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RESEARCH ARTICLE

Collective labour rights of police officers: Global labour constitutionalism and militaristic labour constitutionalism

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Abstract

Collective labour rights, including the right to organize and strike, were recognized in the principles of the International Labour Organization (ILO) as fundamental rights. Despite their importance, different countries enacted legislation that included a ban on police organization in trade unions or a ban just on police strikes. The right of police officers to organize and strike is of particular importance nowadays at a time of increased public scrutiny and large-scale protests over incidents of extra-judicial killing by police. There is a need to recognize collective rights for police officers in order to improve working conditions and organizational justice at work for them as a way of moderating officers' perspectives of public hostility and improving their capability to carry out their duties. Another benefit of recognizing a right to organize is the union's capacity to advance important values, including avoiding racism and violence and assuring the compliance of individual officers with the ethics and code of conduct expected from police officers. This article seeks to address the unique topic of the linkage between the collective labour rights of police officers and varieties of constitutionalism in these critical times. It introduces two potential approaches in this regard: (1) global labour constitutionalism; and (2) militaristic labour constitutionalism. The former implements international standards set by the ILO as a basis for constitutionalism while the latter emphasizes domestic issues and the need to maintain the public order and security of citizens. The article examines the possibility of applying global labour constitutionalism as a basis for recognizing collective rights for police officers.

Keywords: militaristic labour constitutionalism; global labour constitutionalism; police strike; public scrutiny; International standards of the ILO

I. Introduction

Collective labour rights include three rights: (1) the right to organize in trade unions; (2) the right of the latter to bargain collectively; and (3) the right to strike.[1] The right to

[1]T Novitz, 'Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and Its Potential Impact' (2009) 15 *Canadian Labour and Employment Law Journal* 465.

organize in trade unions is an important means by which workers can advance their economic interests and live with dignity.[2] The freedom to organize and the right to collective bargaining were included in the treaties of the International Labour Organization (ILO)[3] and were recognized by the ILO as core fundamental rights.[4]

The freedom to strike is an important means by which workers can seek to secure decent working conditions.[5] Even though the freedom to strike has not been included as a right on its own in ILO treaties,[6] it was recognized by the ILO Committees as a fundamental right derived from the right to organize.[7]

Despite the importance of collective labour rights, various countries have adopted restrictions on police officers' association in trade unions and other collective labour rights. Thus, some states have enacted legislation that includes a ban on police strikes, while others have imposed a ban on all aspects of the organization of police officers in trade unions. The denial of the right of police officers to organize is problematic and violates their freedom of association. In addition, the total, sweeping prohibition on strikes in different countries, regardless of the types of positions and the nature of the specific functions performed by the police officer, raises concerns over police officers' rights.

The right of police to organize and strike is of particular importance in times of increased public scrutiny over incidents of alleged abuse of civilians by police officers. Recent years have witnessed repeated large-scale social protests against the police following incidents of killing of civilians by police officers, some allegedly on racist grounds against Black people or other minorities. In 2020, the police killing of George Floyd in the United States triggered an international movement against the police while at the same time sympathy with the police worldwide was decreasing.[8] In Israel in 2019, nationwide protests were sparked following the killing of Solomon Tekah, a young Israeli of Ethiopian origin.[9]

[2]G Mundlak, *Organizing Matters: Two Logics of Trade Union Representation* (Edward Elgar, Cheltenham, 2020); G Mundlak, 'Human Rights and Labour Rights: Why Don't the Two Tracks Meet?' (2012) 34 *Comparative Labor Law and Policy Journal* 217.

[3]B Gernigon, A Odero and H Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137 (4) *International Labor Review* 441, 445.

[4]ILO Declaration on Fundamental Principles and Rights at Work Geneva (1998).

[5]T Novitz, *International and European Protection of the Right to Strike* (Oxford University Press, Oxford, 2003) 50; V Velyvyte, 'The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15(1) *Human Rights Law Review* 73.

[6]J-M Servais, 'ILO Law and the Right to Strike' (2009) 15 *Canadian Labour and Employment Law Journal* 147.

[7]Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association paras. 751, 753, 754 (6th ed. 2018) (hereinafter CFA 2018). The committee stated that, 'The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.' It also stated in para. 751 that, 'While the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only insofar as it is utilized as a means of defending their economic interests.'

[8]TT Reny and BJ Newman, 'The Opinion-mobilizing Effect of Social Protest Against Police Violence: Evidence from the 2020 George Floyd Protests (2021) 115(4) *American Political Science Review* 1499.

[9]"Thousands of Protests After off Duty Police Officer Shoots and Kills an Ethiopia Origin Israeli', available at <https://www.i24news.tv/en/news/israel/society/1561963211-protests-after-police-shoot-and-kill-young-ethiopian-israeli-man>.

The vulnerability of the police and the loss of public trust following the 2019–20 international protests emphasizes the need to strengthen police officers' rights. Following public criticism, there has been a decline in police officers' satisfaction at work and an increase in police officers' resignations to such an extent that it might affect the capacity of the police to operate efficiently.[10] The criticism over police behaviour has also raised concerns about the possible effect on police officers' conduct, including refusal to carry out police work.[11] The wide protests against police officers – most of whom are hard-working personnel who have not been involved in violent incidents against citizens – cause dissatisfaction among them.

In 2021–22, the police departments in Israel found themselves in the midst of an escalating wave of officers' resignations, which could have a direct effect on the personal safety of citizens.[12] Motivated young people who joined the police force often found an organization that had lost both confidence and public support; combined with poor working conditions and a low salary, this pushed them to resign. This phenomenon, which created the police workforce crisis and could affect police departments' operational capacity to carry out their expected duties, raises the need to recognize constitutional rights and protection for police officers. This is needed to improve organizational justice at work as a way of moderating officers' perspectives of public hostility. One of the advantages of organizing in trade unions is the collective voice that the union enables.[13] Thus, recognizing the right of police officers to organize and strike will improve the dedication of police officers as well as their satisfaction at work, and eventually contribute to their ability to carry out their duties more effectively.

Yet the need to protect the collective rights of police officers does not cast doubt on the importance of the civil rights of civilians to avoid extrajudicial killings and racial violence. Aside from recognizing collective rights for police officers, specific incidents of violence or racism by police officers should be addressed through criminal or disciplinary measures. In this respect, it should be noted that one of the benefits of recognizing the right to organize in trade unions is the organization's capacity to advance important values, such as avoiding racism and violence.[14] Hence, a police officers' organization might help to prevent violent incidents and problematic behaviour of individual police officers, as well as to advance preservation of the rule of law.[15] In this vein, in should be noted that the recent global scrutiny against policing also includes uprisings against the type of policing exercised by Iran's morality police, which followed the morality police's extrajudicial killings. Certain states with Islamic religious regimes, such as Iran and

[10]SM Mourtgos, IT Adams and J Nix, 'Elevated Police Turnover Following the Summer of George Floyd Protests: A Synthetic Control Study' (2022) 21(1) *Criminology & Public Policy* 9.

[11]C Cassell, D Epp, K Fredriksson, M Roman and H Walker, 'The George Floyd Effect: How Protests and Public Scrutiny Change Police Behavior in Seattle' (2022), available at <https://www.marcelroman.com/pdfs/wps/depol.pdf>.

[12]A discussion in the Israeli Public Scrutiny Committee in the parliament (Kneset) revealed that in 2021 over 600 police officers resigned and in 2020 about 650 officers resigned. The discussion pointed to the shortage of 1,700 police officers in the core functions of the police (such as patrol officers and investigators), which led to closure of eighteen police stations.

[13]JT Bennett and BE Kaufman, 'What Do Unions Do? A Twenty-year Perspective', in *What Do Unions Do?* (London: Routledge, 2017) 1–11.

[14]Ibid.

[15]AF Detrick, *Virtue and Vice: Morality Police and Social Control in Islamic Regimes* (London: Naval Postgraduate School, 2017).

Afghanistan, maintain morality police as a mechanism of social control by the government itself, and as a way to impose religious beliefs and maintain political control.[16] That is, the Islamic regime uses morality police as a method of social control to expand its rule. The Iranian Islamic republic has strict rules on dress, behaviour and mixing the sexes. Woman's freedom is particularly restricted, and the morality police are used by the state as a means of imposing the regime's ideology. In September 2022, vast protests were sparked following the death of a young Iranian woman, Mahsa Amni, who died after being beaten by the morality police because she was wearing a loose hijab.

The activity of the morality police raises the issue of whether police unions repress the rights of other groups in society, such as women. In this respect, the role that unions could play lies in balancing problematic policy that the government initiates regarding the police. Police unions could provide leading opposition to problematic government policies, such as the initiative of the government of Iran that developed the morality police. One of the central ways to recognize collective rights is through the implementation of international labour standards. Different scholars have discussed the transformation of the rule of law and constitutionalism in the age of globalization.[17] Some argue that the wider role of international law in the era of globalization should be captured as the rise of a new mode of governance. Others emphasize that supra-national labour institutions play a bigger role in the era of globalization,[18] and emphasize the role of private transnational regulation.[19] The previous literature on the status of collective labour rights mainly emphasized the issue of negative entitlements or rights.[20] Scholars also discussed whether the constitutional status of the right to strike undermined the autonomy of the law and of the industrial relations system.[21]

Nevertheless, the previous literature has not thoroughly discussed the issue of collective labour rights of police officers and the impact of varieties of constitutionalism. This article aims to fill that gap and discuss recognition of police officers' right to organize and strike, and constitutionalism. The article introduces the notion of global labour constitutionalism as opposed to militaristic labour constitutionalism within the framework of collective labour rights of police officers. Whereas the former advances recognizing collective labour rights as constitutional rights based on international labour law, the latter emphasizes domestic issues and the need to maintain the defence of citizens. While the global labour constitutionalism implements the principles of the ILO, which are enshrined in the decisions of the organization's institutions and treaties, the militaristic approach takes a different path.

[16]Ibid.

[17]J Kanishka, 'Globalization and Sovereignty and the Rule of Economic Constitutionalism' (2001) 8(4) *Constellations* 442.

[18]J Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267.

[19]O Karassin and O Perez, 'Shifting Between Public and Private: The Reconfiguration of Global Environmental Regulation' (2018) 25 *Independent Journal of Global Legal Studies* 97; O Karassin and O Perez, 'Public and Private Interactions in Global Environmental Governance' in *Elgar Encyclopedia of Environmental Law* (Edward Elgar, Cheltenham, 2020) 41–55.

[20]J Cameron, 'The Labour Trilogy's Last Rites: BC Health and a Constitutional Right to Strike', (2009) 15 *Canadian Labour & Employment Law Journal* 297.

[21]H Arthurs, 'Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging' (2009) 15 *Canadian Labour and Employment Law Journal* 373; G England, 'Some Thoughts on Constitutionalizing the Right to Strike' (1988) 13 *Queen's Law Journal* 168.

Within the global labour constitutionalism, ILO principles are used as a basis for the recognition of collective labour rights as constitutional rights, and the application of these rights is in accordance with ILO principles. It is a model that was adopted by different legal systems as a platform for constitutional judicial review regarding laws forbidding organization in trade unions or the ability of the latter to bargain collectively and strike in essential and public services. Thus, the use of ILO principles grants legitimacy to the recognition of the constitutional status of the right to strike or other collective labour rights. Regarding police officers' collective labour rights, internationally based constitutionalism has been used as a mechanism for recognizing labour rights and judicial review regarding legislation restricting strike actions or organization of police officers. According to global labour constitutionalism, collective labour rights are recognized as constitutional rights based on ILO principles. In this respect, global labour constitutionalism is a mechanism used as a basis for acknowledging the right of police officers to strike and the right to organize.

As opposed to global labour constitutionalism, according to militaristic labour constitutionalism, the courts refrain from recognizing collective labour rights as constitutional rights and tend to deny the possibility of acknowledging the right of police officers to organize or the right to strike. In some law systems, following the militaristic nature of the country, the public interest in defence and the right to life and security are advanced, while the rights of police officers, prison guards and soldiers within the security forces are disregarded. This phenomenon leads to development of militaristic labour constitutionalism.

It should be noted that when a prohibition on strikes by police officers is a sweeping measure, with no distinction between different duties and positions, and without considering the nature of the authority and of the function performed, it calls for rectification The overall ban raises difficulty and reexamination is called for, while considering the international-based constitutional approach of global labour constitutionalism. As for the right to organize in trade unions or the right of the latter to collective negotiations, depriving police officers of these rights is a violation of their freedom of association and collective bargaining, which are considered core fundamental rights according to ILO conventions.

The article focuses on the Israeli case, given that Israeli legislation includes an absolute ban on the right of police officers to organize and to strike while none of the collective labour rights has been formally included in Israeli constitutional documents. The jurisprudence of Israel is also examined since Israel is unique in its militaristic regime, which is based on patterns of militaristic constitutionalism regarding police officers' rights. It is also unique in being a country with a strong militaristic culture along with solid democratic characteristics that advance human rights. Israel harbours strength in military force and the military culture is very central within civil society,[22] yet Israel is characterized by strong labour courts, committed to advancing labour rights in an activist manner.[23]

[22]B Kimmerling, 'Patterns of Militarism in Israel' (1993) 34(2) *European Journal of Sociology/Archives Européennes de Sociologie* 196; Y Levy, 'The People's Army "Enemising" the People: The COVID-19 Case of Israel' (2022) 7(1) *European Journal of International Security* 104.

[23]G Mundlak, 'The Israeli System of Labour Law: Sources and Forms' (2008) 30 *Comparative Labour Law and Policy Journal* 159; Guy Davidov, 'Judicial Development of Collective Labour Rights – Contextually' (2010) 15 *Canadian Labour and Employment Law Journal* 235.

