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Constitutionalism and Anti-Privatisation Strikes: Introducing an Eclectic Model

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The rise of neoliberal agendas of political actors and a wave of privatisation in the globalisation era have often been followed by anti-privatisation strikes. These are union strikes against the privatisation process and against contracting out and opening markets to competition. The article presents the distinction between different versions of constitutionalism regarding anti-privatisation strikes. It discusses two approaches to constitutionalism – the economic approach and the collective approach – and their manifestation in the case law of Israel and the United Kingdom.

The collective approach suggests the recognition of a constitutional status of collective rights as a basis for counter-balancing the neoliberal practices of regulators and political actors. Following the effects of liberalisation on the labour market – both in influencing union organisational capacity and in weakening job security of individual employees, the collective approach is aimed at protecting employees' rights in a globalised-privatised era. Within the collective approach, constitutionalism is used as a basis for recognising anti-privatisation strikes. In contrast, the economic approach denies the existence of a constitutional right to strike against privatisation.

The article presents an eclectic model which merges the two approaches, and advocates its adoption. Drawing on New Institutional Economics, the eclectic model offers a theory for moderating the constitutionalism practice and developing partial and restrained constitutionalism. It proposes the adoption of a constitutional right to strike against privatisation, when its application reduces transaction costs and advances efficiency and economic goals for the benefit of the public.

Keywords: anti-privatisation strike, collective constitutionalism, economic constitutionalism, eclectic model, transaction costs, New Institutional Economics, constitutional right to strike

1. Introduction

Recognition of labour rights as human rights has been discussed in legal scholarship,[1] including the recognition of the fundamental status of collective rights.[2] Nevertheless, this scholarship has not extended to the constitutional status of collective action against privatisation.

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[1] Alan Bogg and Keith Ewing, 'A Muted Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labour Law and Policy Journal* 379; Eric Tucker, 'Labour's Many Constitutions' (2012) 33 *Comparative Labour Law and Policy Journal* 355; Brian Langille, 'The Freedom of Association Mess: How We Got into It and How We Can Get out of It?' (2009) 54 *McGill Law Journal* 177.

[2] Judy Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining and Strike' (2015) 68 *Current Legal Problems* 267. The reality of the tension between labour interests and human rights has also been discussed: Guy Mundlak, 'Human Rights and Labour Rights: Why Don't the Two Tracks Meet?' (2012) 34 *Comparative Labor Law and Policy Journal* 217. Several court rulings have also discussed the issue of recognising labour rights as constitutional rights. As for discussions on the constitutional status of the right to organise, see CDA 25476-09-12 *The New General Histadrut v Pelephone* (2 January 2013).

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Nor does existing literature discuss the economic considerations and justification for recognising a constitutional right to strike beyond the realm of labour rights as human rights. This article aims to address that gap and discuss constitutionalism as it relates to the specific issue of privatisation. It explores the connection between constitutionalism and the recognition of strike action against privatisation. The article also explores the implications of a constitutional right to strike in times of privatisation for the public interest in enhancing efficiency and economic goals.[3]

The research question which the article explores is the following. What is the suggested approach that courts should embrace regarding the application of constitutionalism in relation to strikes against privatisation? The article presents the concept of the anti-privatisation strike (APS), which is a union strike by employees against the privatisation process. Strike action is an important tool in strengthening the ability of workers to negotiate working terms and conditions and in defending labour rights. Nevertheless, the APS bears negative ramifications for the economy as a result of the potential for preventing privatisations which are needed in order to reduce product prices and improve the supply of services. Hence, the APS might undermine the public interest in performing essential reforms and interfere with free competition goals of the privatisation process.[4] It therefore raises conflicts between workers' rights, which may be affected by privatisation, and the improvement of economic conditions through privatisation. Collective action involving legislation or regulators' decisions to promote privatisations are also a challenge to governmental public policy.[5]

The article compares two main constitutional approaches to the APS: the economic approach and the collective approach. The economic approach emphasises the interest in economic growth, achieving effectiveness, free competition and the free movement of capital. It denies the constitutional status of the right to strike in the context of privatisation and rejects recognition of the APS. In contrast, the collective approach recognises the constitutional status of collective rights and applies collective constitutionalism, which can be defined as the application of the constitutional right to collective action as a basis for recognising the APS.

The article presents the jurisprudence of Israel and the United Kingdom as two distinct examples of the application of constitutionalism. The collective and economic approaches presented by the Israeli and UK cases are not always dichotomous, but they provide a range of responses. Certain courts tend to be closer to adopting one outlook while others may be characterised by the other approach. The article claims that neither approach is practical by itself and presents an eclectic model, which merges both approaches and which courts should embrace. The eclectic model resolves the problems raised by the current application of constitutionalism in different judiciaries. The article argues that the basic approach should be collective constitutionalism,

[3] George Yarrow, 'Privatisation in Theory and Practice' (1986) 1 *Economic Policy* 323, 323–24.
[4] The public interest is the welfare and well-being of the public in general, which is reflected in achieving conditions of free competition and a reduction in the prices of products and services.
[5] The term 'privatisation' in this article includes privatisation of the workplace, as well as contracting out and opening markets to competition.

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but that because of its flaws it should be modified with various elements of the economic approach. That is, in principle a constitutional right to strike should be recognised but, given the problems raised by the collective approach, economic considerations should be incorporated into the model. Hence, the eclectic model will be characterised by a somewhat restrained form of constitutionalism.

The selection of the specific judicial systems is based on the common law characteristics that they share, so that comparisons may be made.[6] The Israeli and UK systems share the absence of formal recognition of a constitutional right to strike. Hence, the article will examine the issue of applying a constitutional right to strike in jurisdictions in which such a right is not explicitly recognised in constitutional documents.

The new eclectic model which the article advocates is based on New Institutional Economics (NIE).[7] The NIE theory aims to increase efficiency[8] by optimising transaction costs.[9] Transaction costs are the costs that are incidental to every market transaction, which in our case relate to incidental costs of carrying out the privatisation reform.[10]According to the NIE approach, institutional arrangements matter and we should distinguish between different kinds of labour market setting,[11] service and privatised function.[12]

The eclectic model should be implemented in accordance with the following eight criteria and judicial tests:

- whether the APS involves working conditions;
- where it does, whether union power (and mainly union density) has declined in a given labour market;

[6] In the UK, despite the absence of a formal constitution, according to the Human Rights Act 1998 a law must be interpreted in compliance with the European Convention on Human Rights (ECHR). In Israel, even though a formal constitution has never been adopted, the two Basic Laws – Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation – are perceived by the courts as having constitutional status.

[7] Jean-Michel Glachant and Yannick Perez, 'Regulation and Deregulation in Network Industry' in Eric Brousseau and Jean-Michel Glachant (eds), *New Institutional Economics* (Cambridge University Press 2008) 328, 328–29; Kwangseon Hwang, 'Contracting in Local Public Organizations: The Institutional Economics Perspective' (2015) 15 *Journal of Public Affairs* 237; Suzanne Young, 'Outsourcing: Uncovering the Complexity of the Decision' (2007) 10 *International Public Management Journal* 307; Paul L Joskow, 'Introduction to New Institutional Economics: A Report Card' in Brousseau and Glachant, ibid 1, 7–8. Institutions include social, cultural, political and economic institutions.

[8] Efficiency is a situation in which the aggregate income minus the aggregate costs – including transaction costs – is high; hence, it is a situation of the highest profit and the least costs. When there is efficiency, transaction costs are zero and there is competition within the markets: Douglass C North, 'The New Institutional Economics and Third World Development' in John Harriss, Janet Hunter and Colin M Louis (eds), *The New Institutional Economics and Third World Development* (Routledge 1995) 17, 17–19.

[9] Glachant and Perez (n 7); EJ Goedecke and GF Ortmann, 'Transaction Costs and Labour Contracting in South African Forestry Industry' (1993) 61 *South African Journal of Economics* 44, 45.

[10] Goedecke and Ortmann, ibid 44–45; Ronald H Coase, 'The Problem of Social Cost' (1960) 56 *Journal of Law and Economics* 837. Transaction costs in our case include bargaining costs, costs paid for finalising agreements, compensation paid to employees in an attempt to obtain their approval of new reforms, supervision costs and external costs imposed on the public.

[11] Hence, the eclectic model considers the monopolistic status of certain corporations and the exaggerated power of unions in monopolistic industries.

[12] Joskow (n 7).

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- involvement of governmental prerogative, coercive power or policy design is a factor, where special governmental skills are required for operating the public service and in supervising privatised services;
- whether core functions of the public organisation are outsourced, especially when permanent core functions are contracted out;
- whether the APS occurs in a monopolistic market in which unions enjoy special power and reforms are of special importance to the public;
- whether the APS involves opening markets to competition and introducing new private competitors into the market, and the collective action is aimed against a third party – a private competitor;
- whether the APS involves either essential services or utility services where unions enjoy considerable strength and privatisation reforms are especially needed;
- whether the collective action prevents the privatisation process from taking place (for instance, by withholding necessary data or reports that are vital for carrying out the privatisation process).

Courts should examine these criteria within the application of the eclectic approach and consider their implications for transaction costs.

The article is structured as follows. Section 2 discusses constitutionalism in the context of the APS and existing approaches to constitutionalism. It starts with a discussion of the state of collective rights in a globalised-privatised world as a background to the question of recognising a constitutional right to strike, and then presents the controversy over the status of strike action as a fundamental right. It then discusses the collective and the economic approaches, and considers the linkage between the adoption of collective constitutionalism and the protection of a specific right to strike against privatisation. This is followed by the justification for rejecting collective constitutionalism and the economic approach as stand-alone approaches, and the need to develop a third model of restrained constitutionalism.

Section 3 discusses developments regarding the APS in the jurisprudence of Israel and the United Kingdom and the application of the two different approaches of constitutionalism. It starts with a discussion of the Israeli position and the adoption of collective constitutionalism in recent years. It then discusses the jurisprudence of the UK, which embraced the economic approach and rejected the application of a constitutional right to strike against privatisation. This is followed by a comparison of the Israeli and British jurisprudence and consideration of the weaknesses of both systems. It concludes with the need to embrace a new model that offers a solution to the problems arising from the existing approaches. Section 4 of the article introduces the eclectic model, presenting a new theory for the partial application of constitutionalism in the context of the APS, in accordance with the NIE approach. It first discusses embracing the eclectic model based on the NIE theory and its rationale, the logic of the eclectic model and its aim of reducing transaction costs. Guidelines are then suggested for putting the eclectic model into practice, presenting eight judicial tests to be used within the eclectic model. The section concludes with a discussion of potential critiques of the proposed eclectic model.

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2. CONSTITUTIONALISM AND THE APS

2.1. THE STATE OF COLLECTIVE RIGHTS IN A GLOBALISED-PRIVATISED WORLD

In the age of globalisation, political actors such as executive branches, regulators and parliaments have embraced neoliberal agendas and privatisation practices.[13] Privatisation – which is derived from the notion of raising private capital, improving public services and reducing costs to the state – leads to reductions in tax for citizens. Yet privatisation can also affect the labour force and labour rights, and may cause a reduction in wages and possible lay-offs. Employees may also lose special working conditions, such as consistency and tenured positions, which are common within the public sector. Nevertheless, working within the private sector following privatisation sometimes might offer job and promotion opportunities for individual employees who perform well.

Increasing globalisation together with socio-economic changes that have occurred over the past few decades threaten labour rights, the state of individual employees and collective labour power.[14] The technological changes and the creation of a hyper-capitalist mode of production have all affected labour, and labour-organisational capacity has declined worldwide, along with organisational density. For instance, the global post-Fordist mode of production includes the development of atypical occupations such as freelancers, teleworkers and outsourced employees. These phenomena have all weakened the capacities of workers to organise. Globalisation therefore affects collective rights beyond the ramifications of privatisation itself. Alongside the effect of privatisation on trade unions and on union density, there is also an impact on individual employees who, in a non-traditional work environment, still need an organisation that can represent their interests and protest on their behalf.

Nevertheless, even though collective action against privatisation is often aimed at protecting employee interests, it has the potential to interfere with the economic goals of privatisation, thus inhibiting free competition. Furthermore, in situations where a market once dominated by a public monopoly opens up to competition, collective action may prevent private corporations from successfully entering the market – for example, if a union uses its monopolistic power in order to place obstacles in the path of rival private firms wishing to enter the market.[15]

The status of collective rights in the globalised privatised world raises the issue of the scope of strike action in cases of privatisation. The next section will present the controversy over the status of the right to strike and the question of its recognition as a fundamental right.

[13] Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17(2) *Journal of Public Policy* 131, 140–43; Yarrow (n 3).

[14] Charles Tilly, 'Globalisation Threatens Labour Rights' (1995) 47(1) *International Labor and Working Class History* 1; Guy Mundlak, *Fading Corporatism: Israel's Labour Law and Industrial Relations in Transition* (Cornell University Press 2007) 4–6.

[15] Robert H Lande and Richard O Zerbe, 'Reducing Unions' Monopoly Power: Costs and Benefits' (1985) 28 *Journal of Law and Economics* 297. For instance, these were the claims of the appellants in the Israeli case concerning the opening of the electricity manufacturing market to competition: CDA 18983-09-14 *The General Histadrut v The State of Israel* (4 May 2017).

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2.2. LABOUR COLLECTIVE RIGHTS AND THE QUESTION OF A FUNDAMENTAL STATUS

Labour-related rights include freedoms relating to the right to act as part of a collective, such as freedom of association, the right of collective bargaining and the right to strike. These collective rights are listed in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[16] Article 8 of the Covenant includes the 'right of everyone to form trade unions and join the trade union of his choice', the 'right of trade unions to function freely', and the right to strike. The Covenant states that it does not prevent the imposition of lawful restrictions on the exercise of these rights.[17] The right to organise is also included in international treaties, such as the International Labour Organization (ILO) Convention concerning Freedom of Association and Protection of the Right to Organise[18] and the ILO Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively.[19]

According to the ILO committees, the right to strike is one of the essential means through which workers may protect their economic interests, and a means to fulfil their right to organise.[20] According to the ILO 1998 Declaration, freedom of association is binding on all member states, even if they have decided not to ratify these conventions.[21] Member states obligate themselves by virtue of ILO membership to respect and realise certain fundamental principles,[22] including freedom of association.[23]

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[16] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.

