted that a Member State could not invoke provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with Directive 75/117. Nonetheless, the approach of the ECJ has been dynamic and in *Gisela Rummler v. Dato-Druck*¹⁷⁵ the issue of equal work was approached in the context of setting promotion criteria based on an objectively quantifiable criterion of muscular strength. It was ruled that for criteria governing pay rate classification to be non-discriminatory, it must ensure that the work which is objectively the same attracts the

¹⁷⁰ Case 80/70, *Gabrielle Defrenne v. Belgian State* [1971] ECR 1-44.

¹⁷¹ Case 43/75, *Gabrielle Defrenne v. Sabena (No. 2)*, [1976] ECR 455.

¹⁷² *Ibid.*, at p. 485.

¹⁷³ *P Jenkins v. Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

¹⁷⁴ *Commission of the European Communities v. Grand Duchy of Luxembourg*, [1982] ECR 2175.

¹⁷⁵ Case 237/85 *Gisela Rummler v. Dato-Druck GmbH* [1986] ECR 2101.

same rate of pay whether it is performed by a man or a woman. In *Danfoss*¹⁷⁶ the burden of proof was placed on the employer to show that there was no discrimination in pay when the pay structure is not transparent.

The *Barber*¹⁷⁷ case presents an interesting example where the limitation of the retrospective effect of the judgment challenged the authority of the ECJ.

The starting point is the decision in *Defrenne v. Sabena (No. 2)*¹⁷⁸ and the ambiguity about what constitutes pay. In *Garland v. BRE*¹⁷⁹ and in *Worringham v. Lloyds Bank*,¹⁸⁰ benefits conferred as a result of the relationship of employment and contributions to the employees' occupational pension scheme were held to constitute pay coming within Art. 141 EC. The expansion of the meaning of 'pay' in the fields of social security benefits and pensions was bound to create difficulties and reactions.

The Court's approach can be seen as an attempt to supplement the area of non-discrimination and to broaden the scope of the principle, but in relation to pensions and social security benefits complex issues are involved. The framework is completed by Directive 79/7¹⁸¹ and the proposal for Directive 86/378¹⁸² intended to supplement the former, in the sense that occupational pensions were now to be seen as social policy matters. The consequence would be that pensions would not be regarded as pay, thus taken outside the strict scope of Art. 141 EC and within the more flexible structure of Directive 79/7. All these factors can be seen as setting the framework for the analysis of *Barber*.¹⁸³

The approach of the Court must be seen in light of the case law preceding *Barber*. In *Bilka-Kaufhaus*¹⁸⁴ the ECJ had to consider the claim by a female part-time worker challenging the employer's occupational pension scheme, under which part-time employees could benefit from the scheme if they had been employed for at least fifteen years. The scheme was financed by the employer, with no contributions from the workers, while it was adapted to correspond with the existing statutory social security scheme. The claimant was arguing that the scheme was in breach of Art. 141 EC because the majority of the part time workers were women.

¹⁷⁶ Case 109/88 *Danfoss* [1989] ECR 3199.

¹⁷⁷ Case 262/88, *Barber v. Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889.

¹⁷⁸ *Ibid.*

¹⁷⁹ Case 12/81, *Garland v. BRE*, [1982] ECR 359.

¹⁸⁰ Case 69/80, *Worringham v. Lloyds Bank*, [1981] ECR 767.

¹⁸¹ (1979) OJ L6/24.

¹⁸² (1986) OJ L225/40.

¹⁸³ Case 262/88, *Barber v. Guardian Royal Exchange*, [1990] ECR 1889.

¹⁸⁴ Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607.

The Court made two important points, one in relation to the case and the second in relation to the proposals considered for Directive 86/378. In relation to the former, it was held that a non statutory pension scheme could be within the scope of Art. 141 EC as it could constitute ‘pay’, which was a clear message to the Institutions in relations to the plans that excluded pension schemes from Art. 141 EC. Nevertheless, Directive 86/378 was adopted and it clearly excluded pension schemes from the scope of Art. 141 EC, which in effect contradicted the reasoning in *Bilka-Kaufhoaus*.

In *Barber* a group of male employees challenged payments made by their employer payable at different ages for men (65 years) and women (60 years). The scheme was contracted out, which meant that it was set up by the employer as a substitute for the statutory social security scheme and a statutory redundancy scheme. Therefore, the issue was whether a statutory scheme or a scheme contracted out as part of the obligations under the statutory scheme constituted ‘pay’ or social security benefit. The claimants argued that because the resulting payments from the scheme were in effect paid by the employer, they qualified as ‘pay’.

Therefore, the question was whether the specific type of scheme was within *Bilka* or *Defrenne I*.¹⁸⁵ The latter classified statutory pension schemes resulting from agreement with the national unions as being outside Art. 141 EC, while the former classified contracted out schemes as ‘pay’. Alternatively, the issue was whether such pension schemes were within the strict scope of Art. 141 EC or within the scope of Directive 79/7 that allowed for exceptions in relation to the pensionable age and other related benefits.