This article explores the jurisdiction of the European Union and that of Israel as distinct examples of adopting one of these approaches. In these legal systems, a right to strike is not included formally in constitutional documents and the issue of recognizing a constitutional right to strike arises. As for the right to organize, the question raised relates either to its recognition as constitutional right or the scope of the right according to ILO principles and its application to police officers. The article proposes applying global labour constitutionalism for the purpose of recognizing the right of police officers to strike alongside the right to organize in trade unions.

Section II presents the historical developments regarding organization of police officers in trade unions and police strikes. It describes the reasons for denying collective labour rights to police officers in some countries and for recognizing them in others. It also discusses the rationale and importance of reconsidering collective labour rights of police officers. Section III presents the ILO standards regarding the right to organize and strike in general, and with regard to essential services in particular. The section describes the supervisory and complaint mechanisms of ILO committees and the implications of ILO's standards. It discusses the 2012 challenge of the employers' group within the ILO regarding the right to strike and the developments since 2012. It also discusses the status of ILO standards and their use as a basis for global labour constitutionalism.

Section IV examines the issue of police strike action and association and varieties of constitutionalism. Section V presents models for recognizing the right of police officers to strike and to organize. Section VI discusses the specific approach adopted in different countries and the adoption of global labour constitutionalism in the European Union. In addition, it looks at the development of militaristic labour constitutionalism in Israel. Section VII draws on the guidelines for the suggested model. Section VIII concludes the article by drawing together its suggestions.

II. Police officers and organization in trade unions

Historical developments regarding freedom of association and striking of police officers

Reasons for recognizing collective labour rights for police officers in some countries and denying them in others

Police forces were first established in most Western countries during the middle of the nineteenth century, following the Industrial Revolution and the development of Fordism.[24] The establishment of the police force was mainly intended to deal with unrest in the poor neighbourhoods of the proletarians. When police departments were first established, police officers were considered part of the working class, and enjoyed the right to organize in trade unions. Nevertheless, their belonging to the proletariat and their solidarity with it raised a conflict with their duty to handle disorders during strikes.[25]

Denying the right of police officers to organize and strike was intended to detach the police officers from the general working class by avoiding representation by trade

[24]N Levenkorn, 'I will be the Martin Luther King of the Police: The Struggle of Police Officers for Their Status as Employees' (2021) 16 *Labour, Society and Law Journal* np.

[25]Ibid.

unions, hence enabling them to ensure industrial piece among the working class.[26] Thus, while trade unions were intended to strengthen blue-collar workers, the police force operated in attempt to help the capitalist class maintain order and the continuity of the workers' regular activity. After World War I, due to economic depletion, police officers in many countries found themselves earning very small salaries and frustrated over poor working conditions, so police strikes occurred. The major police strikes that occurred in Western countries were followed by a tendency to place restrictions on the strike action of police officers. Some countries also placed a ban on the organization of police officers in trade unions. In this regard, it should be noted that the role of the police was originally intended to protect the public, and therefore the reversal of the roles – so that the police officers themselves are given the opportunity to use force in an unregulated manner – has been perceived throughout history in different countries as problematic and as a violation of public safety.[27]Yet, in many countries, the right of police officers to organize is recognized and, in different countries, police officers were also granted the right to strike. For instance, in Croatia,[28] Sweden[29] and Slovenia,[30] a right to strike is recognized in addition to a right to organize. There were a few reasons for denying collective rights from police officers in some countries. First, a major reason for denying their possibility to organize was a willingness to preserve security. Second, countries restricted police officers' freedom of association and right to strike in order to preserve the ability to determine working conditions or establish police reforms without intervention from police organizations.

A third reason for denying the right to organize was the attempt to emphasize the unique role and duty of the police officers as a body with unusual organizational characteristics. The police officers themselves often wished to refrain from being understood as part of the regular civil service (which was granted a right to organize) and preferred to preserve their image as a separate body with special authority.[31] The police officers wished to preserve their image as a capable, efficient body, always on guard, which led to restrictions on their right to stop service during strikes.

On the other hand, there were reasons for recognizing the right of police officers to organize, and many countries did grant police officers collective labour rights. First, with regard to the argument for the need to preserve security, it should be noted that in European countries in which the right of police officers to organize was granted, such as Germany, and even in those countries recognizing a right of police officers to strike, such as Sweden[32] and Croatia,[33] the security of citizens has still been preserved over the years. Moreover, part of the duties of the police in the last few decades have not been linked to preserving the personal safety of citizens but rather concerned with other tasks, such as the parking of cars in unauthorized places. Therefore, police strikes could not cause severe

[26]D Robinson, 'The Deradicalization of the Policeman: An Historical Analysis' (1978) 24(2) *Crime and Delinquency* 129.

[27]RL Lyons, 'The Boston Police Strike of 1919' (1947) 20(2) *New England Quarterly* 147, 148.

[28]The Law on Police (Act no. 129/2000), Art 96 (Croat).

[29]Employment (Co-Determination in the Workplace) Act (1976:580), Art 41 (Swed).

[30]Trade Union Act (Slovenia).

[31]Levenkorn (n 24).

[32]Employment (Co-determination in the Workplace) Act 1976 Article 41 (Swed).

[33]The Law on Act Police Article 96 Croat 2000.

consequences regarding the defence of citizens' lives. Second, regarding the need to prevent the intervention of police organizations in drawing up policies regarding the police force, it should be noted that giving police officers a voice on policies and reforms advances the effective implementation of such policies and ensures the cooperation of the police officers with them.

Third, it should be noted that police reforms in recent years in many countries have included New Public Management ideas, aimed at creating a community police force and decentralization of power from the police departments to local community police stations.[34] The attempt to establish a community police force that is closer to the general public leads to a tendency to recognize the right to organize and to understand police organizations as an integral part of civil society. It leads to considering police officers as part of the public service. Fourth, liberal states recognized collective rights of police officers as part of the general tendency to advance human rights. Police unions in countries where such associations have been considered legitimate have contributed to the welfare of police officers[35]. Fifth, the fear of creating a politicized police force led to an attempt to refrain from a tight linkage between police officers and the state and political actors who determine their salaries.[36] In this sense, countries recognized collective rights of police officers as a way to create an independent professional organization of a police force detached from the political arena and from irrelevant pressures.

The developments regarding freedom of association of Israeli police officers

The Israeli police force was founded a few years before the independence of the state at the end of the British colonial regime, known as the 'Mandate'.[37] The political and military conditions in the first years of the state and the constant threat of invasions from the border created a hierarchical organization with military-like characteristics that was not captured as part of public service.[38] Hence, the Israeli police was initially a semi-military nationwide centralized organization. The military situation necessitated the continuation of the Mandate police organization, accompanied by the absence of police trade unions. After the Six Day War, the police developed a central role in internal defence, since they assumed new roles of policing the occupied territories and the mission to fight terror.

In the 1970s, the salaries of police officers were very low, and they were affected by growing inflation. The poor salary and hard-working conditions were followed by a phenomenon of vast resignations among police officers and an attempt to establish an association of police officers.[39] The struggle over the right to organize during the 1970s was unsuccessful and resulted in the a ban on police officers organizing in the police internal procedures. Soon afterwards, in 1979, the ban on the freedom of association was included in Article 93(b) of the Police Act. Denying police officers the right to organize and strike was not accompanied by the establishment of a parallel mechanism for resolving disputes regarding police officers' interests at work.

[34]H Goldstein, 'Toward Community-oriented Policing: Potential, Basic Requirements, and Threshold Questions' (1987) 33(1) *Crime & Delinquency* 6.

[35]J Fleming and M Marks (2004) 'Reformers or Resisters? The State of Police Unionism in Australia' (2004) 4(1) *Employment Relations Record* 1.

[36]R Reiner, *The Politics of the Police* (Oxford University Press, Oxford, 2010).

[37]M Hovav and M Amir, 'Israel Police: History and Analysis' (1979) 2 *Police Studies: International Review of Police Development* 5.

[38]Ibid.

[39]Levenkorn (n 24).

Yet, while the law bans police officers' organization and collective actions without any other mechanism for representing their interests, their salaries were linked to the well-paid military personal through a government decision. Nevertheless, police officers have still received unfair wages over the years and have experienced difficult work conditions. Israeli police officers often work very long hours – even during weekends and holidays – without overtime, and they are exposed to dangerous situations. The difficult working conditions were apparent during the COVID-19 pandemic, when officers worked twelve-hour shifts. Their attempts to struggle for fair wages over the years have often been unsuccessful, due to the inability to strike or take other kind of collective action through trade unions.

Police officers are dependent on state decisions within the political arena for their salaries and working conditions. In some cases, governmental decisions to grant them specific benefits were not fulfilled or were withdrawn a short time later. Hence, despite a government decision in 1979 to link police salaries to those of military personal,[40] the decision has not been implemented properly.[41] Hence, different additional increments to the salaries of military personal, such as risk payments and payments for fieldwork outside the office, have not been given to police officers.[42] Police officers have struggled for fifteen years to receive a specific increment of pay (related to employment security) that was given to army personnel.[43] In some of these cases, the police officers turned to the courts, which occasionally accepted their petitions. For instance, in the *Gershon* case[44] in the 1980s and the *Zruya* case[45] in 2017, it was held that the government acted unfaithfully in not implementing past governmental decisions to link police officers' salaries to the salaries of army personal.

The inability for police officers to struggle for an adequate salary over the years raises the need to recognize collective labour rights for them. Acknowledging the collective rights of police officers in Israel would result in cancelling the linkage to the salaries of army personal. This would lead to avoiding the current method of payment, which is not connected directly to the working conditions of police officers but rather dictated by the different terms of work of army personnel.

Furthermore, the tight links between the salaries of the policeman and partisan politics creates a fear of a politicized police force. This requires adopting a new arrangement that grants collective labour rights to police officers while avoiding linkages between their working conditions and the political arena.

The rationale for and importance of reconsidering the collective labour rights of police officers

The growing need to recognize collective rights for police officers in times of global scrutiny and other recent developments

The police force has played a central role in democracies, and advancing the rights of police officers is of importance in any attempt to maintain the capability of the police to

[40]Governmental decision SH/33 1979.

[41]Levenkorn (n 24).

[42]Ibid.

[43]The police officers received the raise that had been given to military personnel 15 years previously after an appeal to the Labour Court. See Labour Case 28000/0610 *Zruya v the State of Israel* (2017).

[44]National Labour Court case 45/ 3-77 *Gershon v. The State of Israel* 17(1) 337 (1986).

[45]Labour case 28000/0610 *Zruya v. the State of Israel* (2017).

operate well. Organizational justice has always been an important element of police officers' work-related perceptions and conduct. Research indicates that police officers who believe their agencies treat them fairly operate more effectively.[46] It also shows that fairly treated police officers hold more favourable views towards the public and are less likely to engage in misconduct. Hence, recognition of a professional union for police officers could lead to an improvement in the efficiency and effectiveness of police work due to an increase in police satisfaction.

The debate over global labour constitutionalism *vis-à-vis* militaristic labour constitutionalism has gained particular importance. The need to protect police officers' rights has gained special importance due to a number of developments that have occurred in recent years. First, the global movement against police violence and mass protests against the police force that started in Minneapolis in 2020 have raised a special need to consider police officers' rights. Following George Floyd's death while in the custody of Minneapolis police in May 2020, thousands of protests swept across the United States, which in turn ignited a global protest movement against police violence, including in Israel, in which demonstrations occurred in 2019 following the death of a young man, a member of the Ethiopian new immigrants community, caused by a police officer.[47] Nationwide protests against the police also occurred in Israel in the winter of 2021 over the same police officer's return to the force.

The social protests reflect a phenomenon of widespread, global opinion mobilized against the police.[48] As a result, the institution of policing found itself enrolled for reform and under attack as much of the rhetoric surrounding policing since 2020 has been characterized by negative criticism of the police.[49] Following the wave of protests against the police force since 2019–21, the large police departments have experienced an increase in voluntary police resignations and increased turnover.[50] The change in the socio-political climate following the large protests also affected police officers' satisfaction and potential officers' motivation to join the police force.[51]

The implications of the crisis regarding police personnel may lead to a decline in the police departments' occupational capacity to carry out their expected responsibilities.[52]

The crisis calls for proactive efforts to improve workplace organizational justice for police officers in attempt to moderate officers' perceptions of police hostility following the protests against the police. The change in the socio-political environment in nation-states regarding policing also calls for the application of international labour norms rather than domestic ones, and compels us to care about the debate over global constitutionalism. Furthermore, applying policies established in international organizations is advantageous since international organizations are not subject to local pressures, which could be very influential in the current special context of police strikes.

[46]SE Wolfe and SG Lawson, 'The Organizational Justice Effect Among Criminal Justice Employees: A Meta-analysis' (2020) 58(4) *Criminology* 619.

[47]In Israel, a police officer was accused of killing Solomon Tekah, sparking nationwide protests. See T Staff, *The Times of Israel*, available at <https://www.timesofisrael.com/police-reinstate-officer-who-killed-ethiopian-israeli-teen-in-2019-family-fumes>.

[48]Reny and Newman (n 8).

[49]Ibid.

[50]Mourtgos, Adams and Nix (n 10).

[51]WJ Morrow, SG Vickovic and JA Shjarback, 'Motivation to Enter the Police Profession in the Post Ferguson Era: An Exploratory Analysis of Procedural Justice' (2020) 34(2) *Criminal Justice Studies* 135.

[52]Mourtgos, Adams and Nix (n 10).

Second, the rise of the phenomenon of global and national terror, where police officers played a central role in critical and dangerous situations, strengthened the need to protect police officers' rights and also strengthened their ability to cope with stress and motivation. The last decade has witnessed an increase in police officers' deaths in terror attacks, in what has been termed the cluster killing of police officers.[53] For instance, in the 9/11 terrorist attack, police officers were especially impacted. Hundreds of police officers were rushed to the scenes of the attack, particularly the World Trade Center, and many were killed.