[17] Art 8 states that no restrictions may be placed on the exercise of these rights, other than those prescribed by law and which are necessary in a democratic society in the interest of national security or public order or the protection of the rights and freedoms of others.

[18] ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise (entered into force 4 July 1950) 68 UNTS 17. The ILO is a tripartite UN agency; its special status and the effect of its principles is derived from bringing together governments, employers and workers of 187 member states.

[19] ILO Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (entered into force 18 July 1951) 96 UNTS 257.

[20] International Labour Conference (81st session), Report III (Part 4B): Committee of Experts on the Application of Conventions and Recommendations General Survey on the Freedom of Association and Collective Bargaining (June 1994) 64; Freedom of Association: Digest of Decisions and Principles on the Freedom of Association Committee of the Governing Body of the ILO (5th edn, 2006); Compilation of Decisions of the Committee on Freedom of Association (6th edn, 2018) (Compilation of Decisions), arts 753–54; *Poland (Case No 3111)* (14 January 2015) Report on the ILO Freedom of Association No 378, paras 674, 708; *Djibouti (Case No 2471)* (26 October 2005) Report on the ILO Freedom of Association No 344, para 891; *Greece (Case No 2506)* (12 July 2006) Report on the ILO Freedom of Association No 346, para 1076; *Chad (Case No 2581)* (10 July 2007) Report on the ILO Freedom of Association No 354, para 1114.

[21] ILO Declaration on Fundamental Principles and Rights at Work (adopted by the ILO 86th Session, 18 June 1998).

[22] It should be noted that there is an alternative approach of some governments who do not see ILO mechanisms as binding and prefer not to cooperate with them. The Canadian government, for instance, refused to cooperate with decisions of the ILO committee according to which the Canadian union enjoyed collective rights in the privatisation of hospital services: Judy Fudge, 'The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond' (2008) 37 *Industrial Law Journal* 25. Following that, the Canadian Supreme Court held that the union enjoyed a right of collective bargaining in light of the privatisation process: *Health Services and Support v British Columbia* [2007] 2 SCR 391, 2007 SCC 27.

[23] Ken Norman, 'ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep' (2004) 67 *Saskatchewan Law Review* 591, 596–97; Brian Langille, 'The ILO and the New Economy: Recent

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The right to strike is not included directly in the ILO Conventions and there is doubt as to its status as a fundamental right.[24] The doubt arises also from the controversy regarding the authority of the ILO's committees to interpret freedom of association as including the right to strike.[25] Some claim that the right to strike should not be considered a fundamental right included in the right to organise.[26]

Indeed, one of the issues with which legal systems are faced is the question of the recognition of collective rights as fundamental rights.[27] The recognition of the right to strike as a fundamental right and its scope and boundaries in international law often influence the human rights discourse[28] in local law.[29]

Even though collective rights have not yet been included in constitutional documents in some countries, during the last few years some courts have been willing to consider collective labour rights as constitutional rights derived from other constitutional rights while other courts have declined to do so.[30] The next section will discuss the different views on the matter.

Developments' (1999) 15(3) *International Journal of Comparative Labour Law and Industrial Relations* 229, 229–30. ILO norms are dealt with through a complaints process, which requires governments to take corrective action and to keep the ILO informed of their responses. Nevertheless, some governments, such as Canada, sometimes choose not to cooperate with ILO demands: Tucker (n 1) 367–68.

[24] Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29 *Journal of Comparative Labour Law and Industrial Relations* 199.

[25] Fudge (n 2) 295–96; Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employer's Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338, 342–43. The employers group at the ILO claimed that the committee of experts did not have the legal mandate to interpret the Conventions.

[26] ibid.

[27] In Canada, for instance, the debate over the years has been whether the right to strike and the right of collective bargaining should be considered constitutional rights. Hence, in 1987 three cases in the Supreme Court of Canada, known as 'the labour trilogy', were marked by sharp disagreement as to whether the freedom of association in s 2(d) of the Canadian Charter included the right to strike. The labour trilogy refers to three appeals: *Reference re Public Service Employee Relations Act (Alta)* [1981] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 460: see Fudge (n 2) 295–96.

[28] For instance, in Canada in recent years the Supreme Court has based the recognition and application of a constitutional right in cases of essential services on the recognition of a fundamental right to strike in international law – mainly within ILO principles: Fudge (n 2) 295.

[29] Scholars have emphasised the deliberative democratic justification as a basis for the effect of international law on local law. It is the improved quality of debate achieved in discussing controversial issues at the international level: Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 24–25.

[30] For instance, these collective rights were not included in either the Canadian Charter or the Israeli constitutional norms – the Basic Laws. Another example is the German constitution, which does include freedom of association in Basic Law for the Federal Republic of Germany, art 9(3): 'The right to form association to safeguard and improve working and economic conditions, shall be guaranteed to every individual and to every occupation and profession. Agreements that restrict or seek to impair this right shall be null and void'. This article relating to the right to form associations has been considered over the years by the German Constitutional Court as guaranteeing the right to strike, in addition to the right of collective bargaining: Bundesverfassungsgericht [BverfG] 103, 1993. The Constitutional Court held that art 9(3) of the German constitution protects the right to strike, as long as it is related to an economic strike, aimed at enhancing negotiations regarding collective agreements: Bundesverfassungsgericht [BverfG] 212, 1991, 26 June 1991 Entscheidungen Des Bundesverfassungsgericht.

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2.3. The Collective and Economic Approaches

2.3.1. The Economic Approach

According to the economic approach, privatisation is a process of replacing the state. Public functions are transferred to private actors, which are subject to market mechanisms that may enhance efficiency. The economic approach is based on the liberal neoclassical idea, according to which individuals should be free, and state intervention in individual autonomy should be minimal.[31] This approach supports a *laissez faire*[32] policy.[33] The liberal neoclassical doctrine claims that the price of goods can be lowered only by competition, and that the state should therefore refrain from intensive regulation of market activity.[34] This approach posits that legal intervention in the private sphere and the economic market should be limited.[35] Embracing an economic approach based on the liberal neoclassical doctrine could mean then that courts will hesitate to intervene in the markets, and will tend to promote privatisation. Conversely, a denial of the liberal neoclassical idea may result in extensive intervention in privatisation policy and a rejection of privatisation. According to the economic doctrine, regulation should be minor with the application mainly of liberal rights and economic freedoms. The economic approach thus would be hesitant in limiting constitutional economic freedoms related to privatisation, such as freedom to establish businesses and freedom of movement. The approach also emphasises freedom of occupation, as exemplified by the freedom for new competitors to enter the market.

The economic approach rejects a constitutional status to strike.[36] It argues that constitutionalising labour rights would affect the efficiency of the privatisation process and raise the price of privatised public services, while shifting the cost to consumers.[37] Constitutionalism of labour rights would be considered to be in accordance with the liberal neoclassical theory as a factor in

[31] John Gray, *Mill on Liberty: A Defence* (2nd edn, Routledge 2003) 1–9, 43–63.

[32] *Laissez faire* is based on the French '*laissez faire, laissez passer*' ['let do and let pass']. It requires allowing people to be free without interference and specifically allowing owners of businesses to determine the rules of commerce and employment, without government intervention: Fredrick C Gamst, 'Foundations of Social Theory' (1991) 12(3) *Anthropology of Work Review* 19, 20.

[33] Yuval Yonay, *The Struggle over the Soul of Economics: Institutionalist and Neoclassical Economics* (Princeton University Press 1998) 5–8. The neoclassical economy elaborated on Adam Smith's theory and continued to include the basic assumptions of hedonism and rationality, and added the marginal calculus.

[34] Hila Shamir, 'The Public/Private Distinction Now: The Challenges of Privatisation and of the Regulatory State' (2014) 15(1) *Theoretical Inquiries in Law* 18, 18–24.

[35] ibid.

[36] Privatisation is needed in order to accelerate efficiency and achieve economic goals. The application of a constitutional right to strike against privatisation interferes with efficiency goals and the free movement of capital and the work force: Norbert Reich, 'Free Movement v Social Rights in an Enlarged Union: The Laval and Viking Cases before the ECJ' (2008) 9 *German Law Journal* 125, 126–29. The application of a constitutional right to strike was considered by the ECJ as an interference with economic freedom and free competition.

[37] According to this view, courts should refrain from extensive involvement in the markets through the imposition of collective rights-oriented duties that interfere with free movement in international and local spheres and economic market activity. For instance, Posner claims that labour law and the recognition of labour rights are founded on a policy that is the opposite of free competition and economic efficiency: Richard Posner, 'Some Economics of Labour Law' (1984) 51 *Chicago Law Review* 988, 990.

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strengthening the capability of unions to demand higher salaries and better economic conditions in situations of privatisation as a precondition for union cooperation with the privatisation process.[38]

2.3.2. The Collective Approach

According to the collective approach, in the privatisation era regulators and political actors abandon their responsibilities towards employees and service recipients, while adopting a neoliberal ideology.[39] The collective approach concentrates on implementing collective constitutional rights as a means of counter-balancing the effects of the privatisation processes and the neoliberal agenda of parliaments and regulators. Therefore, embracing the collective approach suggests that courts must take upon themselves the role of protecting employee rights in privatisations. The collective approach imposes new duties regarding strike action. This emphasises the concern that privatisation would affect the interests of employees.

The collective constitutional method is a social approach based on the notion of socio-economic equality and Thomas Hamphrey Marshall's 'social citizenship'.[40] Social citizenship refers to a right to economic welfare and the right to live the life of civilised beings, according to the standards prevailing in a society. It aims to reduce inequality in society and within the labour market by ensuring the interests of employees and unions. Ensuring those interests as opposed to those of holders of capital and private corporations requires recognition of collective rights as constitutional rights. Enforcement of constitutional labour rights requires imposing obligations on the state and a horizontal application of constitutional collective rights on public employers.[41] Within this model, courts apply judicial review of legislation and of decisions of regulators in privatisations. Hence, the collective doctrine requires the state to take positive action

[38] The neoclassical economic approach claims that following labour market regulation through recognition of collective rights, a monopoly-like cartel of unions is introduced. It is claimed that this leads to an increase in wages above the market level. As a result, firms that suffer from reduced profit tend to shift part of the cost to consumers or reduce the quality of their services: Posner, ibid 988; Kenneth G Dau-Schmidt and Arthur R Traynor, 'Regulating Unions and Collective Bargaining' in Kenneth G Dau-Schmidt, Seth D Harris and Orly Lobel (eds), *Labor and Employment Law and Economics* (Edward Elgar 2009) 96, 103; Lilach Luria, Yuval Feldman and Orly Lobel, 'An Economic Approach to Labor Law' in Ariel Proccacia (ed), *The Economic Approach to Law* (Nevo 2012) 477 (in Hebrew); David G Blanchflower and Alex Bryson, 'What Effects Do Unions Have on Wages Now and Would "What Would Unions Do" Be Surprised?' (2004) 25 *Journal of Labor Research* 383; Bruce E Kaufman, 'Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives' in Dau-Schmidt, Harris and Lobel, ibid 3, 3–5.

[39] For instance, governments might initiate vast reductions in the labour force before privatisation or enable such reductions in the post-privatisation era in order to attract potential investors: Sunita Kikeri, 'Privatisation and Labour: What Happens to Workers When Governments Divest?', World Bank Technical Paper 396, 1997, 5–6.

[40] Thomas Hamphrey Marshall, 'Citizenship and Social Class' in Thomas Hamphrey Marshall and T Bottomore (eds), *Citizenship and Social Class* (Pluto Press 1992) 1, 30–32; Marshall proposed the division of citizenship into three parts: civil, political and social. The social part refers to a right to economic welfare and the right to live the life of a civilised being.

[41] Mark Tushnet, 'The Issue of State Action and Horizontal Effect in Comparative Constitutional Law' (2003) 1 *International Journal of Constitutional Law* 79.

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in fulfilling labour rights and imposing duties on employers to respect them. Negligence on the part of the state in so doing is considered a breach of labour rights.[42]

2.3.3. The Connection between Collective Constitutionalism and Protecting the APS and the Distinction between the Approaches

One could claim that the supposed dichotomy between the economic and the collective approaches is superficial, and that even when the right to strike is constitutionally protected it is never absolute, as courts can accept limitations on the right. One could also claim the opposite, namely that even when the right is not constitutionally protected, the legal system can still allow and protect strike action against privatisation.

Indeed, in reality the two approaches are not dichotomous but follow a continuum. Nevertheless, certain courts may follow one approach and be closer to it, while other courts follow the other approach.

Furthermore, there is a real distinction between the two approaches. The application of collective constitutionalism requires courts to ignore the particular economic interests involved in the privatisation process. Even though they may perform a balancing of interests, in applying the collective approach they do not actually take into account economic liberal rights. Courts, therefore, deny the application of liberal rights, such as the right to establish businesses and the right of third parties to enter the market.[43] Courts do not take into account freedom of occupation as it pertains to the right to free competition within the markets.

As for the claim that courts can recognise a right to strike that is not constitutional, we should bear in mind that the very recognition of the freedom to strike as a fundamental right enables a special protection of this right. Hence, the claim is false as it does not appreciate the significance of a constitutional status of the right to strike. Protection of a specific right against privatisation is in fact derived from the way in which collective action as a human right with a fundamental status is applied in local jurisprudence. We will consider several implications of the status of collective rights – and mainly the right to strike – as a constitutional right.

First, even though rights are never absolute, the violation of a fundamental right requires justification.[44]

[42] For the meaning of recognising labour rights, see Langille (n 1) 198–99.

[43] The source of some of these liberal rights is the Universal Declaration of Human Rights, UNGA Res 217A (III), 10 December 1948, UN Doc A/810 (1948). For instance, art 17 ensures the right to property; art 21(2) ensures the right of everyone to equal access to public services in their own country. It could be claimed that an APS affects reforms in public services and hence also affects the rights of citizens to fair and equal access to public services. In the United Nations International Convent on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 12 ensures the liberty of free movement; art 25 ensures access to public services.

[44] Brian Etherington, 'The Right to Strike under the Charter after Saskatchewan Federation of Labour: Applying the New Standard to Existing Regulation of Strike Activity' (2016) 19 *Canadian Labour and Employment Law* 429, 431.

