Judicial Development of Collective Labour Rights – Contextually

Guy Davidov∗

I. Introduction

The decision of the Supreme Court of Canada in Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,1 which raised the right to collective bargaining to a constitutional level, relies heavily on a “contextual” analysis. Previous precedents (most notably the “labour trilogy”2), which the Court explicitly overruled, are criticized for adopting a “decontextualized approach”.3 The Court goes on to insist on sensitivity to context both at the stage of deciding whether the constitutional right has been infringed,4 and at the stage of deciding whether the infringement can be justified.5

The idea of interpreting a constitutional right (specifically, section 2(d) of the Charter) in light of “context” is strongly criticized by Brian Langille,6 who fears it will result in judicial overreach. Langille raises two related concerns. First, he is concerned about the prospect of courts intervening in the details of labour law, noting that this has proved highly problematic in the history of Canadian labour law. Note, however, that this argument is itself highly contextual. It relies on the specific experience of Canadian labour law with ill-advised interventions by courts, to advise against such interventions in the future. But there is nothing in principle to suggest that judges are less capable of developing the law in the labour context than in other areas of law. Indeed, as I will show below, in other countries (specifically, the example given below – in Israel) judges have proved more capable than the legislature in responding to labour market developments.

Second, and more fundamentally, Langille objects to the idea of turning a “freedom” (to organize, or to bargain together with others) into a “right” which imposes corresponding duties on others. He also objects to the idea of “collective” (as opposed to individual) rights. However, once again there is no principled or theoretical reason to necessarily

∗ Elias Lieberman Chair in Labour Law, Hebrew University of Jerusalem. Comments are welcome: guy.davidov@huji.ac.il.
3 Supra note 1, at par. 30.
4 Namely, whether section 2(d) of the Canadian Charter of Rights and Freedoms, which protects freedom of association, has been violated.
5 Namely, whether the infringement is “demonstrably justified” and proportional, and therefore constitutional in line with section 1 of the Charter.
limit constitutional protection (whether in the labour law context or generally) to individual freedoms. The rich literature supporting social and economic rights shows that there is no clear distinction between “negative” freedoms and “positive” rights; and sometimes rights remain illusionary without a positive obligation on the State to promote them.\(^7\) There are similarly strong arguments in favour of recognizing collective rights alongside individual ones.\(^8\) This is not to suggest that freedom of association must be understood as a collective or positive right – just that there is no analytical reason to impose the opposite understanding. At the end of the day it is open for each society to decide whether to constitutionalize positive and collective rights, and if courts are left with the task of deciding how to interpret a constitutional right, they should consider the purpose of the relevant provision. Judges in most countries (with the notable exception of the U.S.) do not place significant importance on the original (historic) intent, but rather look for general purposes and justifications that could change over time. In other words, interpretation involves consideration of the context.\(^9\)

Among other things, when making decisions on the scope of freedom of association it is relevant to consider, for example, the relevant history, culture, and whether there is constitutional protection to property (on the one hand) and equality (on the other). As part of this “context”, judges are also likely to consider the extent to which certain protections are needed. My argument below is that Israeli judges have been developing the law in recent years – creating new labour rights – because they thought that increased protection is needed. Admittedly, these newly-created or improved rights are not constitutional rights. Judges are likely to be more hesitant – and rightly so – when changing their view on what the constitution requires. Yet it seems to me that context – including changing labour market realities – informs and should inform (at least to some extent) constitutional interpretation as well. Hence, the Israeli example can perhaps shed some light on the underlying reasons for the dramatic change of heart in BC Health – a change which is likely to pave the way to recognizing a constitutional right to strike as well.\(^10\)

---


\(^8\) For the view that a right to strike is derived from freedom of association see, e.g., Ruth Ben-Israel, The Case of Freedom to Strike: A Study Prepared for the International Labour Office (Deventer: Kluwer, 1988) 25-29. This is also the view adopted by the ILO Freedom of Association Committee (see ibid., at 64-70; and see Lee Swepston, “Human rights law and freedom of association: Development through ILO supervision” (1998) 137 Int. Labour Review 169). See also the discussion in Tonia Novitz, International and European Protection of the Right to Strike (Oxford: Oxford UP, 2003) 65 ff.