Third, the COVID-19 pandemic has emphasized the centrality of the police force. The special role played by police officers during the pandemic globally has stressed the need to discuss a new approach towards the collective rights of police officers. In countries such as Israel, where police officers were burdened with the enforcement of COVID-19 regulations and a variety of challenging security issues, addressing such issues is particularly important. In Israel, the security forces were largely involved in many new civil tasks during the COVID-19 crisis.[54] An organizationally just policy within the workplace regarding police officers has secondary effects that may help police departments to retain officers during times of crisis with lower levels of depression and lower work-related burnout among police officers. The attempt to preserve a high level of conduct of police officers during times of crisis stresses the need to advance their work-related rights.

Fourth, there has been a development of attempts to bypass the ban on organization. In Israel, there were attempts to establish militaristic regime police associations which would bypass the restrictions on police officers' rights within the militaristic constitutionalism. In this respect, an association of police officers' wives was established in Israel in an aim to represent their interests. This organization has been active in demonstrations and political activity, but naturally its influence is quite limited so enabling police officers to organize is important.

The critique over the recognition of collective rights of police officers and the justification for applying the right to organize and strike

There are some arguments and critiques that could be raised against the recognition of the right to organize and the right to strike for police officers. The arguments and the reasons for rejecting them are discussed below, along with the justification for recognizing collective rights for police officers.

First, it can be argued that police strikes might affect security and the personal safety of citizens. Moreover, a ban on the right of police officers to organize and strike is often derived from a willingness to create a unique security organization with discipline and a hierarchy that would be considered different from a regular public service in which the right to organize is automatically granted. In this respect, one of the purposes of denying the right of police officers to organize and strike was to maintain the internal organizational order of the police force itself. Furthermore, it can be claimed that police officers are not regular employees in the public sector, but rather should be understood as unique civil servants who are not entitled to collective rights.

[53]S Kachurik, J Ruiz and M Staub, 'Police Officers Killed on Duty: A Different View' (2013) 15(2) *International Journal of Police Science & Management* 114.

[54]Levy (n 22).

This first claim should be rejected. Although the police force indeed started out as a hierarchical organization with a military character, later processes that took place in relation to the police force – such as the development of community police – affected its character.[55] These reforms, including decentralization and privatization, changed the organizational structure of the police force, which was no longer the hierarchical organization it had previously been. The new structure of the police force in many countries also reflects a distinction between the police and other security forces, such as the army and the secret services, which still have a hierarchical character of command and control. For instance, one of the reforms in Israel is the development of municipal policing, by virtue of which police functions are transferred to local municipalities. Moreover, a significant portion of the police force includes volunteers, and some of their powers are like those of regular police officers. The conclusion we can reach from these changes is that, even if it is still at the base a hierarchical organization, the police force is increasingly becoming a diverse organization that also uses outsourcing, volunteers, external service providers, municipal police officers who are employed through the municipalities and the like. Therefore, the logic on which the denial of the right to organize and strike was based is gradually losing its significance. In this vein, it should be considered that the police force is indeed different from other defence bodies, such as the army and the secret security services, in a way that enables recognition of collective rights, including the right of police officers to strike. While the army and secret services are concerned with securing the borders of the country against military attacks and wars, the police force is concerned with many civil tasks, such as handling requests to open new businesses. Hence, while strikes of soldiers are problematic and could pose a threat to the very existence of the country and its sovereignty, strikes of police officers do not pose a similar threat.

Moreover, the duties of many police officers nowadays – such as officers in a human resources department – are very similar to those of regular public employees, and there is no justification for depriving them of their basic rights as employees. In this regard, police officers in most countries could today be understood as regular employees rather than civil servants, based on their terms of employment, recruitment procedures and the fact that, contrary to army service – which might be the duty of citizens in some countries – joining the police force is always voluntary.

It should also be considered that one of the justifications for recognizing the right of police officers to strike is based on the need to ensure a dignified existence. Recognizing the possibility of allowing an independent struggle through the exercise of a right to organize alongside the right to strike would allow for proper pay and appropriate conditions for police officers.[56] This justification stems from the nature of the right to organize and strike, the recognition of which is intended to bridge the gap in the bargaining power between workers and their employer – in this case, the state. In countries in which legislation includes a ban on the organization and striking of police officers, their working conditions are set by the state itself. Setting the salary and terms of employment by the state as an employer could be problematic.

Another justification stems from the concept of social citizenship, according to which the protection of social rights at work is part of the entitlement of citizens in every

[55]A Harpaz and S Herzog, 'Police Officers' Acceptance of Community Policing Strategy in Israel and Their Attitudes Towards the Arab Minority' (2013) 19(1) *Israel Affairs* 191.

[56]Novitz (n 5).

country. Likewise, the entitlement includes the composition of this citizenship in several dimensions, including a social dimension relating to rights at work[57]. Moreover, according to the concept of decommodification, the workplace is based on human capital.[58] Recognizing a right to collective representation and a collective struggle in trade unions can also advance the cooperation between police officers.[59]

Second, it could be claimed that strikes in essential services in general, and police strikes in particular, affect the interests of citizens in receiving service.[60] Thus, governments are concerned to eliminate any harmful repercussions to third parties and preserve the ability of the government to supply essential services.[61] Moreover, it could allegedly be argued that the possibility of recognizing the right of police officers to strike raises concerns over public order.

Regarding the latter claim, the harm based justification that is the rationale for denying the right to strike in essential services exists only in relation to tasks whose interruption might pose substantial harm on the population at large.[62] In this respect, it should be considered that some of the functions and duties of police officers (such as handling parking in forbidden places or attending noisy parties) are not essential, and work stoppages regarding these kind of police tasks would have only a minor effect on the public.

Furthermore, it is possible to adopt specific mechanisms within future legislation providing arrangements for maintaining the public order. For instance, a specific arrangement within future legislation could demand a minimum supply of essential services and a requirement that part of the police officers would stay on duty even during a strike. The use of proportionality tests could be another mechanism enabling the performance of a balance of the right to strike with other public interests. The mechanism of proportionality is used by the courts in various countries, such as Germany, as a tool to balance the right to strike and essential services with other interests.[63] The European Court of Human Rights (ECtHR) also adopted proportionality tests regarding strikes in public services, and such mechanisms could also be used in relation to police strikes.[64] The Israeli model for strikes in essential services in general also enables the application of proportionality tests. The labour relations model adopted in Israel includes the possibility of the court striking a balance between the right to collective action and the ability to provide essential services, according to the circumstances of the specific case.

[57]TH Marshall, *Citizenship and Social Class*, *Vol. 11* (Cambridge University Press, New York, 1950).

[58]HC Katz, TA Kochan and AJS Colvin, *Labour Relations in a Globalizing World* (Cornell University Press, Ithaca, NY, 2015).

[59]G Davidov, 'Collective Bargaining Laws: Purpose and Scope' (2004) 10 *International Journal of Comparative Research and Industrial Relations* 20, 81.

[60]ME Ackerman, 'The Right to Strike in Essential Services in MERCOSUR countries' (1994) 133 *International Labour Review* 385.

[61]R Le Roux and T Cohen, 'Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region' (2016) 19(1) *Potchefstroom Electronic Law Journal (PELJ)* 25; Ackerman (n 60).

[62]C Pérez-Muñoz, 'Essential Services, Public Education Workers, and the Right to Strike' (2022) *Political Research Quarterly*. https://doi.org/10.1177/10659129221103483.

[63]M Weiss, 'The Development of Industrial Relations from the Perspective of Labour Law' in A Ingrid, B Martin, K Berndt, W Matiasue, N Werner, R Britta and W Carsten (eds), *Developments in German Industrial Relations* (Cambridge Scholars Publishing, Cambridge, 2016) 221–52.

[64]V Velyte, 'The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15(1) *Human Rights Law Review* 73.

The use of proportionality tests in case of an essential services strike leads to permitting only partial strike activity, demanding a minimum service supply or issuing an injunction against the strike. Thus, although the right to strike is granted even to essential service workers, such as employees involved in water supply, in practice there may be restrictions on the right while ensuring the public interest and the needs of citizens in the continued supply of essential services. Such a model, which includes the application of proportionality tests, could as well be used for police strikes. Thus, even if the right of police officers to strike is recognized, the court could allow only a partial strike in a specific case and demand a minimum service supply or issue an injunction against a strike as result of performing balances in a particular case. Moreover, in Israel, firemen – although considered part of the security forces –have always had a regular right to organize and to strike. Cases of strikes in Israel's fire departments are handled ad hoc by the labour courts, which can issue injunctions in specific cases of firefighter strikes. The proportionality tests could be also used by the courts concerning strikes of police officers while enabling the balancing of collective rights of police officers with the interests of the public in general. Applying proportionality tests would enable flexibility and the preservation of the rights and interests of all the parties involved, according to the circumstances of each case. The recognition of the right of police officers to strike could be also accompanied by a demand to settle in advance via collective agreements in which police officers, whose duties are essential and needed, would be required to continue working during a strike in such a way that substantial harm to the public would be prevented. Another consideration is the fact that recognizing a right to organize and strike in public services could be beneficial in cost-benefit terms and improve efficiency, since a union is more efficient in leading central negotiations regarding police reforms and advancing new policies. A union could also ensure the compliance of individual employees with the ethics and code of conduct that an officer would be expected to follow.

It should also be considered that strikes in public services might have positive consequences, since the granting of the possibility to strike might improve the police officers' salary and thus improve the quality of their service.[65] Enabling police officers to fight for their economic interests would then prevent their employment in poor working conditions. Consequently, the police force would avoid vast resignations of police officers and would be able to attract the best possible professional personnel, highly equipped for the task to benefit the public.

Third, a ban on police organizations and strikes is usually derived from the desire of governments to maintain tight control over the police force. It should be noted that granting police officers the right to organize and strike is advantageous since it would lead to the establishment of an independent professional police force that would be detached from political pressures. Hence, a fear of political policing establishes a need to recognize the collective rights of police officers, who would no longer be dependent on the political arena for their salary, enabling them the opportunity for collective action and an independent struggle for decent work. An independent police union could also oppose and lead a public struggle regarding problematic policies of the government, such as policies that infringe on the human rights of women or minorities who don't follow the religious ideologies of the regime. The organization of trade unions is also

[65]Pérez-Muñoz (n 62).

advantageous in terms of the ability of the union to advance important ideas, such as avoiding racism and improving equality.

Fourth, it could be argued that recognizing the right of police officers to organize could raise a concern over politicization of the police force following the involvement of a regular union in police actions and a fear that police organizations would use the police force as a political bargaining tool to accumulate power. This argument should also be rejected. Recognizing the right to organize in unions would not in itself create politicization of the police force. It is precisely the current situation in which working conditions of police officers are set by politicians and the state. This raises difficulties and creates a fear that the police officers will be dependent on the goodwill of the political actors. The current situation in which the police officers' salary is set by politicians may lead to arrangements that are inconsistent with the public interest.

A government decision on the salaries and working conditions of police officers may be the result of a certain political setting and political pressures alongside an assessment by some of the political actors that choosing a certain way will lead to gaining political power. Therefore, the policy formulated by the government regarding working conditions of police officers depends on the ad hoc power relations and sometimes could even be a result of pressure that police officers exert on the political system. This may lead at a certain point in time - in which these groups have a particular pressure point - to an unnecessary wage increase that would lay a burden on the state budget. In other cases, justified claims of police officers regarding working conditions could be met by the politicians' refusal due to political reasons that are inconsistent with a genuine need to improve working terms. Apart from this, the involvement of a union in determining policy regarding police officers entails advantages. The organization could focus on subjects that are not usually dealt with and turn the spotlight onto important issues such as work safety, the environment and the needs of citizens and communities.

Fifth, it might be argued that police strikes could also affect the reputation of the police force in the eyes of the public and the public trust in the police force as an organization that is always on the alert. However, the use of proportionality tests or other mechanisms that include a demand for a minimum service supply would also ensure that the image of the police would not be harmed. It would allow for a proportionate and reasonable strike. Hence, it would allow necessary functions to continue while avoiding the effect on the organization's image.

Sixth, it could be argued that there is a public fear of police officers who are in control of weapons. This claim should also be rejected on the basis of the possibility to apply a proportionality instrument during strikes in essential services. Using the mechanism of proportionality ensures that even the force exerted by police officers on strikes would be reasonable.

Seventh, it could be argued that there is a difference in various professional aspects between police officers at different ranks, in a way that makes it difficult to uniformly represent the interests of all the police officers by one union. This claim should also be rejected. We should bear in mind that recognizing the right to organize and take collective action generally leads to strengthening the lines and the solidarity of workers. Furthermore, when it comes to differences between different ranks within the police force, it is possible to separate the representation of police officers in different ranks by enabling organization in distinct cells, thus overcoming the gap in needs between ranks and preventing multiple conflicting targets.

III. Police officers' associations and strikes and standards of the ILO

ILO committees and setting labour standards regarding the right to organize and strike

The supervisory and complaint mechanisms of ILO committees and the legal authority and importance of the committees

Collective freedoms were stated in the UN International Convent of Economic, Social and Cultural Rights.[66] Article 8 of the Convent includes the right to organize – the right to form and join trade unions and the right of trade unions to function freely. It also includes the right to strike.

ILO Convention (No. 87) on Freedom of Association and Protection of the Right to Organize 1948 (hereinafter Convention 87)[67] recognized the freedom of association of employees. The right to organize in trade unions and the associated right of collective bargaining was also recognized in the ILO Convention on the Right to Organize and Collective Bargaining 1949 (No. 98) (hereinafter convention 98).[68]

Following the adoption of the two conventions, the ILO set up supervisory and complaint procedures regarding the principle of freedom of association to pursue compliance with them, including in countries which had not ratified the conventions. Two ILO institutions are responsible for the supervisory mechanisms of protecting the right to organize and other rights related to organization in trade unions: the Committee on Freedom of Association (hereinafter CFA) and the Committee of Experts on the Application of Conventions and Recommendations (hereinafter CEACR).