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Secondly, as Langille claims, the important Hohfeldian distinction between freedoms and rights reflects the obligation to protect the right.[45] Whereas freedoms focus on a person's own actions and place no responsibility on others, rights are different in nature. Recognising a human right implies the likelihood of imposing a duty on others to respect that right. Hence, recognition of the authority, as opposed to the liberty, to strike against a privatisation implies the imposition of a burden on others to protect that right. To regard strike action as a right, rather than merely a freedom, means that others, including public employers and the state itself, have a corresponding duty to take positive action to fulfil the right to strike against privatisation.

Thirdly, a constitutional right is considered superior to governmental decisions and legislation[46] that introduces the privatisation process.[47] Hence, the very recognition of the constitutional status of the freedom to strike might enable the judicial system to overturn legislation or executive decisions to privatise.

Fourth, recognition of the constitutional status of the freedom to strike enables the recognition of the APS as legitimate when it is proportionate. Recognition of a constitutional right means that even though legislation or a decision to privatise is introduced in accordance with due process, in principle it cannot violate a constitutional right unless it is justified in specific circumstances. Therefore, even if a political decision to privatise is made by elected officials, it is still subject to a right to strike against the privatisation.[48]

Fifth, the fundamental status of a human right means that a right cannot be denied in its entirety but is only limited. Hence, regarding the right to strike as fundamental would no longer enable depriving all employees of the ability to strike in certain situations.[49] The minimal core of constitutional protection of the fundamental right to strike prevents total restriction of strike action. This line of reasoning could, for instance, prevent the placing of a general ban on strike action in essential services, back-to-work orders, or the imposition of collective agreements that render strikes illegal. The total prohibition of strike action, once perceived as a constitutional right, would then be considered unlawful.

The same line of reasoning applies to the issue of the APS. Classifying industrial action as an illegitimate type of strike and therefore forbidden altogether, on the basis of involving government policy to privatise, is problematic once a constitutional right to strike is acknowledged. The application of collective constitutionalism in privatisations means, therefore, that courts may no longer consider all collective action regarding privatisation as illegitimate per se.[50]

[45] A negative liberty does not have positive implications, and therefore does not impose parallel obligations on the state and public employers to recognise collective action in privatisations and in similar circumstances: Langille (n 1).

[46] Aharon Barak, 'The Role of the Supreme Court in a Democracy' (1998) 3(2) *Israel Studies* 6, 6–12.

[47] Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 19.

[48] Barak Medina, 'Constitutional Limits to Privatisation: The Israeli Supreme Court Decision to Invalidate Prison Privatization' (2010) 8(4) *International Journal of Constitutional Law* 8.

[49] Benjamin Oliphant, 'Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard and Saving the Freedom to Strike' (2012) 70(2) *Toronto Faculty of Law Review* 36, 54–55.

[50] Steven Barrett and Benjamin Oliphant, 'The Trilogy Strikes Back: Recognizing Constitutional Protection for the Freedom to Strike' (2014) 45 *Ottawa Law Journal* 206. Recognition of a constitutional right to strike might offer

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As we see, largely applying a constitutional right to strike – while embracing collective constitutionalism – leads to broad protection of the APS.

2.4. The Need for a Third Model

This section discusses the claim that collective constitutionalism allows overprotection of the right to strike. It lays the foundation for rejecting the application of either of the two existing approaches described above and the need to develop a third model of restrained constitutionalism.

In spite of the benefits of the APS as a fundamental right, expressed in the previous section, there are several difficulties in the application of collective constitutionalism (some of which derive from the economic approach). The first is the claim that human rights frameworks are often not suitable for the protection of workers' interests. The claim is based on the perception of the right to strike as a collective right that is given to unions as opposed to other rights of employees as individuals. The application of constitutionalism in some jurisdictions is based on individual human rights discourse, and therefore does not fit as a basis for advancing collective labour interests.[51] In cases where the constitutional order of a certain jurisdiction includes individual discourse, a broad application of constitutional labour rights is problematic, as it could lead to extensive judicial intervention in the legislator's work without a stable constitutional basis.[52] In Israel the constitutional norms include individual characteristics. Basic Law: Human Dignity and Liberty includes civil-political rights only and reflects an individual human rights discourse. The Human Rights Act (HRA) in the United Kingdom also includes an individual human rights discourse.[53] Yet, in other constitutions that include social rights such a problem does not occur.

Second, in general, a human rights discourse potentially undermines labour's capacity for class-based collective struggles within the public sphere.[54] In the age of globalisation, the constitutionalisation of collective rights has shifted from legislative politics and the struggle of unions within the political arena to rights litigation and the human rights discourse. This shift has been precipitated largely by political actors and governments which have adopted a neoliberal ideology and an economic liberal public policy. The rise of neoliberalism in most western countries and the general decline of labour parties[55] makes it difficult to fulfil the interests of

wider protection for strike action, such as a positive obligation and meaningful exercise of a right to strike. Such wider protection could include, for instance, a restriction on using replacements for striking workers.

[51] Individual human rights discourse is the recognition of only individual economic rights within the constitutional system, such as the right to liberty and dignity: Larry Savage, 'Workers' Rights as Human Rights' (2009) 34 *Labor Studies Journal* 8.

[52] ibid.

[53] Human Rights Act 1998 (UK), s 2. Another example is Canada, where the constitutional order includes liberal individual discourse, and scholars have claimed that it could not be a basis for the recognition of labour rights as constitutional rights: Savage (n 51).

[54] Tucker (n 1).

[55] For instance, with regard to the decline of the Israeli Labour Party see Myron J Aronoff, *Power and Ritual in the Israel Labor Party: A Study in Political Anthropology* (Routledge 2015) x–xiii.

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labour unions within the political process.[56] Thus, applying collective constitutionalism will result in unions taking the path of litigation over a public struggle against privatisation schemes,[57] leading to the possible further weakening of unions.

Third, it is contended that the argument of the collective approach about the broad role of the courts and their essential involvement in the privatisation arena is an activist claim, and courts should refrain from this kind of intervention. Thus, it has been suggested that courts should not write entire labour codes when they create derivative rights.[58] Such judicial intervention also raises difficulties in that it imposes an additional burden on the state to consider labour rights. In privatisations, therefore, constitutional collective rights cannot be enforced primarily by the courts because their enforcement requires the courts to make decisions that may have major repercussions[59] on government policy.[60] Scholars assert that collective disputes involve reconciling conflicting ideologies and values and that relevant political, social and economic considerations[61] lie beyond the area of expertise of the courts.[62] Scholars also emphasise the inability of courts to adjudicate in respect of economic interests.[63]

Nevertheless, the economic approach, which denies recognition of a constitutional status of a right to strike altogether, should also be rejected for several reasons.

First, in response to the argument that human rights frameworks are not suitable for the protection of workers' interests, it should be noted that an individual human rights discourse could be seen as giving individuals rights that then become collective in nature once employees join together to operate in parallel.

Second, as for the claim that a human rights discourse potentially undermines the capacity of labour for class-based collective struggles within the public sphere, it should be noted that the economic approach disregards the dwindling number of organised employees. It also ignores the fact that the retreat of the welfare state and the decline of union power might create a

[56] Fudge (n 22).
[57] Savage (n 51).
[58] Brian Langille and Benjamin Oliphant, 'The Legal Structure of Freedom of Association' (2014) 40(1) *Queen's Law Journal* 250, 284, 294–97 (stating that we must distinguish between the role of a judge in interpreting the constitution, and the role of democratic branches of government. Therefore, limitations should be placed on judges when drafting complex labour codes covering freedom of association or strikes).
[59] For instance, Dotan presents the claim that courts do not have the democratic mandate to make such decisions regarding privatisation: Yoav Dotan, 'Informal Privatisation and Distributive Justice in Israeli Administrative Law' (2010) 36(1) *Hamline Law Review* 27, 36.
[60] Tushnet (n 41).
[61] Otto Kahn Freund, 'The Impact of Constitutions on Labour Law' (1976) 35 *Cambridge Law Journal* 266. Therefore, generally the scope of social legislation is a political question and courts are portrayed as ill-equipped to settle these issues: Langille (n 1) 202.
[62] Roy L Heeman, 'Saskatchewan Federation of Labor and Strikes in the Public Sector: Confusing Social Rights with Fundamental Ones' (2016) 19 *Canadian Labour and Employment Law Journal* 399, 401; Jamie Cameron, 'The Labor Trilogy's Last Rites: BC Health and a Constitutional Right to Strike' (2010) 15 *Canadian Labour Law and Employment Journal* 298, 311; Dotan presents the claim that the judiciary does not have the professional expertise: Dotan (n 59).
[63] Privatisations also have budgetary implications and are aimed at reducing government spending.

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need for some judicial involvement.[64] Furthermore, changed realities have also led to changed needs in the political arena, and the political power of unions through political channels is no longer as important as it once was. The economic approach indeed ignores these considerations, which could motivate some courts to put labour rights beyond the reach of governmental action.[65]

Third, as for the claim that courts should refrain from this kind of activist intervention, it should be taken into account that even though labour realities may be characterised as essentially political, courts should play a role[66] in the area of socio-economic policy.[67] Although the primary decision whether to privatise certain fields of economic activity is not to be taken by the judiciary, courts should supervise the privatisation process and its implications.[68] There is a difference between involvement in the initial decision to privatise, which is a political issue, and supervision of the process of implementing the decision and its implications for the labour market and strikes, which can be carried out by the courts.

Furthermore, constitutional duties that are imposed on governments are not fixed and static.[69] When constitutionalising a fundamental collective right the government is still left with discretion on how to realise that right and how to regulate labour relations.[70] Judicial involvement does not deny governments and legislatures this flexibility. Even though constitutionalisation means that governments should protect the right to strike in cases of privatisation, many specific terms of the privatisation scheme may be left to state discretion.

As for the claim that judges lack the professional skills and capacity to settle economic matters, it should be noted that judges are not expected to determine economic-arithmetic issues. The application of constitutionalism requires judges to be involved in the privatisation arena by merely applying a constitutional right to strike when necessary. Judicial review is perceived as the normal role of the courts.[71]

Hence, the base approach should be that a constitutional status of the right to strike should be recognised; yet a collective approach, which includes a far-reaching and dominant judicial role in replacing political actors and regulators that have adopted a neoliberal ideology, is indeed hard to

[64] We should also bear in mind that in the age of post-Fordism, the patterns of workforce outsourcing and New Public Management (NPM) reforms, which are characteristic of the new globalised era, have weakened the position of public employees. The meaning of post-Fordism as a labour process can be defined as a flexible production process, based on flexible machines or systems, and an appropriately flexible workforce: Bob Jessop, 'Post Fordism and the State' in Bent Greve (ed), *Comparative Welfare Systems* (Macmillan 1996) 165, 184. NPM reform is the incorporation of market-oriented modes of management, efficiency goals and marketisation in the public sector: Nissim Cohen, 'Forgoing New Public Management and Adopting Post New Public Management Principles on the Ongoing Civil Reform in Israel' (2016) 36 *Public Administration and Development* 20.
[65] Tucker (n 1); Fudge (n 22). In that sense, constitutionalism counter-balances neoliberalism in the political arena and the legislator's intention to roll back workers' rights.
[66] It should be considered that in the modern era the sharp dichotomy between the judiciary and parliamentary branches, according to the classic principle of separation of powers, no longer applies: Barak (n 47) 26.
[67] Jason R Paquette, 'The Call for Deference in Labor Relations: An Answer to Justice Rothstein' (2016) 19 *Canadian Labour and Employment Law Journal* 413.
[68] Dotan (n 59) 27, 36.
[69] Bogg and Ewing (n 1) 399–400.
[70] ibid 399.
[71] Paquette (n 67).

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justify. Accordingly, it should be modified with elements of the economic perspective. A third model, which requires only restrained intervention by the courts, should be developed. The legitimacy of the somewhat moderate role of the courts, which this article advances within the eclectic model, is based on the dynamic aspects of the economic analysis and on the strive for increasing efficiency for the public benefit, as will be explained in the next part. Courts should indeed recognise the special characteristics of labour rights,[72] and the limitations of the judiciary when applying constitutionalism in privatisation. There is a need to develop a third way, which applies only partial constitutionalism and suggests the application of a constitutional right to strike in some cases only.

3. APPROACHES TO THE APS IN ISRAELI AND UK JURISPRUDENCE

3.1. THE IMPLEMENTATION OF COLLECTIVE CONSTITUTIONALISM IN ISRAELI LABOUR MARKETS

3.1.1. TRADITIONAL JURISDICTION AND CONSTITUTIONAL BACKGROUND

At the beginning of the 1990s two Basic Laws of human rights were constituted,[73] which, according to the Supreme Court, enjoyed a constitutional status.[74]

Even though social rights were not included in the Israeli Basic Laws, the courts, over the years, have recognised several additional rights as constitutional and derived from statutory rights.[75] These include several social rights included in the Basic Law of Dignity, such as the right to an adequate standard of living.[76] Nevertheless, even though the existence of social rights in most cases is not in dispute, their scope is unknown.

[72] Guy Davidov, 'Judicial Development of Collective Labor Rights – Contextually' (2010) 15 *Canadian Labour and Employment Law Journal* 235.

[73] Basic Law: Freedom of Occupation; Basic Law: Human Dignity and Liberty.

[74] HCJ 6821/93 *Bank Hamizrahi v Migdal* 1995 PD 49(4) 221. The court also ruled that it held the power to review regular legislation of the parliament, leading to the potential disqualification of unconstitutional laws. These rulings came to be known as 'the constitutional revolution': Ran Hirschl, 'The "Constitutional Revolution" and the Emergence of a New Economic Order in Israel' (1997) 2(1) *Israel Studies* 136, 142–47.

[75] The Basic Laws of human rights include only the protection of a limited list of individual liberal rights. Nevertheless, over the years the list of constitutional rights has been expanded by the courts to include several derivative rights. For instance, the right to equality has been recognised as a derivative right: HCJ 6298/07 *Yehuda Ressler, Major (Ret) v The Knesset* (21 February 2012).