\(^9\) Indeed, in BC Health the Court equates between a purposive approach and a contextual approach (supra note 1, at par. 30).

\(^10\) See, Langille, supra note 6, at 207; Brian Etherington, “The B.C. Health Services and Support Decision – The Constitutionalization of a Right to Bargain Collectively in Canada: Where did it
could also provide a supporting justification for this move. If changing realities of the labour market mean that freedom of association becomes hollow and meaningless without a corresponding right to bargain collectively and strike, then the purpose of the constitutional protection could be frustrated. Under such circumstances it makes perfect sense for the Court to interpret the right in a way that will promote freedom of association – including by deriving new rights from it, even if these were not needed in the past – to ensure that the purpose of entrenching freedom of association is achieved.

II. The setting: can Israel be a good source of comparative law?

The aim of this short contribution is to suggest that some lessons can be learned from the Israeli experience concerning the development of collective labour rights. But this requires a preliminary justification. Why should Canada look at the experience of a small and controversial (to put it mildly) State? There are three reasons why readers should put aside any objections they may have to actions of the Israeli government, and consider the jurisprudence developed by Israeli courts in the current context.

First, Israel has a unique combination of strong labour courts and a common-law tradition that allows them to develop the law. The labour courts have broad jurisdiction over labour, employment and welfare matters, following the model of Germany, Sweden and some other European countries. Judges of this system have unique expertise in labour law, and usually a world-view that supports the idea of labour law, with a healthy suspicion of market values and freedom of contract in the labour context. At the same time, the Israeli legal system is based on a common-law tradition, which leaves judges relatively broad latitude to develop the law and create new rights. It is therefore quite common for the National Labour Court to rethink current workplace protections and develop new ones, more so than in other countries. While Israeli labour courts have the legitimacy to develop the law in the common-law tradition, they do not feel bound by values often associated with common-law systems such as strong protection to freedom of contract and property rights. For better or worse, they constantly develop the law in a way they believe to be normatively justified.11

Second, Israel has a history of exceptionally high union density and strong collective bargaining, followed by significant decline in the last couple of decades. Although the decline of unionism is hardly unique to Israel, it is fair to say that we have experienced this phenomenon more sharply: union density fell from 80-85% in the early 1980s to 40-

45% in 2000,\textsuperscript{12} and has probably continued to decline ever since. This has prompted response from courts, perhaps more quickly and forcefully than in other countries.

Finally, there are also some similarities in constitutional structure between Israel and Canada. The Israeli Knesset (the Parliament) enacted a number of Basic Laws over the years, which are understood by the Knesset and the Supreme Court to have constitutional stature. Most notably, the Basic Law: Human Dignity and Freedom, enacted in 1992, which entrenches a number of human rights and freedoms, was modeled to a large extent after the \textit{Canadian Charter of Rights and Freedoms}. The limitation clause of this Basic Law is very similar to Section 1 of the \textit{Charter} and the Basic Law as a whole has already attracted numerous petitions, resulting in a rich body of case-law. Although the Basic Law does not include any explicit reference to freedom of association, the “right to human dignity” which is the cornerstone of the Basic Law has been interpreted very broadly by the Supreme Court, and is likely to include protection to freedom of association. We therefore face in Israel questions that are very similar to the ones currently debated in Canada.

III. The law: between a “basic right” and a constitutional right to strike

Israeli courts have long considered the right to strike to be a “basic” or “fundamental” human right, and sometimes they have also described it as a “constitutional” right. In 1994, shortly after the enactment of Basic Law: Human Dignity and Freedom, the Chief Justice of the Supreme Court at the time, Aharon Barak, authored a comprehensive book on constitutional interpretation, where after a wide-ranging analysis of the Basic Law he dedicated a couple of paragraphs to freedom of association and the right to strike.\textsuperscript{13} Barak concluded that freedom of association, because it is closely linked to freedom of speech, is derived from human dignity and therefore has ascended to a constitutional level. As for the right to strike, Barak noted that the question is more difficult, but added that he tends to agree with the view that the right to strike is also derived from human dignity, because it is needed to realize employees’ freedom of association and give effect to the autonomy of their free will.