The ECJ ruled that contracted out pension schemes constituted ‘pay’, thus coming within the scope of the equal pay principle in Art. 141 EC,¹⁸⁶ while the scheme was in breach of the aforementioned provision.¹⁸⁷ The approach of the Court was therefore expanding the scope of Art. 141 EC in an area of high complexity and with severe financial consequences affecting a vast number of employers and with an ever greater number of potential applicants. The Court followed its approach in *Defrenne v. Sabena (No. 2)*¹⁸⁸ whereby it ruled that judgment in relation to schemes of the same type could not be relied on to claim entitlement to a pension with effect prior to the date of the decision.¹⁸⁹ The only exception was for workers that had initiated legal proceedings, at the Community or the national level, prior to the date of the

¹⁸⁵ Case 80/70, *Defrenne v. Belgium*, [1971] ECR 445.

¹⁸⁶ *Barber*, at para. 28.

¹⁸⁷ *Ibid.*, paras. 32, 34.

¹⁸⁸ *Op. cit.*, note 179.

¹⁸⁹ Case 262/88, *Barber v. Guardian Royal Exchange*, [1990] ECR 1889, at para. 45.

ruling.¹⁹⁰

However, the judgment created considerable uncertainty and confusion. The issue was whether Art. 141 EC applied to claims in relation to time in work completed before the decision of 17 May 1990 or whether it applied to claims for time in work after that decision. The interesting and differing point of this case is that the Member States were reluctant to wait for the Court to clarify the ambiguity, especially because of the nature of the issues involved and because of the financial element involved. Moreover, the Member States could not predict with certainty the approach of the ECJ in subsequent cases, since the Court had departed from *Defrenne I* and had bypassed the provisions of Directive 79/7 as supplemented by Directive 86/378. Therefore, the Member States took the remarkable step of attaching a Protocol to the 1992 EU Treaty of Maastricht that limited the retrospective effect of *Barber* to claims for time in work after the decision.¹⁹¹

It must be noted that the effect of a Protocol has the legal status of a Treaty provision in accordance with Art. 311 EC, with the effect that any decision of the ECJ that predates the Protocol will no longer be valid law from the moment of entry into force of the Protocol. The date of entry into force was 1 November 1993, thus leaving a window of opportunity for the ECJ to rule on one of the pending issues in order to indicate its reaction to the Protocol.¹⁹²

The opportunity came in the *Ten Oever*¹⁹³ case where the ECL followed the will of the Member States. In *Ten Oever*, the issue was the ambiguity of the limitations to the retrospective effect of *Barber*, and the Court adopted an identical approach to that of the Protocol. The Court held:¹⁹⁴

Given the reasons explained in paragraph 44 of the Barber judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the Barber judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

¹⁹⁰ *Ibid.*, paras. 44-45.

¹⁹¹ Protocol No. 2 attached to the Treaty of Maastricht.

¹⁹² See Harvey, "Legal Issues Concerning the Barber Protocol," in O'Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994), p. 329; Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1992) 29 *CMLRev.* 17, at p. 51.

¹⁹³ Case C-109/91, *Ten Oever v. Stichting*, [1993] ECR I-4879.

¹⁹⁴ *Op. cit.*, note 203, at para. 19.

Certain comments must be made in relation to the judgment. Firstly, the Court did not make a reference to the Protocol, thus trying to bypass the clear and direct challenge to its authority. The challenge came in the form of the Member States clarifying a legal situation without waiting for the ECJ to rule on the issue, which can be interpreted as lack of trust in the approach of the Court and as a possible loss of confidence in the ability of the ECJ to receive and understand the messages coming from the involved parties. Secondly, the ECJ approached the *Ten Oever* case as a mere expansion of its earlier case law, by trying to link the limitations to the scope of *Barber* on the basis of the reasoning of that case. *Barber* was referred to twelve times in the judgment in *Ten Oever*, which implies that the ECJ was approaching the latter case as an opportunity for clarification of the existing case law, which was not unnatural in the process of development of legal principles.