All ratified ILO conventions, including conventions 87 and 98, are dealt with by the CEACR, which is an independent body charged with examining the application of conventions and recommendations. Governments report on a regular basis to the CEACR and the committee makes any comment that may be called for and establishes labour standards.[69]

In 1951, the ILO established the CFA as a fact-finding independent body that has been able to examine complaints, and it has examined over three thousand complaints over the years.[70] Complaints may be submitted by governments or employers, or by employees' organizations, alleging that the right to organize and associated rights have been infringed upon.

If the CFA decides to receive the case, it establishes the facts in a dialogue with the government concerned. If it finds that the principles of the right to organize have been violated, it issues a report and makes recommendations on how the situation could be resolved. In cases where the country involved ratified the convention, legislative aspects of the case may also be referred to by the committee of experts. The principles contained in convention 87 and 98 have thus been subject to intense scrutiny over the years by both committees, which issued recommendations and decisions regarding the right to organize, even though strike action by itself is not included directly in the ILO conventions. Yet the ILO committees have recognized in their decisions and resolutions

[66]International Convention on Social Economic and Cultural Rights United Nations, 1967.

[67]C87: Freedom of Association and Protection of the Right to Organize Convention, 1948.

[68]C98: Right to Organize and Collective Bargaining Convention, 1949.

[69]L Swepston, 'Human Rights Law and Freedom of Association: Development Through ILO Supervision' (1998) 137 *International Labour Review* 16.

[70]Ibid.

a right to strike,[71] which is derived from the right to organize.[72] The importance of the complaint procedure of the CFA in establishing recommendations and its legal authority stems from the special structure of the CFA. It is based on its unique characteristics and the fact that it is composed of impartial and experienced members nominated from the governing body, reflecting its tripartite composition.[73] Furthermore, the importance of the recommendations of the committee stems from establishing recommendations on a process of examining facts of real-time disputes. The CFA's structure and setting standards in a tripartite dialogue between the three social partners of labour relations creates legitimacy. According to the organization's constitution of 1919, the committee on freedom of association is authorized to interpret conventions 87 and 98 and set standards for the right to organize.[74]

The legal authority of the CFA enables it to examine complaints whether or not the country concerned has ratified the ILO convention on freedom of association, and its legal authority to operate is derived directly from the ILO constitution, so complaints may be filed against any member state of the ILO.

The moral authority and legitimacy of the decisions and opinions of the CEACR are based on its professionality and impartiality as it is composed of high-level legal experts. The committee consists of independent experts who represent the different member states and their judicial and socio-economic diversity and variety of ideas.[75]

The 2012 challenge of the employers' group regarding the right to strike and the implications of the ILO standards

The freedom of association in trade unions and the right of trade unions to collective bargaining were both recognized in ILO conventions on freedom of association. The right to organize was also included as part of the principles recognized in the Declaration of Fundamental Principles and Rights 1998 (hereinafter 1998 declaration)[76] as one of the core labour rights.[77]

The question arises as to the right to strike, which was not included in the ILO conventions. Even though the right to strike by itself is not explicitly included in ILO conventions, the CFA and CEACR in their recommendations acknowledged the right to strike as a fundamental right, derived from the right to organize. The CEACR recognized the right to strike as an essential element of the right to organize in

[71]S Sorewz, 'The Right to Strike Between ILO Labour Standards and the European Convention on Human Rights' in HU Verlag (ed), *Social Dimensions of International Law* (2012), available at <https://beckassets.blob.core.windows.net/product/toc/16450045/9783831643240_toc_001.pdf>; J Brecher, T Costello and B Smith, 'Globalizing Worker Rights' (2007) 16(2) *New Labour Forum* 19.

[72]ILO General Survey-ILO Freedom of Association and Collective Bargaining: A General Survey of Conventions No. 87 and No. 98 conducted in 1994 by the Committee of Experts on the Application of Conventions and Recommendations (ILO 1994a); ILO CFA Digest-ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association. Committee of the Governing Body of the ILO (1996).

[73]JR Bellace, 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* 29.

[74]Constitution of the International Labour Organization, part XIII of the Treaty of Peace Between the Allied and Associated Powers and Germany, 28 June 1919, LNTS 34 UKTS No 4, Art 19(5)(e).

[75]C La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42(4) *Industrial Law Journal* 338.

[76]P Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15(3) *European Journal of International Law* 457.

[77]The recognition of the right to organize in the 1998 declaration grants it a special status as a fundamental right.

1959.[78] The CFA recognized the right to strike under convention 87 as an essential element of its economic and social interests.[79] In the following decades, the CFA elaborated very detailed case law on the right to strike, dealing with many concrete questions of this right and its limits, including the issue of essential services.[80]

Despite the importance of the right to strike as a means for employees to fulfil their right to organize, the last decade has seen controversy over the status of ILO standards and the recognition of the right to strike within ILO institutions.[81] In June 2012, a crisis occurred within the ILO when the ILO employers' group dramatically challenged the recognition of the right to strike and interrupted the proceedings of the annual international conference.[82] The debate caused the ILO's operation within the ILO's tripartite international conference to screech to a halt for the first time since its establishment in 1919.[83]

The employers' group challenged the existence and the scope of the right to strike and the status of the recommendations and decisions of the supervisory bodies regarding the right to organize. The main argument of the employers' group was that the CEACR did not have a mandate for interpreting the conventions, and hence did not have the authority to interpret the convention in a way that acknowledged the existence of a right to strike as a fundamental right. In this respect, it was claimed by the employers' group that according to the ILO's Constitution, the only bodies authorized to interpret conventions 87 and 98 were the International Court of Justice, located in the Hague (hereinafter ICJ)[84] or a tribunal, which had never been established.[85] Nevertheless, different concerns could be raised regarding the proposition that the interpretation authority is reserved to the ICJ, including the fact that the ICJ has only dealt with one case of interpretation of the conventions over the years: the claim that it is ill-equipped to deal with the task, and the need of participation and representation of the three social partners in the process of interpreting. In the absence of interpreting bodies, the existing committees evolved into bodies that set ILO standards and interpreted the conventions.

Following the challenge of the employer-group over the right to strike in 2012, scholars emphasized that the employers' argument was problematic.[86] Different scholars showed

[78]Cf International Labour Conference [ILC], 43rd Sess, 1959, CEACR, General Survey – Freedom of Association and Collective Bargaining, para. 68, ILO Doc. 09661(1959-43).

[79]Comm of Freedom of Association [CFA], (United Kingdom), July 1, 1951, Case No. 28 Rep No 2 (1952). It is worth noting that the complaint revolved around the World Federation of Trade Unions (WFTU) against the United Kingdom for having dissolved a strike by police officers in Jamaica. In the complaint procedure initiated by the WFTU, the CFA recognized a right to strike under Convention 87 and that the police operation in question was lawful.

[80]The case law and labour recommendations were compiled in the digest of decisions and principles of the Freedom of Association Committee of the governing body of the ILO.

[81]La Hovary (n 75).

[82]F Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10(1) *International Organizations Law Review* 117.

[83]La Hovary (n 75). For the first time in history, the application committee and the conference committee found themselves unable to fulfil their tasks while the employers' challenge blocked the adoption of a proposed list of cases to be examined by the conference committee.

[84]Article 37.1 of the ILO Constitution. La Hovary (n 75).

[85]The possibility to establish a tribunal for the expeditious resolution of any dispute or question relating to the interpretation of the convent was included in Article 37.2 of the ILO Constitution.

[86]KD Ewing, 'Myth and Reality of the Right to Strike as a "Fundamental Labour Right" (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 145, 155.

that the employers' claim was an unsuccessful political attempt to challenge the legitimacy of ILO supervisory bodies in an attempt to weaken ILO institutions while undermining the rule of law, which was not legally based.[87] Other authors emphasized the de facto agreement of the social partners within the ILO to preserve the in-house ability of the committees to set ILO standards while interpreting the conventions, and not to enable the operation of other institutions.[88]

The claims of the employers regarding the right to strike were contrary to the constant recognition of the right to strike over the years as a fundamental right by the ILO institutions. The ILO constituents themselves recognized a positive right to strike over the years which was considered an inevitable corollary of the freedom of association of Convention 87.[89] Even though the ILO conventions did not explicitly recognize a right to strike, Convention 87 acknowledged in Article 3 the full freedom of workers not only to join trade unions but also to organize their activities and formulate their programs, which was considered over the years as granting a right to strike to workers.

It should be noted that since the 2012 challenge to the right to strike, the opinion of employers has not been accepted by the institutions of the ILO, and the ILO principles regarding the right to strike have not been changed in response to this challenge. The ILO institutions have also chosen to keep the interpretation of the convention and supremacy mechanisms as they were within the ILO rather than submitting them to external organs, such as the ICJ, as a response to the employers' claims.[90]

In 2015, the governing body of the ILO set up a tripartite meeting as a response to the employers' challenge regarding the right to strike.[91] In the 2015 meeting, a joint statement agreed by the three social partners[92] – which acknowledged the right to strike – was issued.[93] The joint statement declared that the right to take industrial action by workers and employers was recognized by the constitutes of the ILO. In the years after 2012, the committee of experts emphasized that the right to strike was

[87]L Swepston, 'Crisis in the ILO Supervisory System: Dispute Over the Right to Strike' (2013) 29(2) *International Journal of Comparative Labour Law and Industrial Relations* 199. Some authors showed that it was an attempt on the employers' side to make a political claim that was not legally based. Novitz showed that the employers were incorrect in their claims regarding the authority of the supervisory bodies. T. Novitz, 'The Committee of Experts and the Right to Strike: A Historical Perspective' (2012) 19 *International Union Rights* 2021.

[88]F Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10(1) *International Organizations Law Review* 117.

[89]JR Bellace, 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* 29. In this respect, Claire La Hovary emphasizes that up until 1989, the employers' group not only supported the operation of the ILO committees but also the specific ability of interpretation regarding the right to strike and the very recognition of such a fundamental right. La Hovary (n 75).

[90]La Hovary (n 75).

[91]The ILO tripartite meeting on the freedom of association and protection of the right to organize. Convention 1998, No. 87 and the modalities of the right to strike at the national level. Geneva, 23–25 February 2013.

[92]P Van Der Heijden, 'The ILO stumbling towards its centenary anniversary' (2018) 15(1) *International Organizations Law Review* 203.

[93]International Labour Organization, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) in relation to the right to strike and the modalities and practices of strike action at national level (2015), available at <https://www.ilo.org/global/meetings-and-events/WCMS_339518/lang–en/index.htm>.

indeed a fundamental right arising from the right to form trade unions and collective bargaining.[94]

The status of ILO standards and the legitimacy of using them within domestic systems

The main issue involving police associations or police strikes and international law-based constitutionalism is the status of ILO principles regarding strikes and organization, and whether they could be considered binding as part of international law and used as a basis for constitutionalism and the legitimacy of applying them in domestic systems.

The ILO standards regarding organization in trade unions and collective action include both conventions and recommendations of the supervisory bodies of the ILO, including the Committee of Experts and the Committee on Freedom of Association and the question of the extent to which these standards could be used as a basis for global labour constitutionalism. Under international law, and according to Article 38 of the constitution of the International Court of Justice in the Hague,[95] both a convention and a custom are considered binding norms within international law.[96] The right to organize by itself is enshrined in ILO international treaties – Conventions 87 and 98 – and therefore could be considered binding in international law. That is, the right to organize and the right to collective bargaining are both recognized formally within ILO Conventions 87 and 98 and are considered binding within international law as having the status of recognized treaties. These rights are also acknowledged within the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (hereinafter 1998 declaration) as core labour right.[97] Considering the right to organize as a fundamental right by the ILO 1998 declaration creates a special normative status of the right to organize, which could be a basis for constitutionalism.

The second element of the ILO standards is the recommendations of the ILO committees regarding the right to strike. The issue of strikes in essential services revolves around ILO principles set by the ILO committees, according to which striking is a fundamental right. The main question is therefore whether principles established by the ILO committees can be considered a custom.

It should be noted that although many countries, such as Israel, have accepted ILO Conventions 87 and 98 regarding the right to organize, this act by itself did not automatically grant the freedom to strike a special status as a fundamental right in domestic law. In this respect, it could be argued that recognizing striking as a fundamental right may be questionable from the point of view of international law because striking is not formally enshrined in ILO treaties. However, within the ILO Committees' interpretation of Conventions 87 and 98, striking was recognized as a derivative right, derived from the right to organize.

[94]P Van Der Heijden, 'The ILO Stumbling Towards Its Centenary Anniversary' (2018) 15(1) *International Organizations Law Review* 203.

[95]B Stern, 'Custom at the Heart of International Law' (2001) 11 *Duke Journal of Comparative and International Law* 89.

[96]Article 38 of the Statute of the International Court of Justice states that the court, the function of which is to decide in accordance with international law, will consider either international conventions or a custom. The statute refers to international conventions, whether general or particular, and international custom as evidence of a general practice accepted as law – the general principles of law recognized by civilized nations.

[97]Ö Eren, 'Continuation of the ILO Principles in the 21st Century Through the Compliance Pull of Core Labour Rights' (2008) 13(3) *Journal of Workplace Rights* 303.

Despite the challenge by the employers' group over the status of the recommendations on strikes, the question raised is whether ILO standards regarding strikes could still be considered as having a special status and thus as a basis for global labour constitutionalism. Even though the standards of the supervisory bodies were originally intended to be recommendations, ILO standards regarding the right to strike could be recognized as part of international customary law and thus have a special status and implications.

Thus, the central issue with which we are dealing revolves around the status of ILO principles, according to which striking is a fundamental right. The question we should consider is whether principles recognized by the ILO committee on the freedom of association can be considered a custom.[98] A custom enjoys privileged status in international law;[99] it is defined as evidence of a general practice accepted as a global law. A custom within international law is a well-known practice among many countries, where it is considered a rule. Some international practices, when displaying certain characteristics could be considered as creating international norms, the content of which is precisely to render these practices as an obligatory dimension.[100] The actual situation that could be the basis for a customary rule has to result from a repetition of practices. Thus, according to Article 38 of the Constitution of the International Court of Justice in the Hague, the test for a custom is a general and permanent course of action (as opposed to a temporary phenomenon).