In a 1995 judgment of the Supreme Court, justice Doc Levin adopted Barak’s view, with the other two justices on the bench leaving the issue open for future decision.\textsuperscript{14} In a 2000 judgment of the National Labour Court, the President of the Court, Steve Adler, adopted


\textsuperscript{14} Attorney General v. Bezeq, 49(2) PD 485 (1995).
the same view speaking for the entire Court. In another case the National Labour Court added that “freedom of association in labour relations is comprised of the right to organize, the right to bargain collectively and the right to strike”. Thus, it may appear as if Israel now has a constitutional right to strike. Nonetheless, none of the cases mentioned above involved any challenge to legislation or even a governmental decision. The above-mentioned statements were made in the context of judgments protecting strikes from employers’ actions or placing limits on strike action. The current constitutional jurisprudence of the Supreme Court is actually more sceptical towards the idea of deriving concrete rights from human dignity. So it is fair to assume – although it is yet to be decided explicitly – that the right to strike will not be considered a constitutional right, in the strong sense of a higher law which all legislation must conform with.

In the past few years there have been discussions in the Knesset about the adoption of a Basic Law: Social and Economic Rights, or a full constitution which will include (among other things) such rights. All the drafts discussed in this context include the right to strike as a relatively non-controversial social right. Nonetheless, for various political reasons constitutional reforms of this kind are not expected in the near future.

---


17 See, e.g., The Movement for Quality Government in Israel v. The Knesset, judgment of May 11, 2006 (discrimination violates human dignity only when it closely implicates the autonomy of the individual etc.); Ha-Mifkad Ha-leumi v. The Attorney General, judgment of Aug. 20, 2008 (the Court is still undecided on whether freedom of speech is constitutionally protected as part of human dignity – although most judges appear to support this view).

18 An attempt to challenge legislation that included wage cuts in the public sector, directly undercutting collective agreements, was dismissed without serious discussion (Research Staff of the Defense Ministry Union v. The Government of Israel, judgment of Dec. 31, 2003 (Supreme Court)). This was perhaps due to the fact that the legislation was based on an agreement between the Government and the Histadrut, Israel’s major labour union, in the face of a difficult financial situation – and therefore the judges may have considered the limitation to be demonstrably justified and proportional on its face. But the workers who instigated the petition were not represented by the Histadrut – the legislation has undercut agreements signed by other (smaller) unions as well. There was accordingly a valid argument that the right to collective bargaining – and with it freedom of association – has been infringed; but the Court refused to consider this argument. Arguably, therefore, the Supreme Court has signaled that the right to collective bargaining is not constitutionally protected in Israel as well. Although this is hardly a settled law – there is no explicit decision or any real discussion of the matter – the National Labour Court has already followed this ruling in a couple of other cases (see, e.g., High School Teachers Union v. Union of Local Authorities in Israel, judgment of Sept. 30, 2009).

19 See, most notably, the Basic Law: Social Rights Bill (1994), section 4; the Israeli Democratic Institute’s proposal for a constitution (2005), section 31; and the draft constitution prepared by the Knesset’s “Constitution, Law and Justice Committee” (2006), chapter 2, section 20(c).
At the same time, there are no doubts about the status of the right to strike as a “basic right” (which courts sometime also describe, perhaps mistakenly, as “constitutional”) – just like freedom of speech, freedom of association, freedom of occupation etc. Designating the right to strike as a “basic right” is not merely a figure of speech – according to rules developed by the Supreme Court long before the adoption of Basic Law: Human Dignity and Freedom, basic rights (declared as such by the Court itself) enjoy three important protections. First, all pieces of legislation are interpreted with the assumption that there was no intention to infringe basic rights. Second, Government cannot infringe such rights without an explicit authorization in legislation. And third, by-laws and regulations can be struck down if they infringe basic rights without explicit authorization.20

Although obviously weaker than the ability to strike down legislation, this has still proved to be highly significant. Often the court can use creative interpretation to reach the same result without the direct “clash” involved in invalidating a law. So it is fair to say that although Israel does not have a constitutional right to strike strictly speaking, the right to strike in Israel does in fact hold some constitutional stature; it could perhaps be described as a weak constitutional right.