[76] Thus, the right to a minimum standard of living has been recognised as a constitutional right: HCJ 10662/04 *Hassan v The Social Insurance Institution* 2012 PD 65(1) 782. The right is included in the ICESCR (n 16); it is classified as a social right having been formulated within the ICESCR as a positive state obligation imposing affirmative duties of action. It is also one of the rights arising from the social contract and context within a given society, unlike social rights, civil and political liberties, which were designed to protect individuals only from arbitrary governmental encroachment: Yoram Rabin and Yuval Shany, 'The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?' (2004) 37 *Israel Law Review* 299, 301. Nevertheless, despite the recognition of a right to a minimum standard of living as being of a constitutional nature, the Israeli court has refrained from stating what standard of living is actually recognised within the constitutional right.

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Over the years, Israeli courts have dealt with the questions of whether a constitutional right to strike should be recognised and, if so, the extent of its scope and its beneficiaries.[77] These questions arise also with regard to strike action involving privatisations. Israel has been engaged in the process of privatisation since the 1980s.[78] During this period the court has changed its approach and has embraced collective constitutionalism, despite the generally neoliberal wave.[79] Earlier writing on the issues of social rights, the Israeli jurisdiction and privatisation in Israel emphasised that Israeli courts had rarely applied constitutionalism regarding social and labour rights.[80] Until the middle of the first decade of the millennium, the Israeli judiciary did not consider collective action to be a fundamental right,[81] The courts' deliberations on strike action and the issuing of injunctions against striking workers were related to compliance with the rule of law.[82]

The constitutional status of the right to strike in Israel was associated in privatisation cases with the issue of recognition of a political strike, namely a strike against government or political policy.[83] The Israeli judiciary ruled that such strikes are illegal, while regular economic strikes (revolving around salary and working conditions) are legitimate and are protected by the law.[84] Privatisations raise the question of whether collective action against a privatisation policy would be considered an illegal political strike.[85]

The case of *Bezeq*, which dealt with a strike against opening the markets to competition, demonstrates the traditional Israeli jurisprudence.[86] The case involved the privatisation of the international calls market, which until then had been supplied solely by Bezeq as a monopolistic governmental corporation. The privatisation programme was also included in an amendment to the Bezeq Act 1982. The Supreme Court ruled in *Bezeq* that collective action involving a

[77] For instance, HCJ 1181/03 *Bar-Ilan University v The National Labour Court* 2011 PD 64(3) 204.
[78] Daphne Barak-Erez, 'Applying Administrative Law to Privatisations in Israel' in (2006) *Israeli Reports to the XVI International Congress of Comparative Law* 47.
[79] Regarding the general neoliberal wave, see Jonathan Preminger, 'Israel's Recent Unionizing Drives: The Broader Social Concept' (2018) 33 *Israel Studies Review* 23.
[80] For instance, Dotan claimed that the Supreme Court refrained from using socio-economic fundamental rights or intensively intervening in the process of privatisations: Dotan (n 59); see also Daphne Barak-Erez, 'Israel Administrative Law at the Crossroads: Between the English Model and the American Model' (2007) 40 *Israel Law Review* 56; Daphne Barak-Erez and Aeyal Gross, 'Social Citizenship: The Neglected Aspect of Israeli Constitutional Law' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 245, 245–46; Hirschl emphasised that the Basic Laws have been interpreted in a way that protected mainly the authority of the economic sphere and the rights of employers: Hirschl (n 74) 142–47.
[81] Ruth Ben-Israel, *Strikes and Lock Outs in a Democracy* (The Open University of Israel 2003) 121 (in Hebrew); Davidov (n 72).
[82] Guy Mundlak and Itzhak Harpaz, 'Determinants of Israeli Judicial Discretion in Issuing Injunctions Against Strikes' (2002) 40(4) *British Journal of Industrial Relations* 753.
[83] HCJ 1074/93 *The Attorney General v National Labour Court* 1994 PD 49(2) 485.
[84] HCJ 525/84 *Hativ v National Labour Court* 1986 PD 40(1) 673.
[85] According to ILO principles, whereas strikes of a purely political nature do not fall within the protection of Conventions 87 and 98, a right to strike is considered fundamental and legitimate as long as it is utilised as a means of defending economic interests: Compilation of Decisions (n 20) para 751. With regard to political strikes, see Compilation of Decisions (n 20) para 761; *Republic of South Korea (Case No 1865)* (2007) 346th Report on the ILO Freedom of Association Cases, para 749.
[86] HCJ 1074/93 *Bezeq v National Labour Court* 1995 PD 39(2) 485 (English translation at http://versa.cardozo.yu.edu/topics/judicial-review?page=3).

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privatisation process could not be considered the same as a regular economic strike connected to economic issues. Furthermore, a strike against the privatisation process itself, in principle, should be classified as a political strike, which is unlawful.[87] In this case the majority ruled that collective action was not considered a fundamental right. Justice Dov Levin expressed in a separate opinion that collective action should be considered a constitutional right. The Supreme Court held that the democratic process itself requires the rejection of collective action against a governmental programme as such a strike is aimed at elected democratic institutions.

3.1.2. COLLECTIVE CONSTITUTIONALISM IN ISRAEL IN RECENT YEARS

Jurisprudence since the early 2000s has been characterised by the acceptance of collective constitutionalism in cases in which the courts traditionally would not have recognised the right to strike.[88] This is a response to a change in labour market realities and in the political arena and the rise of neoliberalism.[89] Since its establishment, Israel has been characterised as a corporatist welfare state with strong unions and high union density.[90] The loss of the 1977 elections by the Labour party saw the rise of a neoliberal ideology and the decline of collective-social beliefs.[91] Unions have lost their political clout and their ability to preserve labour interests via political channels.[92] Union density has also declined sharply.[93] Since the middle of the 1980s, and mainly since the 1990s, Israel has undergone structural reforms which include massive privatisation and outsourcing.[94] These processes have driven courts to take upon themselves a dominant role in applying collective constitutionalism as a basis for recognising the right to collective action in privatisations.

Developments in the jurisprudence occurred when the courts recognised the legitimacy of the APS against the privatisation of governmental corporations and contracting out of former governmental functions. This line of ruling can be seen, for instance, in the *Train* case,[95] which involved an APS against the outsourcing of maintenance work for the public train service. The

[87] The category of the semi-political strike was introduced in this case. If the privatisation process affects working conditions, it would be classified as a semi-political strike. The semi-political strike, as the judges in *Bezeq* stated, is a political strike with economic elements. Such a classification is attained when the employees can demonstrate that certain economic effects on wages and working conditions will result. A strictly political strike is forbidden altogether as it is seen as undermining democratically elected institutions, including the government and parliament. Contrary to a purely political strike, a semi-political strike has enabled short-term collective action to take place, usually for only a few hours on each occasion: *Bezeq* (n 86).

[88] For instance, CDA 50556-09-11 *The General Histadrut v The Train Association* (28 September 2011).

[89] Preminger (n 79).

[90] Mundlak (n 14) 4–6; Guy Mundlak, 'Addressing the Legitimacy Gap in the Israeli Corporatist Revival' (2009) 47 *British Journal of Industrial Relations* 765, 767–70.

[91] Assaf Meidany, 'The Case of the Israeli State Economy Arrangement Law' (2008) 19 *Constitutional Political Economy* 301.

[92] Yinon Cohen and others, 'Unpacking Union Density: Membership and Coverage in the Transformation of the Israeli IR System' (2003) 42 *Industrial Relations* 692, 693–95; Mundlak (n 14) 4–6.

[93] ibid.

[94] Meidany (n 91).

[95] *Train Association* (n 88).

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court ruled that collective action, although involving a governmental decision to privatise, was not a political strike and, as a strike with major economic characteristics, was therefore legal. The court held that the constitutional status of the right to strike should enable a wide use of collective action.[96] The President of the National Labour Court, Nilly Arad, referred to the fundamental status of the right to strike as justification for the recognition of the APS. The court eventually issued an injunction on the ground that the strike was considered disproportionate[97] because of the prospect of major harm to passengers, regardless of the cause of the strike.[98]

Furthermore, in recent years Israeli courts have ruled that employees could take collective measures in order to protest against privatisation, even though these collective measures involved or violated decisions to privatise made by the government or regulators.[99] In some cases over the past few years, courts have recognised the legitimacy of an APS based on collective constitutionalism.[100] These cases involved opening the field previously dominated by governmental monopolistic corporations to new private service suppliers.[101] The collective action was against the decisions of regulators to privatise and the legislation that introduced the privatisation process.

The *Private Harbours* case presents the first occasion on which an APS was recognised purely on the merit of opposing the privatisation itself and opposing competition.[102] In such cases the courts have abandoned the traditional ruling of the Supreme Court. In the traditional case of *Bezeq*, it was determined that collective action involving a privatisation could not be classified as a regular strike.[103] The fact that the court refrained from classifying collective action as a political strike was a declaration that strike action against privatisation was legitimate. The

[96] ibid paras 8–13.

[97] Israeli courts have developed a proportionality test for the review of collective action and tend to issue injunctions in cases of disproportionate strikes which affect the public interest or third-party interests. It was developed mainly in CDA 1013/04 *Bank Discount v The General Histadrut* (26 September 2004). The proportionality test, in general, is designed to keep infringement of human rights to the minimum necessary in the circumstances: Pnina Alon Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 *McGill Law Journal* 375, 377. In Israel, the proportionality test has been adapted to employment law and has been used as a major tool in strikes: proportionality tests have been used by the National Labour Court as a means of balancing the right to strike with other rights. Courts take into account mainly the rights of service recipients. Hence, courts could issue an injunction against the strike on the ground of the harm caused to the rights of service recipients. For instance, in CDA 20/07 *The State of Israel v The Organization of Teachers in High Schools, Seminars and Colleges* (13 December 2007), the court issued an injunction against the strike because of the harm caused by the strike to the rights of pupils to education.

[98] Since collective action included stopping the train in the middle of the route: *Train Association* (n 88) 8–13. As long as strikes against privatisations were considered illegitimate, the application of the proportionality test was not needed. Hence, the very use of proportionality tests indicates that courts began to enable regular collective action against privatisations.

[99] For instance, CD (Haifa Regional) 54547-07-13 *The Electricity Corporation v The General Histadrut* (17 September 2013).

[100] ibid; CDA 10973-06-13 *The Electricity Corporation v The General Histadrut* (2 June 2013) (*Dorad*); CD (Haifa Regional) 15413-07-13 *The Electricity Corporation v The General Histadrut* (17 September 2013) (*Electricity Corporation (2)*).

[101] NLC 40815-07-13 *The Chamber of Commerce v The General Histadrut* (23 September 2013) 18–19; *Electricity Corporation*, ibid.

[102] GCD 40815-07-13 *The Commercial Chamber v Histadrut* (2013) (*Private Harbours*)

[103] ibid; *Electricity Corporation* (n 100).

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Private Harbours case[104] involved the workers of the Ashdod public harbour, which is a governmental corporation. Contrary to the *Bezeq* case, the court ruled that collective action involving privatisation was not a political strike[105] and therefore was not prohibited.[106] Using collective constitutionalism, the court held that the workers had a right to collective action involving the addition of new private harbours that would operate alongside the current public harbour. The court's reasoning was based on the recognition of the legitimacy of the APS as a regular strike. The President of the Labour Court, Judge Yigal Flitman, noted that the right to strike is a constitutional right derived from the right to dignity, which is included in Basic Law: Human Dignity and Liberty. The recognition of the fundamental status of the right to strike creates a parallel obligation to enable collective action, even when it is aimed against privatisation reforms.[107]

The *Dorad* case,[108] concerning a strike against the decisions of a regulator to add new private competitors to the electricity monopolistic market, is another case in point.[109] Electricity in Israel is produced and supplied by governmental electricity corporations, which were part of a monopoly prior to the current privatisation wave.[110] The new entrants could only use the current infrastructure of wiring and power lines of the public monopoly. In the *Dorad* case the regulatory agency instructed the electricity corporation that Dorad, a new private manufacturer, would be connected to the existing electricity system and power grid. Despite the decision of the regulator, employees of the governmental electricity corporation initiated collective action which included a refusal to connect the private manufacturer to the public corporation's infrastructure. The court held that as long as the government does not negotiate with the public monopoly employees, they have the right to strike as it is a constitutional right. Applying collective constitutionalism, the court ruled that the employees were entitled, in principle, to refuse to connect the private manufacturers to the electric infrastructure.

In *Dorad*[111] the court allowed the collective action, ignoring the fact that the union's refusal to connect the new private manufacturers to the power grid prevented the privatisation process from taking place.

Even though, in some of the recent cases, strikes should have been considered disproportionate, the court often ignored the proportionality issues. This limits the rights of new private service

[104] *Private Harbours* (n 102).
[105] The court emphasised that the strike was also not of a semi-political nature, according to the classification that was introduced in *Bezeq* (n 86).
[106] *Private Harbours* (n 102).
[107] ibid.
[108] *Dorad* (n 100)
[109] ibid; see also CDA 50696-01-13 *The Electricity Corporation v General Histadrut* (11 February 2013) (*OPC case*).
[110] The Israeli Antitrust Authority announced in February 2016 that the Israeli electricity company had abused its monopolistic position and caused harm to customers who started to buy from private electricity producers: Israel Competition Authority, Press Release, 2 February 2016, http://www.antitrust.gov.il/eng/subject/182/item/33927.aspx.
[111] cf text at n 100.

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suppliers or manufacturers to enter the market and ignores the public interest in free competition and continuity in the supply of services. It also violates Basic Law: Freedom of Occupation, in that the collective action infringes the right of occupation. The right of occupation, in this case, is the right of the new private manufacturers to enter the market and supply public services. The collective action in *Dorad*[112] would have been classified in the past as disproportionate according to the traditional jurisprudence, as the means of collective action did not match the legitimate purpose of labour law.[113] The court held that the collective action in this case was proportionate, even though a refusal to connect the new private manufacturers to the current electricity infrastructure prevented the privatisation process itself. In fact, the *Dorad* case demonstrates the National Labour Court's disregard for the Supreme Court's definition of 'political strike' in the traditional *Bezeq* case. The very fact that a strike was classified as political should have influenced the proportionality tests and led to a tendency for the courts to classify the strike as disproportionate.[114]

In May 2017 the National Labour Court ruled, in an appeal in the *Dorad* case,[115] that the government electricity corporation employees had a right to strike against the privatisation reform itself, apart from the issue of working conditions.[116]

[112] In *Dorad*, the government introduced a reform which was intended to transfer all electricity manufacturing – once carried out only by the public electricity corporation – to the private sector. According to this reform, all manufacturing of electricity would be transferred to private manufacturers and would be based on the use of gas and new energy. The old government coal-based power stations would be used only as a backup for emergency situations.