It could be claimed that the moral authority and legitimacy of the recommendations justify their use as a basis for global labour constitutionalism. In this respect, there are a few arguments for the possibility of recognizing a special status of recommendations regarding the right to strike as part of international customary law and for their use as a basis for global labour constitutionalism.

First, from a political perspective, the legitimacy and status of ILO standards stems from the fact that about 200 countries are members of the ILO, and most industrialized countries accept the principles of the ILO. Hence, ILO standards regarding the right to organize and strike could be considered to enjoy a special status.[101]

The ILO standards are generally accepted as a point of reference for human rights throughout the world and as a basis for standard setting in many countries and courts. The ILO standard setting shapes universal values. In addition, the committees' moral authority is well recognized, and their decisions are accepted as important guiding rules. This has been reflected in the incorporation of the committees' opinions and recommendations in national legislation, international instruments and court decisions[102]. Second, the creation of the ILO offered a unique tripartite forum, and the legitimacy and special status of ILO standards are based on the collaborative governance framework, giving voice to the three representatives of the social partners: employees, employers and governments.[103] In this respect, from a political perspective, the legitimacy of ILO standards stems from the specific structure of the ILO, and its internal politics lead to the formulation of balanced and worthy rules regarding the right to strike. In this vein, the

[98]Stern (n 95).

[99]Ibid.

[100]Ibid.

[101]T Novitz, 'Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability' (2020) 17(1) *International Organizations Law Review* 10.

[102]V De Stefano, 'Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards' (2021) 160(3) *International Labour Review* 387.

[103]Novitz (n 101).

use of ILO principles could be justified based on the deliberative democracy doctrine,[104] which advances participation of various stakeholders and state representatives in drawing up policies regarding the labour market. According to this doctrine, international institutions set norms following a more sophisticated discourse, which is the result of a participation of many countries. It therefore reflects the positions of many states and broad international information gathered from various countries.[105]

It could be claimed that subordination of local constitutional norms to the principles of the ILO carries with it certain problems. Such recognition may, for example, lead to the inability to accept Bills that offer a sweeping restriction on strikes in essential services in general. Nevertheless, the structure of the ILO, which includes tripartite negotiations between workers' representatives and employers' and countries' representatives, leads to the adoption of balanced rules regarding strikes and justifies the application of ILO standards in domestic systems. This structure creates a symbiotic relationship, which leads to the formulation of fair rules regarding collective struggles. This tripartite negotiation is evident in the discussions in the CFA and within discussions on the interpretation of the convention on the right to organize. This framework is perceived as a cooperative framework that does not express an ordinary state regulation set 'from top to bottom'. These principles reflect the wide range of interests of the three parties relevant to labour disputes. Therefore, these rules should serve as a basis for establishing the regulation of the right to strike and its status in other constitutional methods. Even if these claims seem to concern the structure of the organization and not the content of the norms, the ILO's cooperative structure also leads to ensuring fair content of norms that reflect prevailing and accepted perceptions of the three sides of the labour relations.[106]

Moreover, the standards regarding the right to organize have been recognized as having a high normative status since this is considered a core right acknowledged in the 1998 declaration. The fact that the right to organize is binding on all the countries that are part of the ILO, regardless of the question of ratifying the relevant conventions, also grants it a special status. According to the ILO Declaration of Principles and Fundamental Rights of 1998,[107] the right to organize and its derivatives are considered core rights and are therefore binding even on countries that have not ratified Conventions 87 and 98. Hence the committees' interpretation of these conventions and their decisions become even more valid and have obligatory characteristics.[108]

Hence, it seems that the ILO principles meet the requirements for the existence of a custom. Even if ILO principles that are the result of the committees' interpretation are not considered customary, they have a special status and can be relied upon as a source of inspiration for the courts. Thus, the recognition of the 87 and 98 treaties within international law as conventions and the special status of ILO principles and decisions of ILO committees can establish the possibility of internationally based constitutionalism.

[104]Novitz (n 5) 24–25.

[105]Ibid.

[106]T Novitz, 'The Restricted Right to Strike: Far Reaching ILO Jurisprudence on the Public Sector and Essential Services' (2019) 38(3) *Comparative Labour Law and Policy Journal* 353, 355.

[107]ILO Declaration on Fundamental Principles and Rights at Work (adopted by the International Labour Conference) (18 June 1998).

[108]Eren (n 97) 304.

ILO principles and collective rights of police officers

Article 8 of the International Convent of Economic, Social and Cultural Rights recognizes the right to organize in trade unions as well as specifically acknowledging the right to strike.[109] The convention states that it does not prevent the imposition of lawful restrictions on the exercise of collective rights by members of the armed forces or the police, or by the administration of the state. ILO standards recognize the right to organize in trade unions as fundamental, insofar as this right of freedom of association by police officers cannot be denied.

ILO standards also enable the regulation of collective action of public employees whose tasks are likely to impact the supply of public services. According to the ILO principles, legislative restrictions could define certain civil servants whose right to strike is limited due to their special duties and the implication of these duties on the supply of public services. Thus, it is possible to establish limitations on specific civil servants who exercise authority in the name of the state due to their special tasks.[110] It was also stated by the ILO committees that the right to strike could be denied or restricted in essential services, which are defined as those services of which interruption would endanger the life and health or personal safety of the whole or part of the population.[111] Police services were considered essential under the ILO principles and therefore striking could be restricted.

Nevertheless, ILO principles demand the existence of other mechanisms for representing the interests of workers upon depriving them of the right to strike. Specific decisions of the ILO require alternative resolution mechanisms for labour disputes.[112] Moreover, the ILO principles state that even if categories of essential services are involved, the state cannot impose restrictions freely. Having considered the status of strike as a fundamental right, the state must present justification for applying such restrictions. Imposing a ban on striking can be justified only insofar as the restrictions are set in the narrowest possible way and only upon necessity.

There are various aspects of existing arrangements in countries where police officers are deprived of the right to strike that infringe on ILO principles. First, such infringement occurs when the law has not provided for alternative arrangements to represent the interests of the police officers upon denial of the right to strike. In these countries, the salary and working conditions of the police officers are unilaterally regulated by the state and there is no consideration of the police officers' positions and interests. In connection with this issue, it has been determined in cases discussed before the ILO that a restriction on striking in public services is possible only when the employees enjoy an impartial dispute-resolution process, designed to secure their interests.[113]

[109]International Convention on Social Economic and Cultural Rights, United Nations, 1967.

[110]*ILO General Survey – ILO Freedom of Association and Collective Bargaining: A General Survey of Conventions No. 87 and No. 98 conducted in 1994 by the Committee of Experts on the Application of Conventions and Recommendations* (ILO, Geneva, 1994) para 158.

[111]Committee of Experts on the Application of Conventions and Recommendations 1994, paras 159, 214; Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body, paras 532, 534 (ILO 1996); Committee of Experts on the Application of Conventions and Recommendations 1994, para 164.

[112]Convention on Labour Relations (Public Service), art 6, 27 June 1978; Recommendations on Labour Relations (Public Service), art. 6, 27 June 1978.

[113]M Schlachter, 'Regulating Strikes in Essential Services from an International Law Perspective' in M Mironi and M Schlachter (eds), *Regulating Strikes in Essential Services* (Kluwer, Dordrecht, 2018) 107–144.

Second, according to ILO principles, to some extent states can deny the right to strike of security forces but a sweeping denial of the right of all officials in a certain vital service causes difficulties. According to ILO principles, the right to strike is a fundamental right and therefore, a total denial of the right regarding all sorts of duties and functions would not be appropriate – especially when it is not necessary. According to the global labour constitutionalism, imposing a blanket ban on striking in essential services, as opposed to imposing restrictions on certain positions or areas, means violating the right to organize. Hence, totally depriving all the police officers in a certain country of the right to strike might infringe upon ILO principles.

IV. Varieties of constitutionalism and the issue of recognizing a right to strike and the organization of police officers

Global labour constitutionalism versus militaristic labour constitutionalism

The need to discuss the collective labour rights of police officers in the framework of constitutionalism is derived from the fact that, in domestic systems, the ban on collective labour rights of police officers is introduced in legislation. A challenge to legislation that includes restrictions on associations and strikes of police officers involves constitutional issues.

The article presents two varieties of constitutionalism regarding police strikes: global labour constitutionalism and militaristic labour constitutionalism. According to global labour constitutionalism, even in cases where constitutional documents do not include an explicit recognition of labour rights, collective labour rights could be considered constitutional while relying on ILO principles. This approach advances the use of ILO principles for the purpose of interpreting constitutional documents as a basis for recognizing a constitutional status of collective rights. In this respect, the adoption of internationally based constitutionalism leads to applying ILO principles in the local law system. It is used as a basis for the recognition of the right to strike as a constitutional right and for the adoption of arrangements that are in accordance with these principles. The approach also bases either recognizing a constitutional right to organize or the widening the scope of the right on the status of the freedom of association as a core fundamental right within the ILO.

Militaristic labour constitutionalism advances domestic issues, the public interest in security and the defence of citizens, whereas global labour constitutionalism implements the principles of the ILO, enshrined in the decisions of the organization's institutions and treaties; the militaristic approach takes a different path.

According to militaristic labour constitutionalism, courts deny the recognition of a constitutional status of the right to strike and tend to deny the possibility of acknowledging the collective rights of police officers. In the case of militaristic labour constitutionalism, a constitutional right for the police officers to organize is not applied either. In this case, following the militaristic nature of the country, the public interest in defence, and the right to life and security of the population, are advanced while disregarding the rights of police officers.

V. Different models regarding police officers' rights

The organization of employees has three dimensions: the organization *per se*, the right of collective bargaining and the right to strike. The right to strike by itself is a means by

which workers pursue collective goals.[114] There are three models possible for the collective rights of police officers, each including different components of the three dimensions of labour organization in trade unions. The first model is the non-organization model, which denies the collective labour rights of police officers altogether. The second one is the thin model, according to which a right of police officers to organize is advanced along with a right to collective negotiations, while denying the right to strike. This is a semi-organization model that includes only part of the different dimensions of labour organizations. The third model is a thick model, which includes all the three dimensions of labour organization: the right to organize, the right to collective negotiations and the right to strike.

There are various arrangements regarding the right of police officers to strike in different countries. There are states that reject any recognition of the collective rights of police officers – adopting the non-organization model – whereas others have recognized a thin model, including only the right to organize *per se* while denying the right to strike. The thin model – of recognizing the possibility of organizing as well as collective bargaining while denying the right to strike – is prominent in the United States and Britain, where police associations are allowed.[115] In Britain in 1919, a prohibition on police strikes was included for the first time in legislation, following a series of police strikes and a degree of unrest.[116]

On the other hand, there are countries in which not only is a police officers' organization recognized but so is the right to strike itself. There are two different mechanisms possible for recognizing the right of police officers to strike. The first mechanism is a conditional strike mechanism, according to which there are preconditions for the exercise of strike action. According to the first mechanism, the right to strike is not prohibited, but restrictions are set *ad hoc*. In addition, within this model, it is possible for courts to issue injunctions against striking according to the specific circumstances. A second mechanism is based on the recognition of the differences between the various duties and positions of the police force and granting a right to strike regarding only part of the positions and duties.

In Croatia, the first mechanism for a police strike exists and all police officers in all ranks and positions have a right to strike for all intents and purposes in addition to the right to organize. However, according to the first mechanism, the exercise of the right is conditional and dependent upon certain conditions, with the aim of ensuring security during a strike and a minimum of service delivery.[117] Croatian law stipulates that the normal legislation of labour relations will also apply regarding the organization and striking of police officers, with the required change. Yet in some situations it has been determined that police officers would not be entitled to strike for security reasons. This is the case in a state of war or an immediate threat to the independence of the state, or danger to the democratic public order, national emergencies and natural disasters. There are also

[114]R Ben-Israel, 'Is the Right to Strike a Collective Human Right?' in *Israel Yearbook on Human Rights, Volume 11* (Brill, Leiden, 1981) 195–216.

[115]Police Act 1996 (Britain). In Britain, according to Part III of the Police Act, the police association is in police federations. There is a Police Federation for England and Wales and a Police Federation for Scotland for the purpose of representing members of the police forces in those countries respectively in all matters affecting their welfare and efficiency.

[116]R Bean, 'Police Unrest, Unionization and the 1919 Strike in Liverpool' (1980) 15 *Journal of Contemporary History* 633.

[117]The Law on Police Act, 2000 art. 96 (Croat).

requirements for police officers to continue providing service during a strike, and there is an obligation to use police force in certain situations. Thus, there is a demand to exercise police authority when it is necessary to maintain the safety and lives of whole or part of the public, when there is a need to arrest a person committing a crime or in order to prevent a crime that is about to occur.

In Sweden, according to the first mechanism, the declaration of a strike is generally conditional and dependent on prior negotiations, and there is no prohibition on police strikes.[118] In Brazil,[119] the second mechanism has been adopted, distinguishing between a category of police officers who are forbidden to strike and all the other police officers who have been granted the right to strike.[120] In this respect, there is a distinction between military police officers on whom a strike ban has been imposed and other police officers who are entitled to strike, as provided for in the Brazilian Constitution. The decision of the Supreme Court of Brazil in 2017 extended the ban on strikes also to police officers who were directly involved in maintaining security.[121]

In Belgium, there is a mixed mode of police strikes, which combines parts of the first mechanism and parts of the second. In accordance with the first mechanism, police officers have the right to strike.[122] A strike by police officers in Belgium is conditional and giving prior notice of a strike is required, as is negotiating with the relevant body to resolve the conflict as a precondition for declaring a strike. The arrangement in Belgium incorporates part of the second mechanism, as the right to strike is given only to part of the police force. Certain police officers are required to continue working even during an active labour dispute and a police strike. Mainly, high-ranking officers are required to continue their work when necessary to ensure the proper functioning and maintenance of order and security.