The significant element of this approach is the existence of a Protocol that effectively pre-ruled on the issue, thus in practical terms making the decision of the ECJ in *Ten Oever* a formality. However, the symbolic effect of the *Ten Oever* ruling was bound to have an impact on the legitimacy of the ECJ's approach. In this sense, the Court took a pragmatic approach whereby it did not insist on challenging the will of the Member States as expressed in the Protocol. The consequences of such a course of action would have irreparably undermined the legitimacy of the ECJ and would have created a constitutional crisis in which the Member States could not have been prevented from prevailing. The point is that within enforcement proper there is a disadvantage if the process is dominated by a court that is pursuing a strategically complex agenda when developing its case law. The consequence is that the actual protection of the right to equal pay, as was the case in *Barber*, becomes embroiled in a broader power struggle between the ECJ and the Member States. The adoption of the Protocol surely had an impact on the willingness of the ECJ to continue the expansion of its case law on equal pay discrimination, thus placing what is in effect a basic human right in a negotiable position. Nevertheless, even such examples are extreme and rare, and could not in any way counterbalance the effectiveness attributed to the enforcement process by the workings of the ECJ. In addition, the ECJ has proved sufficiently competent to strike those balances that would avoid a constitutional crisis and/or undermining the standard of protection afforded to equal pay.

Therefore, the Court made the best possible use of the opportunity presented in *Ten Oever* by complying with the Protocol and presenting that compliance as based on the *Barber* case and the natural process of developing and clarifying issues resulting from earlier decisions of the Court. That approach was founded on the numerous references to *Barber* and on the omission to refer to the Protocol. At the same time, it has to be remembered that the Court's decision in *Barber* was not overruled either by the Protocol or by the *Ten Oever* judgment. Instead, the

focus was on the scope of the limitation that the Court set in relation to the retrospective effect of *Barber* and not on the provisions of the Protocol.

In conclusion, the Court expanded the scope of Art. 141 EC, the essence of *Barber* was not challenged, the Court reacted in the most constructive way possible in the circumstances, and it did not express any preference in relation to the scope of the limitation it introduced in *Barber*. As for the timing, the *Ten Oever* judgment was delivered on 6 October 1993 and the Protocol entered into force on 1 November 1993. The complexity of the reasoning and the plethora of factors influencing the Court's approach are in effect practical constraints on the development of the case law on equal pay and have pushed the ECJ close to a collision course with the Member States.

3.4 Conclusion

The enforcement proper approach of the ECJ has been instrumental in ensuring enforcement of equal pay and it has adopted a dynamic approach that favoured equal pay and elevated it to a fundamental human right that is justiciable before national courts. It is in this respect that enforcement by the ILO is weaker, but that can be explained on the basis of the different structures, purposes, and degrees of protection within the three types of enforcement. Enforcement by the ILO and the EU cannot be compared directly because of these differences, while if the yardstick adopted is closer to enforcement proper, the EU system offers a higher degree of protection. What is important is the realisation of the existence of types and degrees of enforcement; only then can a comparison be meaningful. It is, therefore, submitted that is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of interpenetration of standards and degrees of enforcement.

CONCLUSION

The purpose of this study has been the assessment of the relationship between the ILO and the EU and the comparative analysis of the effectiveness of the two organisations in combating discrimination in pay. The basic organisation premise of the present thesis has been the exegesis of the current state of labour rights on the basis of the working hypothesis that there is a dynamic system connecting different legal organisations that interact and interpenetrate in order to contribute to the evolution of the corpus of labour rights.

That working hypothesis was methodologically important in creating the theoretical foundation that would enable the comparison of the two systems on an equal basis and at the exclusion of any preconceptions favouring either system. Such preconceptions would naturally be derived from the current bibliography that collectively emphasises the superiority of the EU's system in ensuring compliance with the legislative framework that regulates non-discrimination in pay. The removal of preconceptions is also supported by the adoption of a theoretical foundation that focuses on the nature, meaning and attributes of the concept of enforcement. That methodological analysis resulted in the identification of types of tactics that form a spectrum of enforcement that includes enforcement proper, supportive management and soft persuasion.

The enforcement proper approach stems from the utilitarian ideas of rational calculating actors that estimate costs and benefits of non-compliance and determine whether to comply with the obligations set through assessing possible sanctions flowing from non-compliance. The supportive management method perceives failures to comply with norms set by international organisations as a corollary of financial, administrative, or technical shortcomings due to a lack of resources or expertise, and not to opposition to norms. In the soft persuasion approach, compliance with norms is not achieved via instrumental influence, but by recognition of norms following a logic of appropriateness to which a State responds.

The meaning of enforcement that this paper refers to consists of the three aforementioned elements of enforcement, management, and persuasion, thus offering a holistic perception of the term enforcement. The mechanisms at the disposal of the ILO and the EU are very different as are their objectives and structural arrangements, with the EU having a more advanced position on the scale of legalisation. The adoption of the conceptual definition of enforcement as containing the three elements analysed above removes the possibility of comparing the ILO and the EU on the basis of a yardstick that represents just the enforcement proper element. In other words, the comparative analysis is exercised on a broader and more inclusive scale that allows the ILO to present certain important aspects of its machinery entrusted with the promotion of compliance by States.