[113] For instance, in the past the National Labour Court has held that an APS involving the privatisation of a bank was disproportionate, as it was a political strike against the privatisation process itself: *Bank Discount* (n 97). Stephen Adler, Chief Justice of the National Labour Court, emphasised that the workers did not have the power of veto over government privatisation decisions.

[114] For instance, in the past the fact that the strike against a government reform was classified as political influenced the court in determining that it was disproportionate: *The Organization of Teachers* (n 97); Mordechay Merony, 'The Involvement of Law and Labour Courts in Strikes in the Public Sector: New Problems and New Challenges' (2012) 14 *Law and Governance* 271, 284 (in Hebrew). Disproportionality in these cases stems from the substantial harm caused to the public and the public interest.

[115] *The General Histadrut* (n 15). An appeal to the Israeli HCJ in this case was dropped after a while by the government: HCJ 5027/17 *The Private Electricity Manufacturers Forum v The National Labour Court* (4 July 2018) (*Electricity Manufacturers*).

[116] Nevertheless, it should be mentioned that in comparison with the National Labour Court, the Israeli Supreme Court showed unease with this trend. In July 2017 the Supreme Court issued an order for the Histadrut Labour Federation to state why the judgment of the National Labour Court should not be cancelled: HCJ 5027/17 *Electricity Manufacturers*, Decision (23 July 2017). Judicial expressions in the Israeli Supreme Court in the appeal in *Dorad* threatened the Histadrut – the largest workers' organisation in Israel, which preferred to stop sanctions in order to prevent a problematic ruling: see, eg, 'The High Court of Justice Accepted the State's Position, and the IEC Board Stops the Sanctions', *The Marker*, 20 July 2017, https://www.themarker.com/dynamo/1.4278483 (in Hebrew). It seems that the Supreme Court believes that the current collective approach is not ideal. Yet, as agreement regarding the electricity reform had been reached between the government and the Histadrut in July 2018, the Supreme Court rejected the appeal of the private electricity manufacturers. It ruled that the appeal had become theoretical, as the unions had ceased their sanctions against the private manufacturers and agreement with the employees regarding the government reform had been reached: *Electricity Manufacturers*, (n 115).

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3.2. UNITED KINGDOM: ADOPTING AN ECONOMIC APPROACH

3.2.1. THE JURISPRUDENCE OF BRITISH COURTS

The judicial system of the UK has adopted an economic doctrine and has not applied the constitutional right to strike against privatisation. The traditional British common law did not consider strike action as a human right or having a special status, but rather as a tool for granting employees statutory immunity against legal action.[117]

British law, unlike Israeli law, appears to have been designed to prevent unions from exercising collective action on technical grounds, rather than recognising an effective right to strike.[118] Hence, the law imposes obligations on trade unions in relation to strike ballots and special notices that are unparallelled in Israel. Immunity from civil liability in tort, which would otherwise arise under common law, might be granted only if the employees comply with the requirements of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992). Nevertheless, the scope of the legislative entitlement to immunity[119] is limited.[120]

The constitutional background to the UK jurisprudence is based on the European Convention on Human Rights and Fundamental Freedoms (ECHR), which has been incorporated into UK law through the HRA. The courts must consider in their judgments the freedoms and rights contained in the ECHR.[121] Article 11 of the ECHR, on freedom of association, has been interpreted by the European Court of Human Rights (ECtHR) in Strasbourg as including the right to strike as a fundamental right.[122] Nonetheless, the jurisprudence has not adopted a fundamental right to strike against privatisation.

In fact, British jurisprudence has not changed much with regard to strike action against privatisation since the era of Margaret Thatcher in the 1980s, when courts adopted a liberal jurisprudence and a pro-privatisation line of rulings. It could be claimed that this line of rulings

[117] Since 1906, legislation has provided immunity from liability in tort for strikers under certain conditions: Trade Disputes Act 1906 (UK). Legitimate strikes, which are granted protection by the law, are those which comply with the definition of a 'trade dispute' within the legislation: s 244 of the Trade Union and Labour (Consolidation) Act 1992 (UK) provides that a trade dispute is a dispute between workers and their employers, which relates wholly or mainly to one or the other of various categories: '(a) terms and conditions of employment or the physical conditions in which workers are required to work'.

[118] Keith D Ewing and John Hendy, 'The Dramatic Implications of Demir and Biarka' (2010) 39 *Industrial Law Journal* 2, 20.

[119] Immunity from liability in tort can be claimed only if the aim of the collective action comes within the statutory definition of lawful trade dispute, and satisfies the requirements placed on unions to hold a ballot and give notice to the employer. Such requirements, as pre-conditions for immunity from liability, do not exist in Israeli law. In Israel, immunity from liability in tort is wide and exists mainly provided the strike is proportional: CA 593/81 *Ashdod Vehicles v Tzizik* 1987 PD 41(3) 169; CA 862/02 (Haifa) *X v Rishon Lezion Municipality* (23 October 2008).

[120] Tonia Novitz, 'Collective Action in the United Kingdom' in Edorado Ales and Tonia Novitz (eds), *Collective Action and Fundamental Freedoms in Europe* (Intersentia 2010) 173, 176.

[121] Keith D Ewing, 'The Human Rights Act and Labour Law' (1998) *Industrial Law Journal* 275, 275–82.

[122] ECtHR, *Enerji Yapi-Yol Sen v Turkey*, App no 68959/01, 21 April 2009. The ECtHR has also held that the right of association includes the right of collective bargaining: ECtHR, *Demir and Byarka v Turkey*, App no 34503/97, 12 November 2008.

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ignores constitutional obligations (mainly Article 11 of the ECHR, freedom of association) to which the courts are subject.[123]

Thus, the 1983 *Mercury* case involved a collective dispute over the liberalisation of telecommunications by allowing a private company to offer an alternative service to that of the nationalised provider, British Telecom.[124] The Court of Appeal held that the strike was related mainly to the union's opposition to privatisation and liberalisation itself. Since the court perceived the goal of the collective dispute to be a rejection of the privatisation process and a dispute with political objectives, it classified the strike as unlawful, not having been recognised as a regular trade dispute.[125] Employees were therefore not granted statutory immunity protection against lawsuits.[126]

Since the adoption of the HRA, which mandates freedom of association, jurisprudence has refrained from embracing collective constitutionalism. In the 2000 *University College* case the Court of Appeal ruled that strike action in connection with privatisation was not legitimate.[127] The case involved the privatisation of public services, including health services, in a public–private partnership. It was held that the statutory immunity of workers in a collective dispute did not include a dispute that related to terms and conditions of employment of either the workers after they had been transferred to a new employer or the workers who would be employed by the new private employer.[128]

The case demonstrates that UK law has been very restrictive on trade unionism in general[129] and in relation to the APS in particular. Even though the court acknowledged that the strike was aimed at preserving employee working conditions in the privatisation process and during the period after privatisation was to take place, it considered the strike illegal.[130]

In the 2001 *Westminster* case, the Court of Appeal ruled that once privatisation of the service is being opposed, a strike that involves public policy should not be permitted. The case dealt with the privatisation of the Assessment and Advice Unit of Westminster Council, which intended to transfer the functions performed by the unit to a private company. The court held that if strike action was taken in the hope of changing the privatisation policy, an injunction against the strike should be granted.[131] Nevertheless, the strike in *Westminster* was not concerned with the privatisation process itself as the employees of the privatised unit merely wished to remain employed by the Council in other units and performing other duties. The union accepted the privatisation policy. As the strike did not involve the privatisation process itself, an injunction against the

[123] Bob Simpson, 'Trade, Disputes and Industrial Action Ballots in the Twenty First Century' (2002) 31 *Industrial Law Journal* 270.
[124] *Mercury Communications Ltd v Scott-Garner* [1984] Ch 37, [1983] 3 WLR 914.
[125] John Hendy, 'Caught in a Fork' (2000) 29 *Industrial Law Journal* 59.
[126] During the 1980s the Trade Disputes and Trade Unions Act 1946 (UK) granted immunity from lawsuits for employees involved in a strike that was regarded as related to a trade dispute.
[127] *University College London Hospital NHS Trust v UNISON* [1998] EWCA Civ 1528, [1999] ICR 204.
[128] ibid. The court took the view that the dispute was not about terms and conditions of employment, but about terms and conditions yet to be entered into between the workers and the new private employer. Hence the court granted an injunction against the strike: ibid 213–16.
[129] Hendy (n 125).
[130] *University College* (n 127).
[131] *The Lord Mayor and Citizens of Westminster City Council v UNISON* [2001] EWCA 443.

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strike was denied. The court emphasised that even if the employees had succeeded in their demands, it would have made no difference to the privatisation operation. This ruling is a slight diversion from the *University College* case.

The British liberal common law tradition is also reflected in the perception of the right to strike. The *Viking* case before the European Court of Justice (ECJ) dealt with the issue of recognition of the fundamental right to strike in Article 11 of the ECHR.[132] The UK denied any community right to strike in the hearing before the ECJ.[133]

Unlike Israeli jurisprudence, UK law does not recognise the right to strike beyond the employer–employee relationship. In order for a strike to be regarded as legitimate and for unions to enjoy immunity from lawsuits, the strike must be connected with a dispute between workers and their employer, and must relate to specific issues – primarily the terms and conditions of employment. The APS, which is a protest strike against the government, is beyond the realm of employer–employee disputes.[134]

The trend in the UK jurisprudence can be seen also in the fact that the courts have held that the right to exercise a sympathy strike is not included in Article 11. In the 2016 *Govia* case before the Court of Appeal, which concerned a strike in the railway services,[135] the appellant suggested that strike action was designed in part to pursue political goals and to help the National Union of Rail, Maritime and Transport Workers (RMT), a fellow union, in its struggle for the cancellation of the privatisation of the railway. The appellant claimed that the union was hostile to private providers of railway services, such as the employer, Southern Rail. It was claimed that the strike action was intended partially to support the maintenance of the national railway service and the cancellation of its privatisation. The Court of Appeal noted that apart from the fact that sympathy strikes were forbidden, strikes with political objectives aimed at cancelling privatisation and nationalisation were illegitimate and not protected by the law.[136]

Unlike the UK position, Israeli courts have recognised the legitimacy of strikes beyond the relationship of employer and employee. Hence, the legitimacy of secondary strikes has been recognised.[137] The same line of reasoning is used with regard to the APS, which affects the public interest in reform, interferes with economic recovery and growth, and affects the rights of citizens in respect of the supply of public services.

As for the ECtHR, even though it has held that the right to strike is a fundamental right, its scope was narrowed. It is recognised only when it concerns a regular economic strike and the relationship between employer and employee. Hence, in the *Enerji* case the ECtHR ruled that the right of collective action is recognised only for as long as it relates to enhancing collective

[132] Case C-438/05 *Transnational Workers' Federation Union v Viking* [2007] ECR I-10779.
[133] Gary Daniels and John Mcllroy, *Trade Unions in a Neoliberal World* (Routledge 2009) 209.
[134] Howard Davies, *Political Freedom, Associations, Political Purposes and the Law* (Continuum 2000) 170.
[135] *Govia Railway Ltd v Associated Society of Locomotive Engineers and Firemen* [2016] EWCA Civ 1309.
[136] ibid.
[137] See, eg, CA 573/68 *Shavit v Hanan* 1969 PD 23(1) 516.

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bargaining on economic conditions in the workplace.[138] The limited interpretation of Article 11, as referring only to strikes concerning pure organisational and economic issues between employer and employee, was the background to the narrow interpretation of Article 11 also by the UK courts. Hence, UK judicial policy can also be explained in light of the jurisprudence of the ECtHR, which perceives strike action against privatisation to be beyond the scope of Article 11.

The ECtHR itself regards strikes with the aim of better protection for workers after the privatisation as not protected under Article 11 of the ECHR.[139] This is apparent from the *University College* case, which was brought before the ECtHR.[140] The ECtHR rejected the claim that freedom of association under Article 11 included an obligation to enable strike action in cases of privatisation. The Court noted that even though Article 11 included freedom of association, the provision did not secure specific treatment for trade unions according to the state. The Court emphasised that there was no express inclusion of a right to strike in privatisations or an obligation on the part of employers to engage in collective bargaining under these circumstances. The ECtHR noted that Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. Nevertheless, while the ability to strike represented one of the most important means by which trade unions could fulfil this function in privatisations, it was not the only one. The Court held that the restriction was justified by Article 11(2) as necessary in a democratic society, for the protection of the economic interests involved.[141]

The UK position was also upheld by the Strasbourg court in the *RMT* case in 2014.[142] The UK government argued before the ECtHR that the pressing social need for maintaining the statutory ban was to shield the domestic economy from the effects of such a strike, which concerned third parties beyond the employer–employee relationship.[143] The ECtHR rejected the complainant's claim that the ban on secondary strike action violated the right to strike as protected by Article 11.

3.3. Differences between Developments in the Two Jurisdictions and the Implications of the Various Approaches regarding Constitutionalism

The UK and Israeli legal systems are similar in that in neither does the labour legislation (the UK TULRCA 1992 and the Israeli Settling Labour Disputes Law, 1957) expressly provide for a right

[138] *Enerji Yapi-Yol Sen* (n 122).
[139] ECtHR, *Unison v United Kingdom*, App no 53574/99, 10 January 2002.
[140] ibid.
[141] Ewing and Hendy (n 118).
[142] ECtHR, *National Union of Rail and Transport Workers v United Kingdom*, App 31045/10, 8 April 2014. The ECtHR held that under art 11 the freedom of trade unions to protect the occupational interests of union members must be secured and the core of trade union activity protected. Hence art 11 aims to achieve the correct balance between the interests of labour and management paras 85–86. It was also held that if a restriction on strike action does not relate to the core but an accessory aspect of trade union activity, a margin of discretion to member states to restrict strike action is allowed: ibid para 87.
[143] The UK government claimed that secondary action had the potential to infringe the rights of persons who are not party to the industrial dispute, and to cause broad disruption within the economy: ibid para 82.