VI. Applying global labour constitutionalism or militaristic labour constitutionalism in the jurisprudence of Israel compared with the European Union

The countries and cases examined

The cases examined involve a challenge to legislation that includes a ban on the collective rights of police officers or cases discussing the violation of the right to organize and strike by prohibiting the collective action of police officers.

The case of Israel is examined due to the special characteristics of the Israeli regime as a country with a militaristic culture, which gave rise to the development of militaristic constitutionalism. Israel is unique in being a country with a militaristic culture along with democratic characteristics, which typically advance human rights. This militaristic culture has been central in Israeli society and so is the involvement of the security forces in civic tasks and the legitimacy granted by society to this involvement.[123]

[118]1 § Employment (Co-Determination in the Workplace) Act (1976:580) (Swed).

[119]R Frangale Filho, 'Brazil' in M Mironi and M Schlachter (eds), *Regulating Strikes in Essential Services* (Kluwer, Dordrecht, 2018) 4–5.

[120]Ibid.

[121]Extraordinary Appeal no. 654, 432 (201).

[122]M Vranken, 'How Absolute is the Right to Strike? Comparative Reflections' (2015) 59 *New Zealand Association of Comparative Law Yearbook* 60.

[123]Kimmerling (n 22).

Yet Israel is characterized by dominant labour courts committed to advancing labour rights in an activist manner.[124] In Israel, the constitutional documents do not include collective rights, such as the right to organize and the right to strike. Nevertheless, the commitment of the labour courts to the development of labour law and protection of human rights could allow for the possibility of filling these gaps.

The jurisprudence examined in comparison to Israel is that of either the Council of Europe or the European Court of Human Rights (herein after ECtHR). The European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR) provides in Article 11 the right to freedom of association, but it does not include a right to strike. The ECtHR's jurisprudence enforces the ECHR. The jurisdiction of the Council of Europe is based on the Social Charter of Rights and Fundamental Freedoms 1961 (hereinafter Social Charter), which provides the freedom of association but does not include a right to strike. The cases examined within the jurisprudence of ECtHR and the Council of Europe involve a challenge to legislation of European countries, which included restrictions on either the right to freedom of association or the right of police officers to strike.

The countries examined in comparison with Israel within the jurisprudence of the European Union are Ireland, Spain and France. These are countries where neither a right to strike or a right to organize the entire police force or some units of police officers is recognized, despite a corporatist tradition that is similar to the corporatist tradition in Israel. Israel has been characterized by a corporatist regime since its establishment and, despite a decline in corporatism over the last decades, it is still characterized by corporatist labour relations.[125] The corporatist tradition of the countries examined includes strong unions, which conduct national negotiations regarding workers' rights or participate in establishing labour policy. In corporatist countries, national negotiations held by central strong unions with the capacity to influence labour policy, hence denying police officers the possibility of being represented by such strong general trade unions, is problematic.

Ireland also has a tradition of corporatism and strong general umbrella unions with a central role in shaping labour policy. France and Spain have been considered as having a tradition of corporatism or quasi-corporatism, so deprivation of the ability to organize is of special importance.[126]

Adopting global labour constitutionalism in the European Union

ILO principles should be followed regarding the right to strike because of the importance of strike action.[127] Indeed, some countries have used ILO principles within local judicial review as a basis for constitutionalism regarding either organization or strikes in essential

[124]Mundlak (n 23); Guy Davidov, 'Judicial Development of Collective Labour Rights – Contextually' (2010) 15 *Canadian Labour and Employment Law Journal* 235; L. Litor. 'Constitutionalism and anti-privatisation strikes: introducing an eclectic model.' (2019) 52.3 *Israel Law Review* 327.

[125]G Mundlak, 'Addressing the Legitimacy Gap in the Israeli Corporatist Revival' (2009) 47 *British Journal of Industrial Relations* 765.

[126]K Lawson, 'Corporatism in France: The Gaullist Contribution' in F Eidlin (ed.), *Constitutional Democracy* (Routledge, London, 2019) 344–75 MR Hawkes, 'France: A Quasi-Corporatist State' (PhD dissertation, 1988). https://doi.org/doi:10.21220/s2-eytp-6x20; J Szarka, 'Environmental Policy and Neo-corporatism in France' (2000) 9(3) *Environmental Politics* 89; S. Royo, 'A New Century of Corporatism? Corporatism in Spain and Portugal' (2002) 25(3) *West European Politics* 77; S González Begega and D Luque Balbona, 'Goodbye to Competitive Corporatism in Spain? Social Pacting and Conflict in the Economic Crisis' (2014) 148 *Revista Española de Investigaciones Sociológicas* 79.

[127]R Ben-Israel, *International Labour Standards: The Case of Strikes* (Kluwer, Dordrecht, 1988) 46.

services. The rulings of the European Court of Human Rights (ECtHR) and the Council of Europe have applied the global labour constitutionalism approach.

The Judicial Tribunal of the Council of Europe, which is responsible for the supervision of the implementation of the European Social Charter 1961, ruled in the *LO and TCO v Sweden* case that legislation that completely banned essential service strikes was disproportionate and inconsistent with the European Social Charter S. 6(4), dealing with the possibility of workers and organizations taking collective action with reference to ILO principles.[128] It was determined that even in essential services, it was necessary to examine the function performed by each employee. Hence, the right to strike could be denied only to that part of the employees who provided an essential service de facto, and only where it was necessary. One of the cases in point involved a ban on the collective rights of police officers in Ireland. As for the police officers' right to organize in Ireland, they were not allowed to join an umbrella organization of trade unions, such as the Irish Congress of Trade Unions (ICTU), with which trade unions in Ireland affiliate. It meant that police officers were kept out of the overall national negotiations that ICTU conducted on behalf of its members working in the public sector in Ireland. The Garda Siochana Act 2015, according to which the Irish police operated, provided the possibility of representation for police officers in professional associations but imposed a ban on the possibility of joining a regular trade union or participating in trade union bargaining and industrial action.[129] The implication of denying the possibility of joining a general trade union was that the police officers in Ireland were kept out of all national negotiations conducted by the umbrella trade union, the ICTU, on behalf of members regarding working conditions and salaries.

In the ruling of the Judicial Tribunal of the Council of Europe regarding Ireland, the internationally based constitutionalism approach served as a basis for examining legislation that denied the right of police officers to strike. In a major case concerning the police in Ireland, *The European Confederation of Police*, it was determined that the status of striking as a fundamental right prevented the imposition of a sweeping restriction on the strike action of all police officers.[130] It was held that the title of a service as a police force activity was not sufficient to allow a total denial of the right to a collective struggle, and that the individual justification for denying the right to strike regarding the various positions must be examined. It was held that the sweeping denial of the right to strike effectively erased the existence of that right, and therefore infringed upon the principles of the ILO. It was therefore determined that the total ban on police strikes would violate Article 6(4) of the European Social Charter.

In France, police officers are generally allowed to organize, but the freedom of association is denied to military personal. In one case, a police unit was not granted freedom of association by subjecting it to the regulations regarding military personnel. In the *National Police in France National Gendarmerie* case in 2016, the Tribunal of the Council of Europe established a distinction between different functions of police officers.[131] It was ruled that a ban on organizing police officers who perform normal policing

[128] *European Confederation of Police (EuroCOP) v Ireland*, Complaint No. 83/2012 Eur Comm of Soc Rts.

[129] The Garda Siochana Act 2015, Article 18 states that for the purpose of representing members of the police in all matters affecting their welfare and efficiency, they may establish one or more associations. Article 3 emphasizes that the police officers shall not become members of any trade union or association other than associations established under this section.

[130] *European Confederation of Police (EuroCOP) v Ireland* (n 128).

[131] *European Council of Police Trade Unions (CESP) v. France,* Complaint No. 101/2013 Eur Comm of Soc.

functions was prohibited and violated the right to organize; however, it was determined that among police officers holding quasi-military functions of an armed police force, the denial of the right to strike was legitimate. The court held that the Gendarmerie police force, in that case, was exclusively engaged in policing, and that granting it a military status had been a deliberately action by the government to avoid the possibility of organizing and was thus illegitimate.

ECtHR based the recognition of striking as a fundamental right on ILO principles in a way that has led to the disqualification of legislation including a sweeping ban on strikes in public or essential services. In general, the EctHR showed a tendency to apply ILO principles in its judgments regarding trade unions' rights in public or essential services. The *Damir* case, the recognition of the right to collective bargaining as a derivative of the right to organize in the European Convention, was based on ILO principles. Applying ILO principles led to the cancellation of the sweeping ban on public service negotiations in Turkish law.[132] In another ruling in the *Enerji* case, the court held that striking was a fundamental right insofar as it was based on ILO principles.[133] It was ruled that the overall restriction of the Turkish government on the right to strike of all public employees, without a concrete examination of certain categories, was inconsistent with ILO principles.[134]

It was thus held in another case that an absolute restriction on striking in the essential service of medicine was disproportionate. In the *Hrvatski Lijecnicki Syndicate* case, it was determined that a ban on doctors and dentists who sought to reach a collective agreement with the Ministry of Health on striking violated the fundamental right to strike. The court held that it was a disproportionate and invalid violation of the right to strike, while referring to ILO principles.[135] The ECtHR has embraced global labour constitutionalism regarding police officers' collective rights, which was reflected in the case of Spain. With regard to police officers in Spain, section 8(6) of the Institutional Law section 2/1986 included a ban on the right of the Basque police to strike. The police unit of the Basque County had a right to organize in trade unions and the right to collective bargaining, but had been deprived of the right to strike. The European Court of Human Rights ruled in the case of *Junta Rectora v Spain* that while restrictions may be placed on police strikes, they must pass the test of proportionality. Only proportionate restrictions on the right of police officers to strike would be allowed.[136] The court emphasized that even though the right to strike could be restricted in certain conditions, the government could not deprive police officers of the core content of the right to organize under Article 11 of the ECHR.

Adopting militaristic labour constitutionalism in Israel

Israeli jurisprudence

Israeli jurisprudence has adopted militaristic labour constitutionalism, according to which the right to strike is not recognized as a constitutional right and Article 93(B) of the Police Act 1971 prohibits police strikes and any organization of police officers.

[132]*Demir & Baykara v Turkey*, App. No. 34503/97 (Nov 12, 2008).

[133]*Enerji Yapi-Yol Sen v Turkey*, App. No. 68959/01 (Apr. 21, 2009).

[134]KD Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 3.

[135]*Hrvatski Lijecnicki Sndikatv v Croatia*, App. No. 36701/09 (Nov. 27, 2014).

[136]*Junta Rectora Del Ertzainen nazional El Kartasuna v Spain*, App. No. 45892/09 (Apr 21, 2015).

In Israel in 1992, two basic laws of human rights were enacted: the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. These two Basic Laws were declared by the Supreme Court as having a constitutional status in what has been known as the 'constitutional revolution'. Hence, the Supreme Court might perform a judicial review regarding legislation that infringes upon human rights.[137] The Basic Laws do not explicitly include a right to organize, engage in collective bargaining or strike.

Even though social and labour rights were not included in the Basic Laws, the court has not treated them as a closed list of constitutional rights. Hence, the Supreme Court has recognized over the years several social rights as constitutional rights derived from statutory constitutional rights, and mainly from the right to dignity. For instance, the right to a minimum standard of living was recognized as having a constitutional status as a derivative right of the statutory right to dignity.[138]

Nevertheless, the right to strike has not been recognized as having a constitutional status. The right to strike was not explicitly enshrined in the Basic Laws, and a proposal of a Basic Law: Social Rights that was supposed to include collective rights has never been enacted. Shortly after the enactment of the Basic Laws regarding human rights, Judge Dov Levin noted in the *Bezeq* case that there was a need to recognize the freedom to strike as a constitutional right but his position remained a single opinion and was not accepted by the majority.[139] The normative status of the right to strike was again discussed in the *Bar Ilan* case.[140] Although one of the judges noted that it was possible to think of recognizing the constitutionality of the right to strike as a derivative of the right to dignity, the majority did not recognize a constitutional status of the freedom to strike. In this case, the court refrained from deciding on the status of the right to strike, in part because the case did not involve a judicial review of a law. Yet in the *Bar Ilan* case, the court recognized the right to organize as a constitutional right derived from the right to dignity.

In general in Israel, there is no ban or formal restriction within the legislation on strikes in essential services, such as health or water and electricity. An exception to this principle of a lack of a statutory restriction on strikes in essential services is the ban on strikes and the organization of security forces. Israeli legislation includes a ban on the organization and striking of police officers[141] as well as of soldiers,[142] prison guards[143] and secret service personnel. Thus, the militaristic character of Israel, with a history of constant military threats and terror and its focus on defence issues, has led to adopting a ban on strikes and even organization of police officers, who were deprived of the ability to organize in unions. Israel's public policy has been shaped by strong militaristic tendencies as a country in constant military struggle.[144] Having militaristic nationalism in Israel has also affected the labour relations of police officers and has led mainly to advancing the public interest in defence. The ban on the organizing of police officers and on strikes within the police force has been anchored in the past only in internal police orders. In the 1970s, following a petition against these internal orders, the Police Act 1971 was

[137]B Aharon, 'Human Rights in Israel' (2006) 39(2) *Israel Law Review* 12.

[138]HCJ 4/10662 *Hasan v. The National Security Institution* (2012).

[139]CJ 1074/93 *The Attorney General v. The Labour Court* 49(2) 485 (1995).

[140]HCJ 1181/03 *Bar Ilan University v. The National Labour Court* (2011).

[141]Article 93b of the Police Act 1971.

[142]Article 20 of the General Military Service Act 2002.

[143]Article 129 of the Prison Act 1971.