VI. Judicial development of collective labour rights

Although a discussion of whether a right to strike is (or should be) constitutional has hardly developed in Israel, a lot can be learned from judicial development of collective labour rights at the non-constitutional level. Below I briefly describe some major developments of the past 10-15 years in three contexts: freedom of association, the right to bargain collectively and the right to strike. In all three contexts there have been dramatic developments, with the National Labour Court sometimes explicitly noting that change is needed in response to changing circumstances, most notably to counteract the weakening of unions.21 While the Court has also referred to international, comparative and constitutional sources, for the most part it appears that the development of new protections was driven by the view that there is increased need for such protections.

Until the 1980s, the Histadrut (Israel’s major labour union) was extremely powerful, with a large majority of the workforce unionized. Employers have not objected to

---

20 See, e.g., Bejerano v. Minister of Police, 2 PD 80 (1949); Kol Ha-am Ltd. v. Minister of Interior, 7 PD 871 (1953); Miterani v. Minister of Transportation, 37 PD 337 (1983).

21 The President of the National Labour Court, Steve Adler, was most explicit about this in an article he published: Steve Adler, “The Freedom to Strike in the Eyes of the Court”, in Berenzon Book: Vol. II (Aharon Barak and Haim Berenzon eds., Jerusalem: Nevo, 2006) 475, 487-492 [Hebrew]. However, there are hints to the same reasoning in the case-law as well; see, e.g., Israel Electricity Company v. The Histadrut, judgment of Oct. 10, 2007, at par. 12.
unionization, at least not in the sense of actively discouraging and fighting it. Starting from the late 1980s, with the *Histadrut* gradually weakening and global competition creating new pressures, resistance to unionization started to appear. Such resistance became more overt and blatant over the years (although it is still lower than the levels existing in North America). When employers started to fight attempts by employees to organize, the National Labour Court responded by strengthening the protection of freedom of association – most notably, by allowing enforcement of the contract of employment (reinstatement) when dismissals were the result of an attempt to curb unionization.22 Reversing a long-held position that objected to “forcing” an employer to employ someone, the Court noted that this was necessary in order to protect the ability of workers to organize. Indeed, if we are faced with blatant dismissals of workers active in organizing, financial compensation is hardly sufficient as a remedy. Employers might still have an incentive to pay and continue with such practices. Reinstatement, on the other hand, sends a clear message to employers and to other workers in the same workplace wishing to organize, that the right to organize is truly protected.

Another protection developed by the Court to strengthen freedom of association is the prohibition on dismissing employees because they are more costly as a result of being unionized. As a result, in economic dismissals, when only part of the workforce is included within the scope of a collective agreement, employers cannot chose to dismiss more of the unionized employees and less of the non-unionized ones.23

As for the right to bargain collectively, two major developments are noteworthy. First, the National Labour Court has increasingly broadened the issues considered to be open for collective bargaining, concurrently limiting the issues previously considered to be within the employers’ unilateral prerogative.24 In the past, the *Histadrut* has often succeeded in using its power to influence such decisions (e.g. a decision on the number of positions in a certain department, or a decision on outsourcing certain tasks). Now less powerful, the *Histadrut* has asked the Court to declare that such matters are issues for collective bargaining, meaning that they can also justify a strike. The Court agreed that outsourcing decisions affect workers’ rights or at least are likely to have an effect in the future;25 and that the number of positions also has an indirect impact on workers and at least this impact should be subject to negotiations.26

The second development concerns a duty to bargain imposed on employers. Once again, such a duty was not needed when employers were not likely to reject an advance from the almighty *Histadrut*. But there are increasingly cases in which the *Histadrut* as well as

---

24 I discuss some of these cases in Davidov, *supra* note 11.
other (smaller) unions request the Court’s help in bringing employers to the negotiating table. Developments on this front were gradual. First, the National Labour Court introduced a “duty to consult” the union when an employer is introducing significant changes that impact its employees. Then this was turned into a duty to bargain, developed by the Court without any mention for such a duty in Israeli legislation – but still only where there is a representative union and an ongoing relationship (with previous collective agreements) between the parties. Finally, very recently the Court has introduced a duty on employers to bargain with a new representative union even when there is no previous relationship between the parties – i.e. an employer can no longer refuse to negotiate even towards a first agreement. Interestingly, this newly created right was adopted soon afterwards by the Knesset and added into the Collective Agreements Act. But the Court itself introduced it without any direct basis in legislation, maintaining that the duty to bargain follows from the idea of a representative union included in the legislation, and necessary to give effect to this idea. The Court further reasoned that the duty to bargain can be derived from the duty to act in good faith which is included in Israeli contract law.