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to strike. Nor do they have formal rigid constitutions, and in both systems existing constitutional documents do not include a specific right to strike. While in various respects the starting points of the two jurisdictions are similar, their jurisprudence has evolved very differently. There are reasons for these differences in the perception of the right to strike against privatisation, as follows.

First, the diverging approaches of the two jurisdictions are as a result of the different characteristics of the judicial systems in their addressing of labour rights. They differ in the power granted to the courts in undertaking judicial review in the protection of rights, specifically of primary legislation. Whereas in Israel the judiciary may declare legislation invalid when it violates a Basic Law, the situation in the UK is different. The HRA provides that a law must be interpreted in a manner to comply with the ECHR. Nevertheless, the HRA cannot be perceived as handing over supremacy for rights adjudication to the courts:[144] the traditional concept of parliamentary supremacy still prevails, despite the special status granted to rights via the HRA. The HRA maintains parliamentary scrutiny of rights and sovereignty of Parliament over the courts in determining rights-based judicial review. It creates a weak model of judicial review, according to which the court may only declare that legislation violates human rights but it is then up to Parliament to decide whether to confirm it. Thus, Section 4 of the HRA,[145] which allows the court to issue a declaration of incompatibility with ECHR rights, has been drafted so as to maintain parliamentary supremacy, as such declarations do not change the relevant legislation.[146] This weakness in the UK model of judicial review compared with that of Israel, especially with regard to human rights protection, might also reflect on its ability to protect a right to strike, as opposed to the ability of the Israeli courts to do so.

Second, even though the two jurisdictions are similar in not including the right to strike in constitutional documents, there have been differences over the years in the tendency to consider labour rights as human rights. In the tradition of British common law, strike action has never been recognised specifically as a human right. The initial aim of legislation relating to strike action was mainly to create immunity against lawsuits initiated by an employer.[147] In contrast, Israeli courts have always recognised the right to strike as a human right, although its superior normative status and constitutional status has only recently been recognised.

Third, even though neither legal system recognises specifically a right to strike, the perception of strike action is different in each system. The economic approach of British courts is derived from the narrow perception of strike action in the traditional common law. Contrary to the Israeli jurisprudence, where a strike has always been perceived as suspending the working contract, according to British common law the contract is not suspended and a strike is considered a breach of the employment contract.[148] As the contract is not suspended, but is regarded as having been

[144] Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2001) 9 *International Journal of Constitutional Law* 86, 94–95.
[145] This is used as a last resource.
[146] Bellamy (n 144).
[147] Ewing and Hendy (n 118) 12–13; Richard Hyman, 'The Historical Evolution of British Industrial Relations' in Paul Edwards (ed), *Industrial Relations: Theory and Practice in Britain* (Blackwell 2003) 37, 38–40.
[148] Novitz (n 120) 175–76.

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breached by a failure to perform contractual obligations, the scope of the freedom to strike has been narrower in the UK than it has in Israel. In contrast to Israel, under British common law the employer was able to prevent a return to work of employees after a strike and could eventually dismiss them. According to TULRCA 1992, protection against dismissal might be granted only if the workers comply with the requirements of this statute. Nevertheless, protection from dismissal in cases of strike action under British law is very limited. In contrast, in Israel a strike is not perceived as a breach of contract at all[149] and dismissal of employees based on participating in a strike is strictly forbidden.[150] Strike action has been perceived over the years as an integral part of labour relations in Israel, and not as breach of contract. Therefore, strike action in Israel has always enjoyed special protection and a higher status.

Fourth, Israel has a combination of a strong judicial system and a tradition of over-jurisprudence, an extensive role for the courts and an extremely judicialised environment, which allows the courts to develop the law[151] with a relatively wide latitude to create new rights.[152] The law itself hardly addresses the issue of collective rights and strike action, and these issues have been developed by the courts themselves. The Israeli courts that deal with collective action are specialised labour courts; they were established in the 1960s in order to deal with strikes in the first place, and therefore tend to be activist in these matters.[153] Another purpose of establishing Israeli labour courts as specialised courts was to provide a more familiar arena for labour organisations. Labour unions have special status in these courts, and are able to represent employees, in addition to representation by lawyers. The unions were involved in the discussions before the establishment of the courts in the 1960s, having expressed their consent to their establishment. Hence, Israeli judges are likely to take upon themselves a dominant role within the socio-economic arena, creating new forms of protection for employee rights and intervening in labour policy design.

British courts have not been characterised with a similar activist tradition. As noted by Davies, the traditional approach to the regulation of strike action seeks to avoid politicising the courts and to avoid involvement in socio-economic issues and labour policy.[154] Therefore, British courts tend to refrain from being involved in more politically sensitive cases, such as those regarding strikes against privatisation.

Fifth, the different approaches of Israeli and British courts also reflect the various realities and developments within their respective labour markets. The reality of the Israeli labour market has pushed judges to develop new forms of workplace protection via the application of collective

[149] Collective Agreements Act, 1957 (Israel), art 19.
[150] Dismissal of employees on the basis of participating in a strike is forbidden according to the Collective Agreements Act, 1957 (Israel), art 33(10).
[151] Davidov (n 72).
[152] Guy Mundlak, 'The Israeli System of Labour Law: Sources and Forms' (2008) 30 *Comparative Labour Law and Policy Journal* 159; Davidov (n 72).
[153] Looking at the discussions in the parliament with regard to the Labour Court Act reveals that the intention was to replace strikes with adjudication.
[154] Anne CL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126, 146.

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constitutionalism. In response to the rise of neoliberalism and privatisation since the 1990s, and even more so in the new millennium, courts have exercised judicial review, which attempted to preserve the social rights enacted in the 1960s–80s during the period in which Israel could be defined as having a positivist-corporatist welfare state regime.[155] The constitutionalism of labour rights is oriented towards the protection of participants in the labour market. Thus, it attempts to enhance the empowerment of employees and preserve the values of the welfare state. Historically, Israel was also characterised by high union density, corporatism and strong collective bargaining. Since the 1980s there has been a sharp decline in union density, and also in the corporatist regime.[156] The rise of a neoliberal agenda of political actors and regulators, and the widespread phenomenon of privatisation have affected labour interests and created the need for the protection of labour rights.[157]

As opposed to the Israeli labour system, which was characterised originally by corporatism, the British system is based on a tradition of voluntarism. Voluntarism emphasises the importance of individual contracts over collective agreements and union representation.[158] British common law legal history is associated with the liberal values of freedom of contract and the right to property. As Hyman notes, the tradition of voluntarism was associated with individualist free-market presumptions.[159] Unlike the Israeli system of corporatism, in which the state was a major participant in collective bargaining, within the British system the state had very little involvement with labour relations.[160] Furthermore, contrary to the Israeli system in which the courts have been dominant actors in the creation and enforcement of collective norms, in the British tradition of voluntarism courts have played only a minor role in these matters. As Novitz notes, collective bargaining and conflicts came to be known as an autonomous source of norms. Hence, collective rights and interests and collective agreements were not intended to be enforced in the courts, but rather by the parties outside the judicial system.[161]

Thus, the British system, which has embraced an economically liberal tactic, is quite different from the Israeli model. The historical background to the British jurisdiction, its development and its special characteristics can explain the differences in the approaches. In the British jurisprudence the tradition of voluntarism and individualism has pushed judges to follow a neoliberal path and refrain from protecting collective rights. Even though its courts are subject to Article 11 of the ECHR, it has been interpreted in a narrow way, so that the APS is excluded from the scope of the protection of the article.

In the eyes of the British courts, the right to strike could not be recognised as more than an essential element of regular collective bargaining. Therefore, strike action cannot be considered

[155] Mundlak (n 14) 4–6.
[156] Mundlak (n 2).
[157] CDA 18983-09-14 *The Histadrut v The State of Israel* (2017) 4.
[158] For instance, while a union could lawfully call a strike, striking workers were in breach of their contracts of employment and might therefore be dismissed: Hyman (n 147).
[159] ibid.
[160] Regarding this matter Novitz quotes Kahn-Freud, describing the British system as collective *laissez faire*: Novitz (n 120) 175.
[161] ibid 174, 175.

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to be included in Article 11 when it concerns issues beyond the regular bargaining process between employers and employees.[162]

The ECtHR itself had also held that a fundamental right to strike in Article 11 was recognised only for as long as it related to a typical economic strike. Thus, contrary to the Israeli position, applying the right to strike as a fundamental right is possible only when it is connected with an economic dispute between employees and employer over collective agreements.[163] Therefore, the new Israeli jurisprudence, which holds that strikes should be possible for political and socio-economic objectives associated with privatisation, goes beyond the scope of Article 11 as interpreted by UK courts and the ECtHR.

Each of the above approaches – the collective approach, embraced by the Israeli courts, and the economic approach of the British courts – has weaknesses. These weaknesses are considered below.

3.4. The Weaknesses of Israeli and British Jurisprudence

3.4.1. The Weakness of the Collective Approach of Israeli Courts

The jurisprudence of the Israeli courts demonstrates the weaknesses of the collective approach. First, it could be claimed that in Israel the interests of different groups are balanced, and courts do not favour one group but try to maintain equilibrium between the needs of the state and the obligation to protect employees. In reality, however, by embracing the collective approach, courts tend to ignore the public interest in achieving free competition in the markets and the desire of new private entrants to the market. Thus, none of the Israeli court rulings have taken into account the right to establish businesses and supply services, freedom of movement within the markets, and freedom of occupation.[164] This is especially apparent from the cases of *Dorad* and *Private Harbours*, where such considerations were not thoroughly reviewed.

Furthermore, since the collective approach enables collective action against privatisation, even if it is not directed at preserving employees' working conditions, the governmental interests and the public interest in establishing reforms, in particular, are hardly addressed. Thus, the weakness of the collective model is that when the privatisation does not affect wages or working conditions directly, granting employees with a constitutional right to strike will raise transaction costs. Hence, in the *Train*[165] case the courts should have denied the application of a constitutional right to strike and classified the collective action (which was directed against the privatisation process itself) as an illegitimate political strike. Recognising a right to strike in such cases enables employees to demand an increase in pay – which would not have been affected by the reform in

[162] Ewing (n 121) 275–82.
[163] *National Union of Rail and Transport Workers* (n 142).
[164] In the EU some economic freedoms are considered to be fundamental rights – freedom to provide services: Treaty Establishing the European Community (2002), art 56 (formerly art 49); and freedom of establishment: ibid, art 49 (formerly art 43).
[165] *Train Association* (n 88).

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any event – and therefore the result will be an unnecessary increase in remuneration for employees and high transaction costs.

Second, the collective approach ignores the institutional settings of the labour market and the issue of monopolistic governmental industries. Israeli courts that embraced the collective approach have never taken into account the issue of monopolies among public services and corporations. They apply the same parameters to all employers, regardless of monopolistic status. Nor have these courts taken into account the unique status of strong unions in monopolistic governmental enterprises, which often enjoy extraordinary power.[166] As a result, the collective approach enables the placing of far-reaching demands and exerts pressure on the government to accept the unions' agendas.

Thus, in the *Dorad* case[167] the court should have taken into consideration the monopolistic settings of the market, the competition goals and the rights of new private manufacturers to enter the market, as well as the interests of consumers. The rights and needs of new manufacturers to establish businesses should be balanced with collective rights. These aspects of the public interest in privatisation goals should be taken into account.

Another example is the *Metrodan* case,[168] in which the Israeli court should have refrained from applying constitutional labour rights as the strike involved the public transportation system, which was a monopoly. Following the privatisation of the transportation services in the city of Be'er-Sheva, the drivers of the private bus company began strike action, which led the transportation minister to grant a temporary licence to another bus company to operate bus services. The court ruled that the minister's decision was void as it violated collective constitutional rights.[169] The lack of any alternative public transportation in the city of Be'er-Sheva should have led the court to declare the strike to be unjustified. Whenever an employer enjoys monopolistic status, strikes should not be considered legitimate. Even if the strike is aimed at preserving employee rights, the monopolistic status of the corporation should lead the courts to consider the strike illegitimate. In these cases, courts should refrain from applying the constitutional right to strike.

A further weakness of the collective approach lies in ignoring the institutional settings of markets that involve either essential or utility services. Unions enjoy special status in these markets, and an application of collective constitutionalism leads to high demands for salary increases by the unions and high transaction costs. In the *Train* case[170] the court should have refrained from applying a constitutional right to strike, as it involved the utility market of train services in which the union enjoyed a powerful status.

[166] The monopolistic status of some governmental corporations and their employees has never been taken into account within the proportionality tests.
[167] *The General Histadrut* (n 15).
[168] CDA 57/05 *The General Histadrut v Metrodan* (3 March 2005).
[169] ibid.
[170] *Train Association* (n 88).

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3.4.2. The Weakness of the Economic Approach of British Courts

Embracing an economic model in situations of privatisation has its flaws. First, in the *University College* case[171] the framing of the trade dispute as an illegitimate strike created difficulties as the strike involved employment conditions in the post-privatisation era. Such a strike, involving employee working conditions, should have been perceived as legitimate. Refraining from recognising a fundamental right to strike in cases like *University College* would result in employers trying to avoid the necessary steps of making cuts in managerial and administrative costs and instead rely on reducing wages. The eclectic model is also advantageous in taking into account a decline in union power and, in particular, union density. In *University College* a decline in union density should have led to the application of a constitutional right to strike, recognising the APS that concerned working conditions.[172]

Second, the weakness of the economic model can be seen also in the privatisation either of functions of governmental prerogative (such as coercive power) or of policy design. In such cases the approach of British courts in refraining from applying a constitutional right to strike in privatisations is problematic, whereas applying a fundamental right to strike in these cases leads to the prevention of unsuccessful privatisations and reduces transaction costs.

Third, the application of a constitutional right to strike in contracting-out core functions of a public organisation has advantages. In these cases, the special knowledge and skills of the internal employees create an advantage, and collective struggles might lead to the prevention of unsuccessful privatisations and a reduction in transaction costs.