[144]U Ben-Eliezer and R Shamir, 'A Comment on "the Emergence of Militaristic Nationalism in Israel' (1991) 4(3) *International Journal of Politics, Culture, and Society* 387.

amended, and the ban on the organizing of police officers was anchored in the law itself.[145] In the *Ofek* case, the Israeli Supreme Court held that a ban on the right to organize and strike by police officers would be legitimate if it were included in the legislation. The Supreme Court emphasized the legitimacy of imposing restrictions on collective rights to organize and strike by police officers within the Police Act.[146]

In the *Metrodan* case, the Israeli labour court held that even though the state could not deny the right to organize in trade unions for bus drivers, imposing a ban on the right to organize by police officers was legitimate.[147] Chief Judge Adler held, referring to the *Ofek* case, that a denial of a right to organize and strike by police officers was justified.

The general model in Israel regarding strikes in essential services includes performing *ad hoc* balances of the right to strike with other rights, while applying the proportionality demand. Despite the lack of legislative restriction on strikes in essential services, the court could consider the importance of a particular service and issue an injunction against the strike. In the *Mekorot* case,[148] which involved a strike in water supply, it was held that the labour relations model adopted in Israel allowed the performance of balances between the right to strike and the ability to provide essential services and issuing restraining orders or allowing only partial strikes when necessary.[149] Thus, although the right of workers to strike in essential services was not restricted, in practice restrictions may be placed on the right by courts. Courts might issue restraining orders in an effort to advance the public interest in the continued provision of the service while considering the needs of citizens. Hence the court could allow only a partial strike in a specific case or require the supply of a minimum service. In Israel, the complete denial of the right of police officers to strike seems inappropriate while firefighters and workers in other essential services have the right to strike for all intents and purposes alongside the right to organize. Moreover, it would be possible to distinguish among those police officers and those who hold a vital and required position in a way that the right to strike would be denied only from those holding an important and required position. It should be noted in this respect that with the outbreak of the global COVID-19 pandemic, the police reduced the number of workers and only vital workers remained on duty.

There are various aspects of the existing arrangement regarding police strikes in Israel that raise concern when considering the ILO principles. First, a total denial of the right of police officers to organize within Israeli law is contrary to the ILO standards, which consider the right to freedom of association as a fundamental right included in ILO conventions 87 and 98. Having included the right to organize as a core labour right in the 1998 Declaration of Fundamental Rights casts a shadow on restricting this right.

Second, the existing law did not provide for alternative arrangements to represent the interests of the police officers despite the denial of the right to strike. The salaries and conditions of the police officers are unilaterally regulated by the state, and there is no consideration of the police officers' positions. In this respect, it has been determined in

[145]HCJ 789/78 *Ofek v The Minister of Internal Affairs* (1972). It should be noted that the Police Act 1971 does not explicitly prohibit strikes, but its prohibition is derived from the general ban on organization by police officers.

[146]Labour dispute case 57/05, *The general Histadrut v The State of Israel* (2006).

[147]Ibid.

[148]Labour appeal 19/99 *Mekorot v. the General Histadrut* vol. 36 (2000).

[149]It should be noted that in Israel the right of firemen to strike was not restricted in legislation. Nevertheless, the labour court might issue an injunction against firemen striking or demand a minimum service supply during a strike.

cases before the ILO that a restriction on public service strikes is possible only if the employees enjoy an impartial dispute-resolution process, designed to safeguard their interests.[150]

Third, according to ILO principles, states can deny the right of security forces to strike to some extent, but a sweeping denial of the right of all officials in certain essential service raises difficulties. Having considered the status of the right to strike as a fundamental right led to the conclusion that a total denial of the right regarding all ranks and all positions of a certain essential service is not appropriate, especially when it is not necessary. According to internationally based constitutionalism, imposing a blanket ban on strikes in essential services as opposed to imposing restrictions on certain positions or areas means violating the right to organize and the right to strike as fundamental rights.

In Israel, the constitutional judicial review over legislation includes a two-phase test. The first phase checks whether a human right is infringed upon and the second phase checks whether it is justified while balancing this right with other rights and interests. The second phase is performed according to the lines of the limitation clause, which is part of the Basic Law: Dignity and Liberty, and includes a demand for a just aim for infringing a human right and proportionality test.

In Israel, the international labour law could be applied through the limitation clause included in the Basic Laws while considering the local public interests and values. Hence, within Israeli law, it would be possible to implement the international principles regarding strike action while applying the proportionality tests, which are part of a regular judicial review process. Within the tests of proportionality, it would be possible to adapt the principles of international law to local circumstances and to balance other public interests that characterize the local reality with the right to strike.

The trend in the Israeli Supreme Court in recent years has been to accept a broad definition of international law, including statements of interpretation by international bodies on conventions, even if these were not binding formal documents. Among other things, interpretation by committees has been used by the Israeli Supreme Court as a basis for recognizing social rights that are not enshrined in the Israeli Basic Laws[151]. Hence the same pattern could be justified also regarding the right of police officers to organize and strike.

The presumption of interpretation says that regarding ordinary Israeli legislation, local laws should usually be interpreted according to international law unless the legislation itself includes a contradicting arrangement. The Israeli High Court in the *Adam* case did not accept the petitioners' claim that the presumption of interpretation also applied to the Basic Laws, yet it did not hold a positive discussion on the issue and did not rule.[152] The ruling does not just mean that the principles of international law are not automatically binding in Israel; in appropriate cases, they can be used by the courts. Hence, ILO

[150]Case No. 2127 (Bahamas) CFA, para 174, 192 (2002)7, 2001); Case No 1999 (Canada), CFA, para 119, 166 (Dec 15, 1998).

[151]D Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of Expanding Dialogue' (2004) 2 *International Law Journal* 611, 625. For instance, in the *Abu Assad* case, it was determined that the right to water could be recognized as a constitutional right while basing the scope of the right on an international document that interprets the right to an adequate standard of living in the CESCR Convention. In the concrete field of workers' rights and social rights, the courts may also rely on international labour recommendations, such as the ILO principles, due to the lack of a complete human rights charter and the need for an international substitute for it as a basis for interpreting domestic constitutional documents.

[152]HCJ 7146/12 *Adam v. The Knesset* (2012).

principles could be used to determine whether legislation restricting the right to strike is proportionate.

Although the Israeli High Court has not yet accepted the presumption of interpretation regarding the Basic Laws, it seems appropriate to accept the approach that the courts should apply ILO principles when interpreting the Basic Laws, due to the special status of these principles. ILO principles could be used in operating the mechanisms of the restriction clause within the Basic Laws in such a way that the principles would become relevant to the reality of things in Israel. The ILO principles can be used in examining whether there is a justification for infringing upon a human right in a way that would be possible take local circumstances into account within the test of proportionality.

The legal status of ILO standards in Israeli jurisprudence of the labour courts

Israel has ratified conventions 87 and 98 of the ILO, but the act of ratifying does not mean an automatic implementation of the standards in Israeli law. Ratifying the conventions means they are binding in international law and therefore could reflect upon the interpretation of domestic laws.

As for the recommendations of the ILO committees, even though they are not binding, the question that arises is whether they could be considered as having a special status in Israeli law as a part of international customary law. In the *Abu Atiya* case,[153] the Israeli Supreme Court stated that some international rules that are largely approved of and treated as consistent by many states could be recognized as a custom within customary international law and thus as having a special status in domestic Israeli law. The ILO recommendations could indeed be considered as having a special status as a custom, and thus considered as a tool in the interpretation of legislation.

Israeli labour courts have a unique authority of handling labour disputes and a combination of a strong labour judicial system along with a tradition of activism. Most of the collective labour law has been developed by the labour courts themselves, and they tend to be activist in shaping labour rights in a common law manner.[154] Nevertheless, the Israeli labour courts have not imported the specific ILO principles regarding the right to organize and strike in general, and regarding disputes in public and essential services specifically. The Israeli labour courts have implemented the local constitutional documents and existing labour legislation, such as the Collective Agreements Act 1957 regarding the issue of labour rights.[155]

For instance, in the *Mekorot* case, the court emphasized that, in principle, the regular domestic strike law, including the demand of proportionality, should also apply to strikes in essential services.[156] Even though the Israeli national labour court briefly mentioned ILO conventions and recommendations in the *Mekorot* case, it did not apply the specific ILO standards regarding strikes in essential services and concluded that the regular strike law applied as well as demands of balancing different rights, operating in good faith and applying proportionality tests.

In some cases, the labour court issued an injunction against strikes in services that the court considered essential even though these services had not been considered essential

[153]High Court case 69/81 *Abu Atya v The Commander of Yehuda and Shomron* 37(2) 197 (1981).

[154]Mundlak (n 23); Guy Davidov, 'Judicial Development of Collective Labour Rights – Contextually' (2010) 15 *Canadian Labour and Employment Law Journal* 235.

[155]Appeal case 1008/00 *Horn and Leibovich v The General Histadrut, 2000.*

[156]Labour appeal 19/99 *Mekorot v the General Histadrut*, vol. 36 (2000).

according to the ILO standards. For instance, in the *Teachers Strike* case,[157] the court rejected the claim that the strike, which involved a suggested reform in the education system, was illegitimate. Even though education services are not classified as essential services, according to the ILO principles, the court emphasized that education services are considered essential and issued an injunction in attempt to avoid the damages of such a strike.[158] Occasionally the labour court issues an injunction that totally prevents strikes in public services in cases in which, according to ILO standards, there is only a possibility of imposing a minimum service demand. According to ILO principles in public services that have not been considered essential, such as rail or port services, only requirements for a minimum service demand could be placed.[159] The Israeli labour court has not imported the ILO standards regarding strikes in public non-essential services. Instead of posing a demand for a minimum service requirement, the labour court has in some cases issued an injunction preventing the strike in railway services or in the ports altogether. For instance, in the *Train* case in 2012, even though the court classified the collective action as a regular economic strike, the court issued an injunction against the strike while using proportionality tests.[160] ILO principles regarding strikes in cases of reorganization of the workplace and undertakings tend to consider such strikes legitimate, even though they do not concern pure economic interests of salary.[161] The Israeli labour court has not imported the ILO standards regarding strikes in reorganization cases and undertakings, and when involving a governmental policy, these strikes are not considered as a legitimate case of a right to strike but rather as a political or semi-political illegitimate strike. For instance, in the *Ports* case,[162] an injunction was issued in a strike in a case of reorganization of the Israeli ports and the separation of the governmental cooperation to three different companies, even though the interests of employees were to be affected by the reform.

ILO principles also consider socio-economic strikes against policy that involve the social interests of employees to be legitimate.[163] With regard to this, the Israeli labour courts have also not imported ILO principles and considered such strikes as an

[157]Labour Collective dispute case 20/07 *The State of Israel v The Teachers Organization* (2007).

[158]The ILO recommendations of the CFA capture essential services as those services that endanger the life or security of the whole or part of the population.

[159]In the railway services, it is legitimate for a minimum service to be maintained in the event of a strike (see the 2018 Digest para 891; 2006 Digest, para 619; and 372nd Report, Case No 3022, para 614).

[160]Labour Court case 5055609-11*The general Histadroot v The Tran* (2012). With regard to the ports, the services provided by the National Ports Enterprise and ports themselves do not constitute essential services, although they are an important public service in which a minimum service could be required in the case of a strike. See the 2018 Digest para. 888; 2006 Digest, para 616; 348th Report, Case No 2540, para 817; 353rd Report, Case No 2619, para 573; 357th Report, Case No 2690, para 943; and 363rd Report, Case No 2854, para 1039.

[161]ILO committee on Freedom of Association Compilation of Decisions 2018. Article 758, 'The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.'

[162]Labour case 12/03 *The Ports Authority v The Israeli docks Authority* (2003).

[163]ILO committee on Freedom of Association Compilation of Decisions 2018, Article 759: 'Organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living.'

illegitimate political strike – for instance, the strike against a reform in the pension funds and the change both in the age of retirement and pension payments through legislation. The strike against the legislation that intervened in existing collective agreements and involved the social interests of employees was considered an illegitimate political strike in *The Commerce Chamber* case.[164]

Global labour constitutionalism vis-á-vis *militaristic labour constitutionalism: Justification for applying global labour constitutionalism*

A few arguments could be raised in relation to the use of internationally based constitutionalism regarding police officers' rights. Below I will present these arguments, the answer to each of them and the justification for applying the global labour constitutionalism approach.

First, it may be argued that using the internationally based approach may cause groups of workers to turn to the courts rather than using a public struggle within the public and political arenas, in a way that may weaken their power.[165] It could also be claimed that such patterns might lead to a phenomenon of activism on the part of the courts and excessive intervention in socio-economic issues.

Nevertheless, this first claim should be rejected. Global labour constitutionalism has many advantages, including the ability of courts as professional, detached and politically independent institutions to exercise workers' rights whereas political entities may refrain from adequately protecting those rights for political reasons. Apart from this, the ability of the police to lead struggles in the public sphere is limited due to the ban on demonstrations and political activity, which is prevalent in many countries.

In this vein, consideration must be given to the distinction between a strike and organizing in workers' organizations and a political organization. There is a rationale for denying public employees in sensitive positions, such as police officers, the opportunity to demonstrate and to be politically active out of a desire to create the neutrality of public officials without political biases. Nevertheless, this rationale does not hold regarding union organizing and strike action of police officers. Even though there is a justification for depriving police officers who represent the state in their actions the possibility of demonstrating against the actions of the state itself, no similar justification could be raised regarding a strike action that is an economic struggle for dignity, working conditions and decent pay. It should be noted that even recognizing a thin organization model for police officers without a possibility of striking raises difficulty. A strike is essentially intended to serve as a tool in collective bargaining and to be an efficient weapon in union struggles, and is therefore also an important component in relation to police officers.