Finally, just as Israeli labour relations have witnessed increased resistance to workers’ organization and refusal to recognize unions and negotiate with them, we are now increasingly witnessing attempts to break strikes by force. The National Labour Court reacted quite forcefully to such attempts, developing new protections to the right to strike. Thus, for example, there is a prohibition on dismissing striking employees; a prohibition on moving materials to a different plant (of a sister company) in order to frustrate a strike; and a prohibition on the State to interfere with the strike by helping the employer. There is also a significant narrowing, in recent years, of the scope of “political” (and therefore illegitimate) strikes. Thus, for example, “quasi-political” strikes – directed against the State but on issues with direct impact on the striking workers – are now allowed to continue for long periods of time. All these developments are considered by the Court to be necessary in light of changing labour market realities.

---

30 Collective Agreements Act of 1957, as amended, section 33h1.
33 The Histadrut v. Ministry of Transportation and Metrodan, judgment of March 3, 2005 (the Court issued an order prohibiting the Minister of Transportation from granting a temporary license to a bus company, to operate in a city where workers of the existing bus operator were on strike). See also The Port Authority v. The Histadrut, judgment of Dec. 9, 2003 (the Court prohibited the port authority from opening an alternative dock in order to frustrate a strike).
34 For a brief review of these judgments see Davidov, supra note 11.
Changes in collective labour rights, as described above, are based on the idea that the right to bargain collectively and the right to strike are derived from freedom of association – and protecting these rights is necessary in order to give effect to workers’ right to organize. Often this is implicit in the case-law, but sometimes the point is made explicitly as well.36

V. Conclusion

It is widely accepted that laws should be interpreted purposively. This applies to constitutions as well. As part of a purposive interpretation of the Charter, it is pertinent for the Court to consider the context. There is no one meaning of the term “freedom of association” and the Court cannot – and should not – assert the scope of this right by looking at dictionaries or some other “objective” sources. The purpose of constitutionally entrenching freedom of association can change from one society to another, and from time to time.

As part of this interpretive process, courts should consider labour market realities and which protections they necessitate. I have used the Israeli example to show how courts elsewhere are developing the law continuously in response to changes in the labour market and labour relations. The Supreme Court of Canada was right, in my view, to review its previous judgments and determine that in order to truly protect freedom of association, there must be constitutional protection to the right to bargain collectively, and it would be right to take the next step and extend constitutional protection to the right to strike as well. There is not much meaning to the right to organize in the labour context if workers are prohibited from using their union to bargain collectively, and there is little point in allowing them to bargain collectively if they are not allowed to strike. This was probably true in the 1980s as well, when the Court rejected this view.37 It is certainly true today, when unions are weaker, governments are often hostile, outsourcing and subcontracting are widespread, global competition is fierce, and workers are often employed by small, less-established organizations that are less likely to provide decent work conditions and at the same time are more difficult to organize.38

It may be ironic that unions are winning their case at the Supreme Court of Canada only after becoming weaker (and as a result less feared). And there are surely many explanations for this irony that are unflattering for the Court. But there is also a benign justification that should not be ignored: as unions become weaker, they need constitutional protection more – and a purposive/contextual interpretation of Charter rights must take into account the fact that new rights are needed in order to protect the same basic freedoms.

Giving the right to bargain collectively and the right to strike constitutional status does not necessarily mean placing corresponding duties on employers. It could also simply mean that the legislature must allow collective bargaining of workers (i.e. exclude such bargaining from anti-trust laws) and provide basic protection to strikes (e.g. prevent employers from dismissing employees because they participate in strikes). I did not purport to consider the scope of these rights in the current contribution. My aim was different and modest: to argue that the Supreme Court of Canada was right in considering context – and specifically what protections are needed in light of changing labour market realities – when interpreting the scope of section 2(d) of the Charter. Hopefully the comparative insights from Israel were useful in helping to make this point.

---