4. An Eclectic Model

4.1. The Rationale of the Eclectic Model according to the NIE Theory

The eclectic model suggests a partial application of a constitutional right to strike in the context of privatisation. It claims that constitutionalism in privatisations could be justified in some cases, when unions and collective action have an economically beneficial impact. Hence, regulation of the labour market through constitutionalisation of labour rights should take place when it can enhance efficiency.[173] The NIE theory provides the rationale and sketches the contours of the

[171] *University College* (n 127).

[172] According to UK government data, trade union density has been in decline over the last two decades since 1995. Whereas in 1995 union density was 32%, in 2000–01 it was only 29%; in 2009 it was 27%, reducing to 24% in 2013: UK Government, Department for Business, Energy & Industrial Strategy, 'Trade Union Membership: Statistical Bulletin', May 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805268/trade-union-membership-2018-statistical-bulletin.pdf.

[173] Also, consideration of efficiency and free competition goals by the judiciary will create policy cohesion between the various actors, regulators and political actors on the one hand (which typically advances privatisation in order to enhance efficiency), and the courts on the other. Policy cohesion is the strategy to support harmonious policy within different areas: Christos J Paraskevopulos and Robert Leonardi, 'Adaptational Pressures and Social Learning in European Regional Policy Cohesion' (2004) 14 *Regulation and Federal Studies* 315, 317.

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eclectic model[174] with regard to the constitutionalisation of collective rights in privatisations. The NIE theory is aimed at increasing efficiency by optimising the transaction costs[175] of negotiating, securing and completing transactions in a market economy.[176] In our case, transaction costs include bargaining costs, the costs of gathering information and finalising agreements, compensation paid to employees for their approval of the privatisation process, wage increases, and external costs imposed on the public. Yet constitutionalism should be rejected when it results in high transaction costs.[177]

Whereas the collective approach suggests the universal implementation of constitutionalising labour rights, the eclectic model limits its application and emphasises the public interest in privatisation reforms as a means of reducing the costs of services and products.[178] Contrary to the collective approach, within the eclectic model courts must take into consideration the anti-competitive effects of an APS. Unions and collective action are exempt from anti-trust legislation[179] in most jurisdictions. Although this exemption is important,[180] courts should consider the effects of collective action on privatisation objectives, as well as the fact that privatisation is aimed at improving the quality of public services and the general public welfare.

The NIE approach acknowledges that in most circumstances privatisation is intended to eliminate bureaucracy and increase the flexibility and efficiency of public hierarchies in the supply of public services, including improved labour flexibility.[181] Mostly, the NIE approach suggests creating

[174] Oliver E Williamson, 'Foreword – The New Institutional Economics' in Brousseau and Glachant (n 7) xxiii, xxxiii; Oliver E Williamson, 'Public and Private Bureaucracies: A Transaction Cost Economics Perspective (1999) 15 *Journal of Law, Economics and Organization* 306. Williamson's general theory of the internal labour market can be applied in cases of contracting out and privatisation. The theory claims that in some situations the use of internal employees is more efficient as the process of hiring external employees itself has costs: Oliver E Williamson, 'The Vertical Integration of Production: Market-Failure Considerations' (1971) 61 *American Economic Review* 112, 112–13.

[175] Glachant and Perez (n 7); Goedecke and Ortmann (n 9); Hwang (n 7); Young (n 7).

[176] According to Ronald Coase – one of the earlier scholars of institutional economics – prices are generated from market activity and these prices themselves have a cost – the cost of producing market prices: Coase (n 10); see also Victor Nee, 'The New Institutionalism in Economics and Sociology' in Neil J Smelser and Richard Swelberg (eds), *The Handbook of Economic Sociology* (2nd edn, Princeton University Press 2005) 49.

[177] The need to reduce transaction costs could justify regulation that is aimed at strengthening union collective struggles and collective negotiations: ibid.

[178] Contrary to the collective model, which suggests that a constitutional right to strike should be applied generally in privatisation cases, the eclectic model, in contrast, suggests completely refraining from the application of a constitutional right to strike in some cases.

[179] The rationale behind anti-trust legislation is that a union is invulnerable to anti-trust liability as long as it pursues its traditional objective of maintaining working conditions and wages. Thus, when the objective of union conduct is legitimate in the broad sense, and it aims to achieve traditional self-interest within the labour market, it is portrayed as justified in recognising immunity from anti-trust liability: Milton Handler and William C Zifchak, 'Collective Bargaining and Anti-Trust Laws: The Emasculation of the Labour Exemption' (1981) 81 *Columbia Law Review* 459, 480–82.

[180] In Israel unions are exempt from anti-trust legislation: Antitrust Act (1988) (Israel), art 3(9).

[181] Kaufman (n 38). The NIE approach to labour law claims that generally there is no need for governmental regulation and we should aim for free markets and privatisation. Nevertheless, regulation of markets could be justified when there are transaction costs. Institutional scholars claim that it is not possible to create an efficient optimal pricing system based on national monopolies owned by the state, unless real markets for framing real transactions were created: Glachant and Perez (n 7).

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markets by dismantling public holdings of services and vertically integrated state-owned firms[182] and replacing them with competitive mechanisms,[183] unless there are high transaction cost considerations that prevent this.

The NIE approach differs from the neoclassical theory in the perception of the public/private distinction, as it relates to the extent of the regulation of private activities and the tendency to reject privatisation. The neoclassical theory sees current changes as a process of deregulation, according to which the state passes various functions – including the supply of public services, policy design and implementation – to the market through privatisation. As a result, the state should avoid its own regulation and policy making.[184] Whereas the neoclassical theory supports a large process of privatisation, the NIE theory suggests that in certain public services bureaucratic hierarchies are better than private firms, and in some cases privatisation should be denied or followed by a special regulation process and implementation of new duties on employers.[185]

Furthermore, the neoclassical theory denies legal protection and a fundamental status of the right to strike altogether, and portrays it as an obstacle to the free market. It claims that recognising such fundamental collective rights would be an obstacle to raising living standards of the working class as a whole and will cause unemployment.[186] In contrast, the NIE theory recognises that protection of collective action could lead to enhanced efficiency in some circumstances.

Thus, constitutionalisation of labour rights in privatisations could be justified partially in accordance with the NIE theory. In some cases, privatisation should be followed by re-regulation of the markets, including re-regulation with regard to setting up labour-related obligations relating to human rights.[187] The suggested eclectic approach, based on NIE, therefore rejects the neoclassical idea that denying recognition of a fundamental right to strike in privatisation cases necessarily enhances efficiency.

Furthermore, according to the NIE theory, institutional settings matter, and consideration should be given to the implications for transaction costs of the various types of labour market setting and different services and functions that are privatised.

There are a few cases in which constitutionalism reduces transaction costs as well as reasons for enhanced efficiency in recognising collective rights in these cases. There are also cases in which constitutionalism causes high transaction costs and therefore it should be

[182] J David Brown, John S Earle and Almos Telegdy, 'Employment and Wage Effects on Privatisation' (2009) 120 *The Economic Journal* 683.
[183] Glachant and Perez (n 7).
[184] Maxim Boycko, Andrei Shleifer and Robert W Vishny, 'A Theory of Privatisation' (1996) 106 *The Economic Journal* 309, 309–10. The economic neoclassical approach emphasises the relative inefficiency of public firms and public services. Hence, they claim that there would be higher employment per unit of output in publicly provided services.
[185] Williamson, 'Public and Private Bureaucracies' (n 174) 306, 330–36. NIE scholars claim, for instance, with regard to privatisation of security and army services and foreign affairs, that a state can best control violence and manage foreign affairs through public bureaucracies: Deborah D Avant, *The Market for Force: The Consequences of Privatising Security* (Cambridge University Press 2005) 47–49.
[186] Novitz (n 29) 52.
[187] Lorenzo Bordonga, 'Moral Hazard, Transaction Costs and the Reform of Public Service Employment Relations' (2008) 14 *European Journal of Industrial Relations* 381, 392–93.

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rejected. Both of these cases, along with guidelines for putting the eclectic model into practice, are described below.

4.2. The Eclectic Model and Guidelines for Putting It into Practice

Drawing on the above arguments, there are several principles of the eclectic approach and some guidelines that courts should follow in its application. According to the eclectic model, inhibiting free competition by imposing new obligations is justified only when it reduces transaction costs. Hence, there are some cases in which courts should apply a constitutional right to strike as its application will reduce such costs. There are also eight judicial tests which should be used by courts in determining whether to apply a constitutional right to strike.

The first judicial test is whether the strike involves working conditions. Collective action could reduce transaction costs when a strike is aimed at preserving employee working conditions in the post-privatisation era and during the privatisation process. Here, the eclectic model has an advantage in allowing the application of constitutionalism when working conditions are involved, as opposed to the general denial of constitutionalism by the economic approach.

One reason for this is that decentralisation of a collective struggle increases transaction costs by replacing a single centralised conflict and bargaining process with multiple conflicts.[188] Therefore recognition of a right to strike supports central representation by the union in a privatisation. Without collective action, each employee – facing an expected reduction in salary and deterioration in working conditions as a result of the privatisation – will be forced to negotiate individually, or alternatively be dissatisfied with the outcome[189] and therefore neglect his or her work.[190]

The second reason for adopting this test is that, without recognising a right to strike, privatised firms would tend to reduce wages in order to promote efficiency in the post-privatisation phase. Efficiency is the aim of the privatisation process in the first place and commercial corporations in the post-privatisation period will try to increase efficiency by weakening employment terms.[191] Low wages may allow an inefficient business to hide its managerial, organisational and other inadequacies, by relying on low salaries and increasing the dependency of workers on social security, thus imposing costs on society in general.[192] Privatisation could also lower the standard of living of employees and the working class in general as a result of salary reductions. Therefore, recognising a right to strike when collective action involves the effect of privatisation on wages and working conditions enhances efficiency. It forces managers to adopt a more productive system, rather than try to become competitive at the expense of their employees.[193]

[188] Scholars note that collective representation reduces transaction costs: ibid.
[189] The success of unions in avoiding these issues also results in employee satisfaction and a more efficient workplace; for instance, collective rights advance social justice: La Hovary (n 25) 341.
[190] Freeman and Meidoff, drawing on the collective voice theory, underline the economic impact of the collective response of unions to the dissatisfaction of employees: Richard B Freeman and James L Medoff, 'What Do Unions Do' (1986) 38 *Economic Review* 381.
[191] Efficiency is a situation in which the aggregate income is higher than the aggregate costs.
[192] Novitz (n 29) 80–81.
[193] Ray Marshall, *Unheard Voices: Labor and Economic Policy in a Competitive World* (Basic Books 1987) 112.

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The employer in such a situation is a free rider on society in general. These employers – being reluctant to take upon themselves the costs of the privatisation process – refuse to take the necessary investment-oriented managerial and organisational measures needed to enhance productivity. Hence, the employer lays the burden on the employees and society in general. The free-rider effect may cause high transaction costs and justify the application of constitutional duties.[194]

The third reason is that in a strike aimed at preserving working conditions it is economically more efficient to enable collective action for other reasons. Attempts to reduce the prices of public services through privatisation often lead to employee dismissals and the frequent hiring and firing of temporary employees, which again lay the costs of supporting the unemployed on society in general.[195] Labour regulation in applying collective duties in these cases is intended to avoid the tendency of employers to shift costs onto employees, their families, and society as a form of social cost.[196]

Privatisations also often lead to the weakening of union density[197] and to a transfer to unorganised private working environments.[198] Therefore the struggle of unions to preserve the rights of workers may also contribute to public[199] general welfare.[200]

Furthermore, the advantage of the suggested eclectic model, compared with the collective model, is in allowing the application of a constitutional right to strike only in cases of strike action involving working conditions. Hence, it includes a solution to one of the problems of the collective approach, which allows a universal application of constitutionalism even when working conditions are not involved. Granting employees the right to strike, when there is no direct and specific connection with working conditions, will result in unnecessary and high demands for wage increases and will therefore result in high transaction costs.

In the case of an APS that involves working conditions, the second judicial test should ask whether union power (and, in particular, union density) has declined compared with previous years. A considerable decrease in union power and union density suggests the need to apply

[194] A free-rider effect occurs when individual corporations obtain benefit while passing the cost to society in general. These corporations benefit from resources or goods for which they do not pay, at the expense of society and, as a result, economic inefficiency is created: Carlisle Ford Runge, 'Institutions and the Free Rider: The Assurance Problem in Collective Action' (1984) 46(1) *The Journal of Politics* 154.

[195] John Quiggin, 'Contracting Out: Promise and Performance' (2002) 13 *Economic and Labour Relations Review* 88, 95–98. It also affects the rights and welfare of working-class citizens and the public in general.

[196] Boycko, Shleifer and Vishny (n 184) 309; Wendell C Lawther, 'The Role of Public Employees in the Privatisation Process' (1999) 19 *Review of Public Personnel Administration* 28, 30–32.

[197] Privatisation also involves a major change in the internal organisation of a company, leading to a change in the corporate culture. This change has an impact on employee well-being, as it is associated with increased uncertainty and produces increased occupational stress: Rita C Cunha and Cary L Cooper, 'Does Privatization Affect Corporate Culture and Employee Well-Being?' (2001) 17 *Journal of Managerial Psychology* 21.

[198] The break-up of previously unified conditions of employment in collective-based public systems and the move to an unorganised private environment with fragmented career pathways increases the transaction costs of salary negotiation: Bordonga (n 187) 392.

[199] Unions contribute to the general public welfare, as the collective struggles of unions lead to an increase in salaries and improvement in the standard of living of the working class and society as a whole, and guarantees an adequate standard of living.

[200] Scholars stress that, in general, externalities and social costs provide the public interest rationale for employment regulation and the application of human rights in the labour market: Kaufman (n 38).

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constitutionalism if the strike involves working conditions. This is because the weakness of unions makes it even more difficult to demand that reducing costs should be based on reorganisation steps within the management itself and production methods, rather than through wage reductions.

In contrast, where there is a considerable increase in union power and, in particular, union density compared with previous years, constitutionalism should be rejected. In such cases the stronger position of unions strengthens their ability to demand wage increases or excessive compensation as a precondition for their approval of the process.