This paper submits that the two systems exist in parallel and have different objectives and enforcement mechanisms at their disposal, but there is now a state of coexistence through the circulation of labour standards. The ILO has been setting the minimum requirements and the EU has incorporated the essence of those standards into the regional framework of regulations. Therefore, there is a circle in which both the ILO and the EU participate and it includes the stages of norm formation, transition to binding effect of those norms, and enforcement. The segments of the circle are not autonomous, since the ILO has functioned as the source for

minimum benchmarks for the EU, thus the presence of the ILO is continuous at both levels. In terms of enforcement, there are types of tactics that form a spectrum that includes enforcement proper, supportive management, and soft persuasion. This spectrum is the second bridging element between the ILO and the EU, and points to the existence of all three shades of enforcement in both systems but in different degrees of intensity. Nonetheless, at the EU level the availability of more stringent legal enforcement provisions has been used to create a corpus of protection for equal pay that is unparalleled at the ILO level, with the ECJ taking a proactive and contributive role in its decisions. It is, therefore, submitted that it is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete; a middle state exists that takes the form of interpenetration of standards and degrees of enforcement.

In relation to the ILO's assessment, the soft persuasion element is quite strong, while the element of supportive management is highly relevant. That is understandable because the ILO depends on consensus, as its tripartite structure shows, and thus concentrates on capacity-building through a combination of dialogue, action after agreement and financial/technical assistance. The enforcement proper element has been strengthened but the main ethos of the ILO and the procedural provisions are positioned against the application of a strong element of enforcement proper. That is not to say that enforcement as an entity is not effective, because with the emphasis on consensus and capacity building and the different practices to complement them, the lacunae in enforcement proper are filled. The 1998 ILO Declaration introduced certain important changes to the labour right regime of the ILO and to the non-discrimination in employment right. Nonetheless, the lack of specific references to equal pay could create a problem in downgrading the status of Convention No. 100 through its exclusion, while the major changes in the monitoring system are different from the traditional enforcement mechanisms of the ILO. The consequence of the weakened supervision system could further reduce the low intensity of enforcement proper of the ILO, while at the same time it can be seriously doubted whether the management and persuasion aspects of the expanded enforcement concept used in this study, would be promoted. In other words, if the 1998 ILO Declaration is the paradigm for the future of the ILO and if the equal pay right is brought within the spirit of the Declaration, the enforcement capacity of the organisation would be seriously and unnecessarily weakened.

The EU is a system built around enforcement proper while supportive management measures are sporadic and are unjustifiably seen as gaining in importance within the EU, and the situation is worse in relation to soft persuasion to the extent that it could be argued that it is at an embryonic stage of development. The main layer of enforcement proper is the creation of the work of the ECJ that has been instrumental in ensuring enforcement of equal pay and has

adopted a dynamic approach that has elevated the principle to a fundamental human right that is justiciable before national courts. Moreover, there is a plethora of enforcement actors that could utilise the ECJ through initiating proceedings in national courts or the ECJ itself and essentially individuals are a crucial part of that system. The main downside of the ECJ's enforcement proper system is evident in the case law that concerned and followed the Barber case and it relates to the complexity of strategic considerations that influence the Court. In other words, the Court is often a step ahead of the political actors and that creates a power gap that could victimise the individual in a specific case. Nonetheless, the EU's system is highly legalised and predictable, and the individual enjoys protection of equal pay akin to the protection offered to fundamental human rights. What is still a reminder of the practical problems is the documented existence of a pay gap in Member States of the EU, which emphasises the complexity involved in ensuring compliance.

Therefore, the enforcement proper by the ILO is weaker, but that can be explained on the basis of the different structures, purposes, and degrees of protection within the three types of enforcement. The enforcement by the ILO and the EU cannot be compared directly because of these differences, while if the yardstick adopted is closer to enforcement proper, the EU system offers a higher degree of protection. What is important is the realisation of the existence of types and degrees of enforcement, and it is only then that a comparison can be meaningful.

It is, therefore, submitted that is an oversimplification to either emphasise the enforcement divergence between the ILO and the EU in the field of equal pay or to regard it as obsolete. A middle state exists that takes the form of interpenetration of standards and degrees of enforcement. The divergence of the mechanisms used by the ILO and the EU is evident with regard to enforcement proper, while there are trends of convergence in relation to soft persuasion and supportive management with the EU following the ILO's lead. Moreover, there is an overlap as to the norm formation between the two organisations, and that represents the most important element of convergence between the ILO and the EU in the sense that neither can be analysed in isolation from the other.

Whether the future will bring total convergence is doubtful and also undesirable. The issue of future divergence is possible but only in terms of mechanisms and not in relation to the content of labour rights in general and equal pay in particular. The desirability of such an outcome of divergence is still undefined; time will be the ultimate judge.

Cite as: Constantinos Kombos and Maria Hadjisolomou, The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?, vol. 11.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (September 2007), <<http://www.ejcl.org/112/article112-1.pdf>>.