Second, the question of the use of the global labour constitutionalism concerns the tension between local constitutional law and the principles of international labour law.[166] In this respect, one could argue that since the very existence of international law depends on states and they give it validity, the states themselves and constitutions of states prevail over international law, and therefore local constitutions cannot be interpreted according to international principles.

[164]Labour case 13/03 *The Commerce Chamber v The General Histadrut* (2003).

[165]L Savage, 'Workers' Rights as Human Rights: Organized Labour and Rights Discourse in Canada' (2009) 34 *Labour Studies Journal* 8.

[166]E Benvenisty and A Harel, *Embracing the Tension Between National and International Human Rights Law* (2017) 15(1) *International Journal of Constitutional Law* 36, 37.

Nevertheless, this second claim should also be rejected. It seems appropriate to interpret domestic constitutional documents in accordance with the principles of international law, which could be used as part of a judicial review of local legislation if these constitutional documents do not contain a conflicting provision. Moreover, it could be claimed that domestic constitutions must be interpreted in accordance with the principles of international labour law. In this regard, the judges are usually obliged to refer in their rulings to all the binding sources, including international law, that are absorbed into domestic law through international principles. These are international law principles that are understood either as customary law or as conventions.[167] This view is based on the notion that domestic constitutional law is the result of international order, and therefore local constitutional law should place special emphasis on the exercise of universal labour rights based on international principles.

Third, it could be argued that reliance on standards set by global organizations, such as the ILO, undermines the state's sovereignty to formulate policies and the power of domestic politics.[168] Nevertheless, this argument should also be rejected. The legitimacy of applying principles of the ILO is based on the state's sovereignty, since the principles applied are in accordance with conventions and documents that the state itself signed, ratified and approved of.[169] Hence, applying principles of international law strengthens the ability of the government to join international conventions and oblige the country to act in accordance with these conventions. Even when applying principles established by ILO committees, the standards set are based on interpretation of Conventions 87 and 98, which the states themselves have joined and ratified.

However, in practice the interpretation of domestic constitutional documents could be made in accordance with the principles of international law, while adapting these principles to the local reality of the domestic labour market and considering local values. The international principles could be adapted and applied in accordance with the local requirements of the domestic constitution and the local political arena. It should be noted that national institutions are subject to pressure from citizens seeking to receive police services on a regular basis and to political pressures. Recognizing the possibility of police strikes may affect the electoral capital of political actors, which means they are not inclined to allow police collective action. International institutions, unlike nation-states and domestic political actors, are not subject to these constraints and may therefore operate freely and set more appropriate standards. Since the states themselves are the architects setting international order and establishing international norms, they are compelled to follow it on the basis of their consent to the international order. Hence, international principles may apply regarding workers' rights that are not explicitly enshrined in the domestic constitution unless the constitution explicitly denies such recognition.

Although it is possible to claim that international organizations sometimes have political biases regarding certain countries, such political pressures in international organizations usually concern the level of international relations and not the issue of

[167]E Benvenisty, 'Judicial Misgiving Regarding the Application of International Law: An Analysis of Attitudes of Criminal Courts' (1993) 4(1) European Journal of International Law 159, 161.

[168]K Jayasuriya, 'Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?' (2002) 8(4) *Constellation* 442, 443; M Kumm, 'The Legitimacy of International Law: A Constitutional Framework Analysis' (2004) 15(5) *International Journal of Constitutional Law* 907, 908.

[169]B Oliphant, 'Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2 (D) & Saving the Freedom to Strike' (2012) 70 *University of Toronto Faculty of Law Review* 36.

local strikes in certain countries. Political pressures within international organizations usually concern international relations and not internal matters, such as domestic labour disputes.

Fourth, it could be argued that local actors are close to local history and culture, and therefore may well reflect local values that are appropriate regarding the domestic labour market. Thus, it could be claimed that constitutionalism should not be based on international law. Nevertheless, this claim should also be rejected. The principles of the ILO are globally accepted standards. Hence, it could be argued that they reflect proper conceptions of social justice and should also be adopted at the local level. In this context, the formulation of protections for the interests of workers in relation to legislation that violates the right to strike could base normative legitimacy for the use of international principles.[170] Thus, the use of ILO principles leads to the formation of a moral justification for adopting the principles in a certain concrete way. Moreover, one of the considerations in favor of implementing the international-based constitutional approach is the need to adopt global human rights standards, enshrined in international conventions and decisions of international institutions. The need to use the human rights discourse has become particularly important in the global age, in part due to the development of abusive employment patterns towards individual workers. In this context, the adoption of global human rights standards will lead to the promotion of global justice and will ensure adequate conditions for police officers.[171]

Fifth, it could be argued that in some countries the recognition of collective rights while applying international law could invoke problems due to the nature of the local constitution. This is especially prominent in countries where the local constitution includes individual rights discourse and an attempt to recognize new derivative collective rights.[172] For instance, in Israel, where local constitutional documents are characterized by individual rights discourse, it could be claimed that recognizing rights that are collective in nature is rather problematic. Nevertheless, the argument should be rejected. Strike action could be captured as the struggle of many individual employees joined together. Moreover, the very application of ILO principles strengthens the possibility of recognizing the constitutionality of the right to strike and may be beneficial considering the problems arising from the existing constitutional structure, which is individually oriented.[173]

Sixth, an attempt to recognize the constitutionality of the right to strike and enforce it in the context of police officers may also provoke an over-involvement of the courts where the constitution did not recognize these rights. This argument should also be rejected. The use of international principles, such as ILO principles, as a basis for constitutionality of the right to strike provides a seal of approval for the work of the courts.

It could be argued that the operation of the court in an activist manner where it receives international support raises difficulties. It could also be argued that relying on the interpretation and positions of international organizations is inevitably problematic. Nevertheless, the claim should also be rejected. A distinction must be made between the recognition in principle of a constitutional right and the application of certain outlines and policies. The recognition within a certain legal system of constitutional rights that are

[170]P Macklem, 'The International Constitution' in F Faraday, J Fudge and E Tucker (eds), *Constitutional Labour Rights In Canada: Farm Workers and the Fraser Case* (Irwin Law, Boston, 2012) np.

[171]D Yossi, L Hanna and MS Fahina, 'Global Labour Rights as Duties of Justice' in Y Dahan and H Lerner (eds), *Global Justice and International Labour Rights* (Cambridge: Cambridge University Press, 2016) 53–91.

[172]K Kolben, 'Labour Rights as Human Rights?' (2010) 50(2) *Virginia Journal of International Law* 450, 453.

[173]Ben-Israel (n 114).

not explicitly enshrined in domestic constitutional documents does not in itself lead to over-legalization. Thus, the court may adopt the internationally based approach as a basis for judicial review and disqualification of existing legislation following the violation of police officers' rights while leaving the specific arrangements to be drawn by the legislature itself, which could outline a concrete arrangement under new legislation.

VII. The suggested model for constitutionalism regarding collective rights of police officers

This article has advanced the embracement of global labour constitutionalism as a basis for recognizing the right to organize and the right of police officers to strike, while modifying the approach according to a suggested model. There are a few guidelines for the suggested approach. First, it is suggested that a thick model of organization should be adopted, including a right to collective bargaining and collective action in addition to the freedom of association by itself. The association of police officers might also be in independent police organizations and not in general unions.

Second, within the new model, it is suggested to defer between vital positions and non-vital ones and to adopt different arrangements for each. The suggested model includes depriving the right to strike from a minority of concrete police officers who would be defined as holding de facto essential positions which must be performed even in the event of strikes, ensuring public order and security. These vital positions are, for instance, the operation of emergency call centres and performing arrests or stopping ongoing crimes.

As to the distinction between essential and non-essential duties, one must pay attention to the various positions within the police, some of which raise questions about their vitality and importance to the day-to-day activities of the force. Hence, strikes should be understood as possible with regard to the non-essential duties of the police. Among other things, there are office positions, such as administrative duties, including human resources administration, which could be included in a work stoppage without having severe ramifications. Thus, a right to strike should be granted to all the police officers holding non-vital positions, such as handling business licences, or those handling noise and noisy parties or parking in illegal spots. It is proposed to recognize the right to organize for all police officers, including those who hold a vital role and cannot strike. In the case of police officers in a vital position, belonging to the same bargaining unit as the other police officers will enable the protection of their interests without pay gaps or violation of equality. In the same bargaining unit, there will also be police officers whose job is vital and required, so who will continue to carry out their duties during strikes.

Third, in any future arrangement, it would be possible to rely on existing models of police strikes in the world. It seems appropriate to combine the first mechanism of police strikes with the second. According to the first mechanism, the exercise of the right to strike should depend on conditions. Thus, collective action by itself will be subject to certain restrictions, such as avoiding strikes in cases of national emergency. According to this conditional strike model, police strikes are generally possible but subject to terms and conditions. Thus, in accordance with the first mechanism of a conditional strike, taking collective action would have preconditions, including giving notice and a demand for minimum service. It would also include the possibility of issuing an injunction against the strike when necessary. With respect to this, it is also suggested that proportionality tests be applied. According to the second mechanism, there would be a distinction between different police roles while denying the right to strike, with regard to those

duties which are de facto essential. Thus, certain vital functionaries who are unable to strike would be determined in advance.

Following a judicial review that would disqualify existing legislation that rejects the recognition of the right of police officers to organize and strike, a concrete arrangement could be determined in the future by the legislature, which could also enact a law that includes regulations regarding collective agreements in a way that lets the labour parties determine the specific content of the arrangement regarding police strikes within collective agreements. The specific duties and positions that would not be allowed to strike would be determined in advance in negotiations as part of a collective agreement between the police and the police officers or by a committee that would determine a specific arrangement. In the case of vital positions in respect of which the possibility of striking would not be recognized, only the right to organize would be granted.

Fifth, military-like police units should be excluded from the suggested general arrangement that grants a right to police officers to strike. The police officers in these military-like units should be granted only the possibility of organizing without the right to strike. For instance, the Israeli Border Police unit ('Magav') should be understood as a separate bargaining unit, which would not be entitled to the right to strike.[174] This military-like police unit consists of soldiers who serve as part of the police force and their duties include dealing with terror activities and security threats. The service of military soldiers holding a quasi-military role in the Border Police, relating to the eradication of terrorism, justify a different arrangement and a denial of the possibility to strike. Hence, although the right of all police officers to strike should be recognized, there is no place for such a recognition regarding quasi-military positions within the police.

Military-like police units could be organized either in a separate labour organization or a separate bargaining unit within the same organization as the regular police officers. A recognition of a separate bargaining unit would be justified because of the unique interests and special characteristics of such military-like police units. Even though it could be argued that splitting the bargaining unit would influence solidarity among police officers, in fact military-like unions organizationally and in many other respects are indeed separate from the police. Therefore, their association either in a separate independent organization or in a separate bargaining unit would not create a problem of solidarity or inequality.

VIII. Conclusion

The right of police officers to organize and strike is of particular importance in times of increased public scrutiny and large-scale protests against the police. The vulnerability of the police and the loss of public trust following international scrutiny emphasize the need to strengthen police officers' rights to avoid the employment of police officers in poor working conditions as well as in an attempt to improve their ability to carry out their duties. In addition, it can also provide a way to moderate police officers' perspectives of public hostility. Recognizing the right to organize in trade unions would enable a union to advance important values, such as avoiding racism and violence, while ensuring the compliance of individual police officers with the code of conduct expected from police officers.

[174]G Rubinstein, 'Authoritarianism Among Border Police Officers, Career Soldiers, and Airport Security Guards at the Israeli Border' (2006) 146(6) *The Journal of Social Psychology* 751.

The right to organize in trade unions and the right of unions to take collective action are important freedoms allowing workers to live with dignity and prevent the infringement of their rights and economic interests. The ILO principles declare that the freedom of association and the right to strike are fundamental rights. According to ILO principles, although restriction of the right to strike in essential services is possible, there are limitations to imposing a ban on strike action. ILO principles state that the impositions of such restrictions would not be possible if not they were not necessary, nor should the right be restricted without granting employees alternative channels to represent their economic interests. The right to freedom of association should not be denied to police officers, according to ILO standards.

Nevertheless, in different countries, collective rights – including the right to strike and to organize – have been completely denied to all police officers in all circumstances. The total restriction on collective action and association, when applied without considering the issue of necessity and without providing alternative channels for resolving conflicts, raises difficulties.

The article introduces two potential approaches in relation to judicial review over legislation that includes a ban on police associations and strikes: global labour constitutionalism and militaristic labour constitutionalism. The former implements international standards set by the ILO as a basis for constitutionalism, while the latter emphasizes domestic issues and the need to secure the defence of citizens. The militaristic approach denies the recognition of a constitutional right to strike and advances the protection of the public interest in security. Global labour constitutionalism posits that imposing a total ban on the right to strike in essential services, even when it is not required, is not justified and infringes on the freedom to strike as a fundamental right. The approach posits that a right of police officers to organize in trade unions should be recognized with a right to strike, based on ILO standards. This approach has been adopted by the Tribunal of the Council of Europe and by the European Court of Human Rights as a basis for constitutional judicial review of laws denying collective rights in public and essential services.

The article introduces the global labour constitutionalism variant as a basis for recognizing the constitutional right to strike and other constitutional collective rights in a way that would allow for judicial review of legislation that includes a ban on police strikes and associations. The article advances applying global labour constitutionalism as a basis for recognizing collective rights, enabling a judicial review of laws prohibiting the organization of and strikes by police officers. The implementation of the approach, while modifying it according to suggested guidelines, will lead to the recognition of collective rights for police officers.

In this regard, it seems that future legislation should include recognition of a full organizational model, including the right to collective bargaining and striking. The suggested model will enable a right to strike and to organize for most police officers. Nevertheless, a minority of police officers holding vital positions will be deprived of the right to strike. The new model also suggests imposing various restrictions on police strikes regarding different aspects of the operation of the police force during a strike including the supply of a minimum service. Thus, the article opens a window for future research regarding a specific model that should be adopted in every country.

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