The third judicial test relates to the kind of working place and function that is being privatised. It focuses on the question of whether privatisation involves functions of governmental prerogative, coercive power or policy design. A constitutional right to strike should be applied when the strike is against privatisation of functions of governmental prerogative, such as security or foreign affairs, or in cases of privatising policy design and regulation, and functions of coercive power, even if the strike undermines the privatisation process itself. Here the eclectic model has an advantage compared with the economic approach, which denies applying a constitutional right to strike altogether. The application of constitutionalism in these cases reduces transaction costs.

When privatisation relates to services which are governmental functions in nature, carrying out such functions by the government is more efficient, and unions strive to avoid these unsuccessful privatisations. Specialised governmental skills are required for such services, rendering privatisation problematic and costly and often resulting in lower service quality. For instance, designing educational programmes for public schools requires special governmental expertise as well as special oversight. They are more difficult to monitor and supervise, once privatised.[201]

In cases of unsuccessful privatisation in which public bureaucracies are more suited for the supply of public services, the NIE approach calls for a rejection of the privatisation process.[202] Hence, a constitutional right to strike should be granted to employees whenever strike action is associated with the privatisation of core governmental services. It is also the case in the privatisation of coercive power institutions, such as prisons, police and fire departments, and prosecution proceedings. In these cases, collective action relates to increasing the general public good, as the struggle of employees as a group is efficient in achieving social goals in the privatisation era.[203]

When applied to these specific public functions, privatisation may lead to lower service quality as a result of attempts by private corporations to cut post-privatisation costs.[204] Prior to these privatisations, unions sought to avoid the negative consequences of unsuccessful privatisations in a bid to enhance general public welfare. It should be noted that many privatisations are derived

[201] High transaction costs are involved in privatising governmental core functions and special services in which either special skills or special investments are required: Trevor L Brown and Mathew Potoski, 'Transaction Costs and Institutional Explanations for Government Service Production Decisions' (2003) 13 *Journal of Public Administration Research and Theory* 441.
[202] Williamson, 'Public and Private Bureaucracies' (n 174) 330–36.
[203] Scholars demonstrate that the collective voice that unions enable can increase general welfare in several ways: Dau-Schmidt and Traynor (n 38).
[204] Quiggin (n 195).

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from the interests of strong corporations and elite groups that support privatisation processes out of capitalistic interests and at the expense of neglecting employee rights.[205] The influence of strong elite groups on policy making affects policy choices and, as a result, affects the interests of workers and of service recipients; it may also result in an unsuccessful privatisation process.[206]

Even though it could be claimed that administrative law is a more appropriate tool to deal with unsuccessful privatisations, in fact employees who are familiar with the flows and reality of the workplace are more equipped to resist the consequences of a bad privatisation. For instance, teachers are more suited to fight against an unsuccessful privatisation of a school, having the required inside knowledge and professional skills, and being familiar with the problems of the education system. Hence, their struggle against unsuccessful reforms through strikes and the tools of labour law is more efficient in the attempt to prevent the undesired results of privatisation than the use of other legal instruments.

The fourth judicial test asks whether a core function of a public organisation is being outsourced, as opposed to a marginal function only, and whether permanent duties of the public organisation are being privatised. A constitutional right to strike should be applied when core functions are outsourced. The advantage of the eclectic model, compared with the economic approach, is also prominent in a privatisation of core functions of a public organisation where the application of constitutionalism improves economic factors.

In these cases, the special knowledge and skills of the internal employees create an advantage. Contracting out in these circumstances might lead to unsuccessful privatisation and create high transaction costs for the public organisation. This is especially true when privatisation involves permanent duties. The resistance of unions in these cases prevents an unsuccessful privatisation.

There are cases in which courts should reject the application of a constitutional right to strike in order to avoid high transaction costs. One such case is that of monopolistic public industries and services.

Thus, the fifth judicial test should ask whether the relevant markets are competitive or monopolistic, and whether a public employer enjoys monopolistic status. According to the NIE, since institutions and institutional settings matter,[207] we should take into account the fact that privatisations in monopolistic markets are different from those in competitive markets. In markets where governmental corporations enjoy monopolistic power, unions have a unique status and strong bargaining power at the outset. In such situations, the application of a constitutional right to strike should be rejected, even if the strike concerns working conditions.[208] Here, an advantage of the

[205] Gordon Tullock, 'Practical Problems and Practical Solutions' (1977) 29(2) *Public Choice* 27.

[206] For instance, privatisation of the military and the system of military imprisonment, which are core government functions of the American army fighting in Iraq, led to inefficiency and economic costs in addition to corruption, failures in conduct and problems regarding contract enforcement and oversight and accountability issues: Martha Minow, 'Outsourcing Power: Privatising Military Efforts and the Risks to Accountability, Professionalism and Democracy' in Jody Freeman and Martha Minow (eds), *Government by Contract* (Harvard University Press 2009) 110, 123–27.

[207] Williamson, 'Foreword – The New Institutional Economics' (n 174).

[208] It should be noted that the ILO Committee on Freedom of Association delineates a difference between a political strike and a working conditions strike. Strikes of a political nature do not fall within the scope of the

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eclectic model, compared with the collective approach, is in distinguishing between the different institutional settings and in considering the exaggerated power of unions in monopolistic markets and their ability to demand increases in salary and working conditions. The influence that strong unions have on political actors in these situations indeed affects transaction costs and influences the decisions of policy makers. In these situations, negotiations with strong unions over privatisation reforms are complicated and costly. When unions use a right to strike in order to demand higher salaries as a preliminary condition for approval of the reform, the increase in salaries and labour costs will lead to a rise in prices and the costs of services, which the public will ultimately have to bear, and therefore to high transaction costs. Government decision making in these matters is often affected by government unions – interest groups that have traditionally benefited from a government monopoly.[209] Denial of the right to strike in situations that involve unions in monopolistic public industries reduces transaction costs.

The sixth judicial test relates to whether the strike involves opening markets to competition with new private companies. Rejection of a constitutional right to strike prevents high transaction costs when strikes involve opening markets to competition by new private actors. Here also the institutional settings of the market are of the essence. Collective action aimed at a third party, such as a private manufacturer that wishes to enter the market rather than against the privatisation, should be considered unjustified, and the application of constitutionalism should be denied.[210] Such strikes interfere with the public interest in maintaining free competition.

The seventh judicial test asks whether the right to strike involves essential services or basic utility services (including public transportation services and ports).[211] A constitutional right to strike should be denied in either case, even if the strike concerns working conditions. Here, an advantage of the eclectic model, compared with the collective model, is in considering the institutional settings in markets of either essential or basic utility services. In these markets, unions enjoy special power prior to the privatisation process, and hence constitutionalism should be rejected. In such markets and institutional settings unions hold great power in that interruption of these services in the event of strike action causes severe damage.[212] Furthermore, privatisation

principles of freedom of association: Compilation of Decisions (n 20) para 760; *Guatemala (Case No 2413)* (14 March 2005) Report on the ILO Freedom of Association No 340, para 901; *Romania (Case No 2509)* (20 July 2006) Report on the ILO Freedom of Association No 344, para 1245. A strike based on working conditions is considered legitimate and within the scope of freedom of association, as long as the strike is used as a means of defending their economic interests: Compilation of Decisions (n 20) paras 751–53. Unlike the ILO principles, such a distinction does not apply with the eclectic model.

[209] Glachant and Perez (n 7) 335–36.

[210] In some cases in Israel the collective action of the employees of a public corporation were aimed at a third party – a new entrant into the market or an existing private competitor. Collective action included a refusal to connect the new private manufacturers to the public corporation's infrastructure.

[211] Essential services are those services interruption of which would endanger the life, personal safety or health of the population or part of it: Compilation of Decisions (n 20) para 836.

[212] Even though union power diminishes if unions cannot threaten to stop these services, it should be noted that the right to strike may not include essential services even according to ILO principles. According to ILO principles, a situation in which a strike could be prohibited is where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population: Compilation of Decisions (n 20) para 836; *Colombia (Case No 2355)* (7 June 2004) Report on the ILO Freedom of Association No 343, para 469; *Philippines (Case No 2488)*

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and a reduction in the price of services are especially needed as these services are of particular importance to the public. The strong position and the influence that unions hold over political actors – either in essential services or basic governmental utilities – must also be considered. The special status of such powerful unions might cause high transaction costs and unions might demand high salary increases as a precondition for their approval of the reforms. Hence, in such cases the application of a constitutional right to strike should be rejected.

The eighth judicial test asks whether the collective action actually prevents the privatisation process from taking place in practice. This situation occurs when a union takes action that can hinder the privatisation process on technical grounds, for instance, by withholding data or failing to prepare reports that are vital for the privatisation process. In such situations the application of constitutionalism should be denied.

Several critical arguments can be raised against the eclectic model. These are described below, along with a justification for applying this model.

4.3. Critical Analysis of the Eclectic Approach and Its Justification

One critique of the proposed eclectic model is that establishing the proper rules regarding the APS should be decided by the legislature rather than through judicial review. Another critique is that presenting a uniform approach for the application of a right to strike in privatisation cases is problematic. In this respect, it could be argued that there is a need for a flexible approach, given the differences in the labour market characteristics of different countries and fields. Third, it could be argued that the eclectic approach focuses on economic factors and therefore raises concern over the possible omission of human rights considerations. Such an approach, motivated by financial concerns, might violate employees' rights just by virtue of focusing on economic interests. The focus on financial interests might also fail to consider other issues of the public interest, such as public welfare.

In response to the first critique, based on the theory of 'democratic ossification', a greater role for the courts could be justified as, in a neoliberal world, alternative democratic channels, such as legislation, are often opposed to the public interest – including the interests of citizens, consumers and workers – because of the influence of corporations and strong capitalist interest groups.[213] This calls for ratification of the problem. Hence, when strong corporations and interest groups lobby governments and legislatures in the development of public policy regarding privatisation, it is often left to the courts to protect the public general interest.[214] This is especially true in countries where non-governmental organisations (NGOs), consumer organisations and unions have very little influence on, or participation in, the design of privatisation programmes. In Israel, for instance, privatisation processes are often presented without the proper

(31 May 2006) Report on the ILO Freedom of Association No 346, para 1328; *Sri Lanka (Case No 2519)* (27 September 2006) Report on the ILO Freedom of Association No 348, para 1141.

[213] Bogg and Ewing (n 1) 414–15.

[214] According to the public choice theory, the capital elite, strong corporations and well-organised interest groups have the ability to lead conflicts in the political arena: Tullock (n 205).

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involvement of civil society and the public, and sometimes are advanced via very swift legislative procedures.[215]

Although judges might be influenced by the same lobbying and have even less knowledge than regulators in coping with the complexity of these matters, the characteristics of judiciaries make them more resistant to such influences. Judiciaries, being inherently designed to protect the rule of law and safeguard citizens from violations of the law, are different from regulators, economists and political actors, and hence should be more equipped to deal with such influences.[216] In addition, legislation is of a general and static nature, whereas judicial review is more dynamic and can more easily adapt the rules regarding strike action against privatisation to specific circumstances and changing realities.

With regard to the second critique, the eclectic model, as opposed to the current approaches, is more flexible. The consideration of various factors – from either the collective or the economic approach – is inherent in the eclectic model, it being a mixture of both methods. The eclectic approach also takes into consideration diverse factors and several judicial tests, creating a flexible approach. It can therefore be adapted for different situations and various market settings. Contrary to the economic approach, which in practice is rigid, the eclectic model does not deny the application of a constitutional right to strike altogether. Thus, in deciding whether to apply a constitutional right to strike, the eclectic model in practice is flexible by taking into account the specific circumstances, including the types of function and services involved and the concrete characteristics of the market in question.

A response to the third critique is that although the eclectic approach is based on economic factors, in principle it advances the recognition of a constitutional right to strike and its application, when appropriate. It also claims that the application of collective action is justified in certain circumstances, according to economic factors. Accordingly, in reality this approach also protects the collective rights of employees.

Despite the fact that the eclectic model is based on financial considerations, it aims to enhance the public common good. The very improvement of efficiency goals and the reduction of transaction costs has a beneficial impact on the public interest and therefore improves the general welfare of the public.

Judiciaries differ in their willingness to embrace the collective constitutional doctrine. Two different judiciaries are considered above. This discussion demonstrates the weaknesses of the economic and collective approaches compared with the proposed eclectic model, as well as the need to embrace an eclectic model to address these weaknesses.

[215] Privatisations in Israel are often presented through a procedure that is connected with the budgetary process – the Economic Arrangements Law. It is performed without due process of the participation of NGOs in the legislative process: Dotan (n 59) 27.

[216] Benish and Maron show that lawyers and jurists are different in their institutional logic than regulators and economists and tend to promote the logic of law: Avishai Benish and Asa Maron, 'Infusing Public Law Norms into Privatized Welfare: Lawyers, Economists and the Logics of Administrative Reform' (2016) 50 *Law and Society Review* 953.

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5. SUMMARY

The article introduced an eclectic model for the constitutionalism of collective rights in cases of strike action against privatisation. The eclectic model suggests the partial application of a constitutional right to strike in privatisation cases, according to which constitutionalism is justified when it advances efficiency. The article suggests a basic distinction between the existing collective and economic approaches. In the latter approach, liberal constitutional rights primarily are embraced; in the former approach the right to strike is emphasised while ignoring the public interest in competition within the markets. Contrary to the economic approach, which rejects recognition of a constitutional right to strike, the collective approach suggests a broad universal application of constitutionalism as a basis for recognising strikes against privatisation. The collective approach embraces collective constitutionalism in order to counter-balance the neoliberal practices of regulators and political actors.

The Israeli and British jurisprudences were used as test cases to examine the application of the two approaches. Hence, British courts have embraced an economic approach, while the Israeli jurisprudence over the last few years has applied collective constitutionalism. The examination of the British and Israeli systems reveals the weaknesses of each of the current extreme approaches – collective and economic – compared with the eclectic model. The weaknesses of both approaches suggest the need for the judicial systems to embrace an eclectic model.

The eclectic model introduced here offers a cure for the defects in the existing approaches. It includes a new theory for the application of constitutionalism in cases of strike action against privatisation. Based on New Institutional Economics, it suggests the application of a constitutional right to strike where it will reduce transaction costs. In such cases, implementing constitutionalism as a basis for recognising the APS is justified, as it advances efficiency and economic goals.

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